

## Misrepresentation - Part II

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## MISREPRESENTATION — PART II\*

FLEMING JAMES, JR.\*\* AND OSCAR S. GRAY\*\*\*

### § 8. JUSTIFIABLE RELIANCE: "FACT" AND "OPINION" — STATEMENTS OF LAW

A person who relies on a misrepresentation can recover for losses caused to him thereby only if the law regards his reliance as justifiable. This limitation on liability again reflects the customs and ethics of the market place, which have traditionally allowed some latitude for dishonesty in bargaining situations.<sup>1</sup> Positive statements about past or existing facts apparently within the speaker's knowledge and material to the transaction are the sort which have most readily subjected the representer to liability for misrepresentation. To the extent that statements do not fit into that mold, there has been more or less a question whether custom or law requires them even to be honest,<sup>2</sup> let alone carefully made or accurate. In bargaining, as in diplomacy and politics, there is an area in which a

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\* Part I of this article, comprising Sections 1 to 7, appears at page 286 of this volume of the *Maryland Law Review*.

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1. See § 1 at note 4 *supra*.

Another reason sometimes given for the rule is "to make certain that there has been a reasonable probability of reliance" in fact. Statements of opinion "are usually made under circumstances which negative any likelihood of reliance, and legal machinery is not capable of attempting to reach a theoretically sound result without causing serious, practical undesirable consequences." P. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643, 668 (1937).

2. For example, in *Longshore v. Jack & Co.*, 30 Iowa 298, 300 (1870), the court stated:

In morals, a man is not guiltless who intentionally and falsely represents his opinion to another, although that other may have the same facts upon which to form his opinions. But in law, this obligation to truly represent opinions is not enforced, and cannot form the basis of an action when the other party has an equal or fair opportunity to know the facts upon which such judgment or opinion is based.

In *Gordon v. Parmelee*, 84 Mass. (2 Allen) 212, 213-14 (1861), the court observed that statements about the productiveness of farm land and its capacity to support cattle fall within that class of affirmations, which, although known by the party making them to be false, do not as between vendor and vendee afford any ground for a claim for damages. . . . Assertions concerning the value of property . . . or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property.

certain amount of rhetoric is used and expected, and nobody has a right to take it seriously.<sup>3</sup> This and the next three sections deal with the kind of statements about which questions of this kind exist. It will be noted that through them all runs this common thread: the area of immunity on this ground is constantly shrinking.<sup>4</sup>

Statements of "opinion," as distinguished from statements of "fact," raise the kind of question described in the last paragraph, *i.e.*, whether custom or law requires such statements to be honest, carefully made or accurate.<sup>5</sup> It has been doubted whether this attempted distinction is a meaningful one, or at least whether it is felicitously phrased;<sup>6</sup> nevertheless courts and commentators continue to use it and the words probably carry meanings which correspond roughly to concepts sufficiently distinct from each other to warrant some differences in treatment. Many past or existing facts are apparently susceptible of fairly accurate knowledge by the speaker. Thus the number of acres in an owner's farm or the number of fruit trees in his orchard can be ascertained with substantial accuracy. Where the owner makes a positive and definite statement about such a fact, the statement will satisfy the present requirement for actionable fraud.<sup>7</sup> A statement about the same fact may,

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3. This rationale was well expressed in *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (L. Hand, J.):

The reason of the rule lies, we think, in this: There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.

The word "rhetoric" in the text is used in its pejorative sense as is the current fashion.

4. See, *e.g.*, *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 103 N.E.2d 692 (1952) (reviewing earlier decisions and overruling one line of them).

5. See, *e.g.*, *Southern Dev. Co. v. Silva*, 125 U.S. 247 (1888); *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853 (2d Cir. 1918); *Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198 (1880); *Longshore v. Jack & Co.*, 30 Iowa 298 (1870); *Kimball v. Bangs*, 144 Mass. 321, 11 N.E. 113 (1887); *Gordon v. Parmelee*, 84 Mass. (2 Allen) 212 (1861); *Penney v. Pederson*, 146 Wash. 31, 261 P. 636 (1927).

6. P. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643, 656-58 (1937). Dean Keeton follows Wigmore in noting "that it is scientifically impossible to distinguish fact from opinion," and "in strict truth nothing is certain." *Id.* at 657. He does not urge that all statements be treated alike, but rather that the distinction be drawn in terms of whether "the declarant is giving a shorthand description of the knowledge and information which he professes to have over and above that possessed by the representee." *Id.* at 658.

7. *Forman v. Hamilburg*, 300 Mass. 138, 14 N.E.2d 137 (1938); *McDonald v. McNeil*, 92 Vt. 356, 104 A. 337 (1918); *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313 (1869); *Alexander Myers & Co. v. Hopke*, 14 Wash. App. 354, 541 P.2d 713. *But cf.* *Gordon v. Parmelee*, 84 Mass. (2 Allen) 212, 214-15 (1861) (where vendors pointed out

however, be made in such a form as to show that it rests upon belief, estimate, or mere conjecture.<sup>8</sup> In other cases the subject matter of the representation or the surrounding circumstances may make it apparent that the statement rests on belief or conjecture, rather than knowledge, regardless of the form in which the statement itself is cast.<sup>9</sup> Where either is the case, the speaker may clearly not be taken to guarantee the accuracy of the statement. Indeed, older cases sometimes went to the opposite extreme and ruled that no one was justified in relying even on the honesty of a statement cast in such form or obviously resting on such basis, at least where the parties bargained at arm's length.<sup>10</sup> This was the area of trade talk and puffing. Here, to be sure, the speaker misrepresented his state of mind, his opinion, and this came to be recognized as an existing

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true boundaries to vendee, misrepresentations of quantity of land not actionable since "at the time they were made, they had the means and opportunity to verify or disprove"; *Whitton v. Goddard*, 36 Vt. 730, 732-33 (1864) (statement that there were 3,000 spruce logs on land might be opinion if plaintiff "bought the lot on inspection and examination," but "if the plaintiff had not seen the lot, and bought without any other means of knowledge than the defendant's representations, it might be otherwise").

8. See, e.g., *Dawson v. Graham*, 48 Iowa 378 (1878); *Kimball v. Bangs*, 144 Mass. 321, 11 N.E. 113 (1887); *Stacey v. Robinson*, 184 Mo. App. 54, 168 S.W. 261 (1914); *Belka v. Allen*, 82 Vt. 456, 74 A. 91 (1909) (dictum); *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S.E. 423 (1909). Cf. *Middlesex County Sewerage Auth. v. Middlesex Borough*, 74 N.J. Super. 591, 181 A.2d 818 (1962) ("estimates" of future charges).

9. See, e.g., *Southern Dev. Co. v. Silva*, 125 U.S. 247 (1888) (quantity of ore in mine); *Gordon v. Butler*, 105 U.S. 553 (1882) (value of land containing unopened quarries) (good discussion by Field, J.); *Harris v. Delco Prod. Inc.*, 305 Mass. 362, 25 N.E.2d 740 (1940) (that driven well would strike sweet water near salt water); *Smith v. Badlam*, 112 Vt. 143, 22 A.2d 161 (1941) (agent's statement known to be based on information given by vendor). Cf. *Control Data Corp. v. Garrison*, 305 Minn. 347, 223 N.W.2d 740 (1975) (a building, represented as structurally sound, nevertheless settled badly, possibly because supporting pilings had sheared underground; court stated that determination of whether pilings driven in ground had remained intact was "susceptible of knowledge," however difficult ascertainment might have been, and however reasonable defendant may have been in not undertaking costly and burdensome inspection).

10. See sources cited in notes 2, 3, 5, 8, and 9 *supra*; *Harper & McNeeley, A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 1001-06 (1938); P. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643 (1937).

Some earlier cases regarded as opinion many statements (between buyer and seller, or the like) which went pretty far in implying the existence of facts within the speaker's knowledge, e.g., about the characteristics and performance of a product. See, e.g., *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853 (2d Cir. 1918) (cleanliness, efficiency and economy of vacuum cleaners); *Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198 (1880) (performance of grain screening device); *Longshore v. Jack & Co.*, 30 Iowa 298 (1870) (quantity of wood on land); *Penney v. Pederson*, 146 Wash. 31, 261 P. 636 (1927) (rents which apartments would bring).

For a discussion of earlier Massachusetts cases in this area, see *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 103 N.E.2d 692 (1952).

fact;<sup>11</sup> but it was in many contexts regarded as an immaterial fact.<sup>12</sup> Opinions vary, and in an individualistic society one is ordinarily expected to act upon his own opinion rather than that of others.<sup>13</sup>

This line of reasoning, however, is something of an oversimplification and courts have realized for some time that persons frequently do rely at least on the honesty of the opinions of others,<sup>14</sup> and that there are many variable factors which also should be considered in determining whether such reliance is justified. Among these is the relationship between the parties. A fairly clear case is presented where one party stands in a fiduciary capacity toward the other so that the latter will naturally repose confidence in his opinions.<sup>15</sup> Relationships which invite peculiar confidence are not confined to those of technical trust; they may include those which involve family,<sup>16</sup> business,<sup>17</sup> or professional

11. Dean Keeton suggests that by "fact" "the courts probably meant, originally, facts of the external world existing outside of the person's mind . . ." P. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643, 644 (1937). But at least by the nineteenth century it had become a familiar notion that "the state of a man's mind is as much a fact as the state of his digestion." *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (C.A. 1885) (Bowen, L.J.). See also P. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643 (1937). Cf. *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (an opinion is a fact).

12. 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. The statement of such opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is.

*Smith v. Land & House Prop. Corp.*, 28 Ch. D. 7, 15 (C.A. 1884) (Bowen, L.J.). See also *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853 (2d Cir. 1918); *Sorrells v. Clifford*, 23 Ariz. 448, 204 P. 1013 (1922); P. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643, 644 (1937).

13. *Dawson v. Graham*, 48 Iowa 378, 380 (1878); *Longshore v. Jack & Co.*, 30 Iowa 298, 300 (1870).

14. See, e.g., *Vickers v. Gifford-Hill & Co.*, 534 F.2d 1311, 1316 (8th Cir. 1976).

15. *Stephens v. Collison*, 249 Ill. 225, 94 N.E. 664 (1911) (executor); *Cheney v. Gleason*, 125 Mass. 166 (1878) (plaintiff's real estate broker); *Tompkins v. Hollister*, 60 Mich. 470, 27 N.W. 651 (1886) (coexecutor).

16. See, e.g., *Sims v. Ferrill*, 45 Ga. 585 (1872) (brother-in-law and widowed sister-in-law); *Stokes v. Stokes*, 48 S.W.2d 724 (Tex. Civ. App. 1932) (son and elderly mother). Cf. *Jekshewitz v. Groswald*, 265 Mass. 413, 164 N.E. 609 (1929) (fiance of recent immigrant).

In *Stark v. Equitable Life Assur. Soc'y*, 205 Minn. 138, 285 N.W. 466 (1939), the close friendship between defendant's agent and the insured was regarded as significant in combination with other factors. The court declared that the significant relationship "need not be legal, but may be moral, social, domestic, or merely personal." *Id.* at 145, 285 N.W. at 470. Cf. *Casper v. Bankers' Life Ins. Co.*, 238 Mich. 300, 212 N.W. 970 (1927) (friend).

17. See, e.g., *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Dist. Ct. App. 1968) (dancing teacher and gullible middle-aged widow); *Teachout v. Van Hoesen*, 76 Iowa 113, 40 N.W. 96 (1888) (joint venturers); *Hassman v. First State Bank*, 183 Minn.

relationships<sup>18</sup> or, simply, great disparity in knowledge or means of knowledge<sup>19</sup> or in intelligence and training.<sup>20</sup> Often, of course, the relationship will involve more than one of these factors. Another factor which may color the relationship between the parties is the speaker's own interest, or apparent interest, in the transaction.<sup>21</sup> Where he is seller, buyer, or the like, his interest is fairly obvious; if he is apparently disinterested this may tend to throw the other party off his guard.<sup>22</sup>

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453, 236 N.W. 921 (1931) (small town banker and customer); *Colby v. Life Indem. & Inv. Co.*, 57 Minn. 510, 59 N.W. 539 (1894) (insurance agent and insured). *Compare Vokes with Parker v. Arthur Murray, Inc.*, 10 Ill. App. 3d 1000, 295 N.E.2d 487 (1973). See generally Annot., 28 A.L.R. 3d 1412 (1969).

18. See, e.g., *Hicks v. Deemer*, 87 Ill. App. 384 (1899) (attorney, acting as purchasing agent for defrauded party); *Squyres v. Christian*, 242 S.W.2d 786 (Tex. Civ. App. 1951) (accountant acting as advisor for defrauded party). Cf. *Shoen v. Lange*, 256 S.W.2d 277 (Mo. 1953) (speaker misrepresented opinion of third person known to be influential with parties addressed).

19. See, e.g., *Bissett v. Ply-Gem Indus., Inc.*, 533 F.2d 142, 146 (5th Cir. 1976) (projections by franchiser of future profits or business success); *Southern Trust Co. v. Lucas*, 245 F. 286 (8th Cir. 1917) (trust company's representation to invalid widow concerning its ability to turn over real estate and what it would bring); *Jekshewitz v. Groswald*, 265 Mass. 413, 164 N.E. 609 (1929) (fiance's representations to recent immigrant about legality of purported marriage ceremony); *Casper v. Bankers' Life Ins. Co.*, 238 Mich. 300, 305, 212 N.W. 970, 971 (1927) (insurance agent's statement to insured that, under the circumstances, "it was best for him to give . . . up" policies on his life); *Collins v. Lindsay*, 25 S.W.2d 84 (Mo. 1930) (statements by older, experienced man to young, uneducated, and inexperienced girl, estranged from home, that her father intended to default on mortgage and let farm go; and statements of value of farm).

20. See, e.g., *Benson v. Bunting*, 127 Cal. 532, 59 P. 991 (1900) (attorney's statement to mortgagor that he had one year to redeem whereas he had, in fact, only six months); *Stark v. Equitable Life Assur. Soc'y*, 205 Minn. 138, 285 N.W. 466 (1939) (insurance agent's statement to illiterate man with limited business experience that he had no claim to waiver of premium and disability annuity under provision providing for such if insured became totally disabled). But cf. *Kennedy v. Flo-Tronics, Inc.*, 274 Minn. 327, 143 N.W.2d 827 (1966) (some discrepancy in age and experience will not justify reliance by junior in statement that stock would triple in value within a year, in absence of bad faith or misrepresentation of fact).

21. *Eno Brick Corp. v. Barber-Greene Co.*, 109 N.H. 156, 158, 245 A.2d 545, 547 (1968).

22. [T]he distinction between the two cases [*i.e.*, of the vendor, and of a third person] 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 it 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 no motive or intention to depart from the truth, and who thus throws the vendee off his guard, and exposes him to be misled by the deceitful representations.

*Medbury v. Watson*, 47 Mass. (6 Met.) 246, 260, 39 Am. Dec. 726, 732 (1843).

It is, of course, entirely consistent with even ancient views of caveat emptor to concede a right to trust the apparently disinterested misrepresenter. It does not follow,

The amount of factual information which the speaker's statement implies or suggests may also be important and will often interplay with the matter of relationship. The general distinction between statements of fact and statements of opinion has already been noted.<sup>23</sup> But there are obvious significant gradations within the latter class. Some statements purport to convey no more than the aesthetic preference of the speaker about a matter open to the perception of both parties, *e.g.*, the taste of a cigarette, or the beauty of an automobile or a view. Others imply the possession of information about the existence of external facts. In most situations the former statements would indeed concern an immaterial fact.<sup>24</sup> But as the implication of external facts increases, so does the justification for reliance, especially where there is also disparity of knowledge or expertise.<sup>25</sup> And most statements of opinion imply at the least that the speaker knows no fact which renders the opinion invalid.<sup>26</sup>

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however, that a buyer today may never reasonably rely on at least the honesty of a representation of opinion by a vendor. Since it is reasonable to rely on his representations of fact despite the known adverse interest of the vendor or his agent, reliance is not necessarily less reasonable, *on grounds solely of that adversity of interest*, if the representation concerns an "opinion." There may, of course, be other reasons to question whether the purchaser's decision could reasonably be influenced by knowledge about the vendor's opinion, depending, *e.g.*, on whether the subject of the opinion is material, or the extent to which it is hedged, or whether the vendor's judgment, if honestly reported, could reasonably merit confidence because of his supposed experience or expertise. But these questions usually turn on the kind of opinion expressed, and how it is expressed, and the qualifications of the representer, rather than on his relationship as a vendor *vel non*. The principal exception is probably in the area of opinions as to value. Unless predicated on the implied existence of relevant extrinsic facts, such as the existence of development plans by others, or of mineral resources, the expression of such opinions is routinely regarded as puffery on the part of vendors, but could be actionable on the part of persons in other relationships, at least if knowingly dishonest.

23. See text accompanying notes 5 to 9 *supra*.

24. See, *e.g.*, *Lehigh Zinc & Iron Co. v. Bamford*, 150 U.S. 665 (1893) (assertion by lessor that mining properties were "valuable" or "very valuable"); *Prince v. Brackett, Shaw & Lunt Co.*, 125 Me. 31, 130 A. 509, 511 (1925) (assertion by vendor: "We unreservedly claim that this is the best sawmill power on the American market today."); *Nichols v. Lane*, 93 Vt. 87, 88, 106 A. 592, 593 (1919) (assertion by vendor: "There is no better land in Vermont.").

25. See notes 16 to 20 *supra*; P. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643 (1937).

26. *Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401, 407 (8th Cir. 1976) (representation that a contract existed; knowledge suppressed that existence of the contract was disputed by one of the parties); *Bissett v. Ply-Gem Indus., Inc.*, 533 F.2d 142 (5th Cir. 1976). Cf. *United States v. Ekelman & Assoc.*, 532 F.2d 545, 549-50 (6th Cir. 1976) (discussion, concerning prosecution under False Claims Act, 31 U.S.C. §§ 231-235 (1970), that under common law, certification "to the best of my knowledge and belief" constitutes assertion that representer "had no knowledge of, nor intention to make, misrepresentations"); *Feltman v. Sarbov*, 366 A.2d 137 (D.C. App. 1976) (lessor induced lessee to renew unprofitable lease with representation that right of

Misrepresentations of law have often been called statements of opinion on which no one has a right to rely.<sup>27</sup> But here, too, the statement may imply the existence of external facts. For one thing it may imply the existence or non-existence of an applicable statute, regulation, or judicial decision,<sup>28</sup> and this is one kind of external fact which may seem very important to the person addressed by the statement. The defendant may have said, for example, that the law does not require a certain contract to be in writing,<sup>29</sup> or that the Office of Price Administration has established no ceiling price for frozen fish.<sup>30</sup> Beyond that, the statement of law may imply the existence of facts which have legal significance but are not part of the law itself,<sup>31</sup> e.g., that a corporation has taken the steps required to qualify it to do business within the state,<sup>32</sup> or that conveyances have been made which vest title in the speaker;<sup>33</sup> or that the actions and agreement necessary for the formation of a contract have been

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first refusal in lease was valuable despite lessor's existing arrangements to develop property in such a way that opportunities to exercise option would be remote).

27. *E.g.*, *Christopher v. Whitmire*, 199 Ga. 280, 34 S.E.2d 100 (1945); *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. Rep. 357 (1883); *Williams v. Horton Realities, Inc.*, 121 N.Y.S.2d 552 (Sup. Ct. 1953), *aff'd*, 283 App. Div. 889, 129 N.Y.S.2d 766 (1954); *Wicks v. Metcalf*, 83 Or. 687, 163 P. 434 (1917); *Gormley v. Gymnastic Ass'n*, 55 Wis. 350, 13 N.W. 242 (1882); P. Keeton, *Fraud: Misrepresentations of Law*, 15 TEX. L. REV. 409 (1937).

As Dean Keeton points out, the origin of the notion is mixed up with the old canard that everyone is conclusively presumed to know the law; but this distortion of the notion that ignorance of the law is (often) no excuse for a crime or tort is no longer taken seriously as an explanation of whatever remains of the judicial reluctance to accept as justifiable the reliance upon a statement of law. *See also* 1 F. HARPER & F. JAMES, *LAW OF TORTS* § 7.8 at 564-65 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 724-25 (4th ed. 1971). It is, nevertheless, occasionally still repeated. *E.g.*, *Puckett Paving Co. v. Carrier Leasing Corp.*, 236 Ga. 891, 225 S.E.2d 910 (1976).

Sometimes the discredited form of the statement may reflect a commonsense appraisal of what the party must in fact have known about the law which he claims was misrepresented to him. *See, e.g.*, *Ad. Dernehl & Sons v. Detert*, 186 Wis. 113, 202 N.W. 207 (1925) (that plaintiff would have legal right to sell liquor, in his soft drink parlor, during Prohibition). *See also* *Democratic Nat'l Comm. v. McCord*, 416 F. Supp. 505 (D.D.C. 1976), discussed at note 37 *infra*.

28. RESTATEMENT (SECOND) OF TORTS § 545, Comments a & b (1977) (statement that a particular statute has been enacted or repealed or that a particular decision has been rendered is a statement of fact).

29. *Rosenberg v. Cyrowski*, 227 Mich. 508, 198 N.W. 905 (1924).

30. *Unger v. Eagle Fish Co.*, 185 Misc. 134, 56 N.Y.S.2d 265, *aff'd*, 269 App. Div. 950, 58 N.Y.S.2d 332 (1945); RESTATEMENT (SECOND) OF TORTS § 545, Illustration 2 (1977).

31. RESTATEMENT (SECOND) OF TORTS § 545, Comment c (1977).

32. *Miller v. Osterlund*, 154 Minn. 495, 191 N.W. 919 (1923). *Cf.* *Myers v. Lowery*, 46 Cal. App. 682, 189 P. 793 (1920) (that hospital was accredited to train nurses); *Sorensen v. Gardner*, 215 Or. 255, 334 P.2d 471 (1959) (that house met all building code requirements).

33. *Riley v. Bell*, 120 Iowa 618, 95 N.W. 170 (1903); *Hunt v. Barker*, 22 R.I. 18, 46 A. 46 (1900); *Curtley v. Security Sav. Soc'y*, 46 Wash. 50, 89 P. 180 (1907). *Cf.* *Rollins v.*



completed.<sup>34</sup> The modern tendency is to treat either kind of statement as one of fact so far as justifiable reliance goes, at least where the statement is made by one who is apparently in a position to know the facts which are implied.<sup>35</sup>

Other statements of law, however, are quite apparently only prophecies of what the courts will do in a case not clearly governed by statute, decision, or regulation. Of course this situation overlaps and shades into those described in the last paragraph. But the more clearly the statement reflects only the speaker's legal judgment, the less likely courts are to hold that reliance upon it is justified<sup>36</sup> unless the speaker has special legal skill or knowledge,<sup>37</sup> including, *e.g.*, that he could reasonably be expected to have special knowledge of

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Quimby, 200 Mass. 162, 86 N.E. 350 (1908) (that second and third mortgages were first mortgages).

In *Seeger v. Odell*, 18 Cal. 2d 409, 115 P.2d 977 (1941), the court held misstatements to plaintiffs concerning the state of their own title were actionable.

34. *Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401 (8th Cir. 1976).

35. See notes 28 to 34 *supra*; RESTATEMENT (SECOND) OF TORTS §545 (1977). Statements of "foreign law" (*i.e.*, the law of another state of the United States or of another country) have sometimes been regarded as statements of fact because foreign law used to be treated as a fact for purposes of pleading and proof. See, *e.g.*, F. JAMES & G. HAZARD, CIVIL PROCEDURE § 3.7 (2d ed. 1977). But that rule of pleading and proof has no relevance to the problem here under discussion. Statements of foreign law will, however, often be actionable under the tests treated in this section. RESTATEMENT (SECOND) OF TORTS §545, Comment e (1977).

36. See, *e.g.*, *Dillman v. Nadlehofer*, 119 Ill. 567, 7 N.E. 88 (1886); *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. Rep. 357 (1883); *Stacey v. Robinson*, 184 Mo. App. 54, 168 S.W. 261 (1914); *Wicks v. Metcalf*, 83 Or. 687, 163 P. 434 (1917); *Ad. Dernehl & Sons v. Detert*, 186 Wis. 113, 202 N.W. 207 (1925).

37. *Benson v. Bunting*, 127 Cal. 532, 59 P. 991 (1900); *Hicks v. Deemer*, 87 Ill. App. 384 (1899); *Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 235 N.W.2d 831 (1975); *Rice v. Press*, 117 Vt. 462, 94 A.2d 397 (1953).

In *Stark v. Equitable Life Assur. Soc'y*, 205 Minn. 138, 285 N.W. 466 (1939), the court said that misrepresentations of law would be actionable in at least two types of cases:

- (a) Those in which the person misrepresenting the law is learned in the field and has taken advantage of the solicited confidence of the party defrauded, and
- (b) Those in which the person misrepresenting the law stands with reference to the person imposed upon in a fiduciary or other similar relation of trust and confidence.

*Id.* at 143, 285 N.W. at 469. The Minnesota court refused to extend this doctrine to the negligent "informal" misrepresentation by county officials that a permit would not be required under the applicable zoning ordinance for a rock concert, in reliance on which plaintiffs lost \$75,000 in promotional expenses when the concert was enjoined for lack of such permit, *Northernaire Prods., Inc. v. County of Crow Wing*, \_\_\_ Minn. \_\_\_, 244 N.W.2d 279 (1976). It held as a matter of law that the "individual defendants, solely by virtue of their offices and in the absence of other facts evidencing an intent to assume such an obligation, owe no fiduciary duty to members of the public when giving advice." *Id.* at \_\_\_, 244 N.W.2d at 282. Good faith was conceded. "To subject county officials to the prospect of liability for innocent misrepresentation would discourage their participation in local government or inhibit them from discharging responsibilities inherent in their offices. Their reluctance to express opinions would

settled legal rules as they apply to routine transactions in his business,<sup>38</sup> or unless he stands in a fiduciary capacity to the person to whom the statement is made.<sup>39</sup>

frustrate dialogue which is indispensable to the ongoing operation of government." *Id.* The court stated it would continue to hold such officials liable for negligent misrepresentations of fact because "[m]embers of the public have no other access to factual information maintained by the government except through government officers and employees" and "the policy of promoting accuracy through the prospect of tort liability outweighs the possibility of inhibiting performance of duties of office . . .," but that "plaintiffs here had alternative means of obtaining an interpretation of the zoning ordinance, either by consulting an attorney or by applying to the full County Planning and Zoning Commission for a formal interpretation pursuant to established procedures." *Id.* Perhaps the problem would have been more clearly discussed not in terms of misrepresentation theory but in terms of qualified privilege doctrine, for purposes of which a distinction could conceivably be drawn between the need to rely on government personnel for certain kinds of information and the availability of other kinds of information elsewhere.

Even where the speaker who gives bad advice has special legal skill, reliance on that skill may be justified only if the relier's ability to judge the matters in question is markedly inferior to that of the speaker. *See, e.g.,* Democratic Nat'l Comm. v. McCord, 416 F. Supp. 505 (D.D.C. 1976), in which a principal Watergate culprit was denied recovery against the [Republican] Committee for the Re-Election of the President for damages resulting from the claimed misrepresentation by committee's servants that a break-in at the headquarters of the opposition political party would be legal, based on asserted approval of the break-in by the Attorney General of the United States; the court considered McCord not "particularly gullible or otherwise dependent upon the superior knowledge of those who made the representation of legality to him," which representation the court described as "inherently unreliable." *Id.* at 509. In contrast the court referred to defendants in *United States v. Barker and United States v. Martinez*, 546 F.2d 941 (D.C. Cir. 1976), where criminal convictions for the celebrated break-in at the office of Dr. Louis J. Fielding, Daniel Ellsberg's psychiatrist, were overturned because of sufficient evidence that defendants reasonably believed that they were engaged in a national security operation "lawfully authorized by a government intelligence agency." *Id.* at 949.

38. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 545, Comment d (1977):

It is not necessary, however, that the person making the fraudulent misrepresentation of law be a lawyer. It is enough that he purports to have superior information that will enable him to form an accurate opinion. Thus the ordinary layman dealing with a real estate or insurance agent may be justified in relying upon the agent to know enough about real estate or insurance law to give a reliable opinion on the simpler problems connected with it.

*Accord, Peterson v. Auvel*, 275 Or. 633, 552 P.2d 538 (1976) (liability for knowingly false statement by seller's real estate broker that purchasers would not be able to enforce existing purchase money agreement in court, made to induce plaintiffs to sign new agreement at higher price). In the absence of a fiduciary relationship, however, it is sometimes said that misrepresentations even on such matters are not actionable, *e.g., Puckett Paving Co. v. Carrier Leasing Corp.*, 236 Ga. 891, 225 S.E.2d 910 (1976) (alleged assurance, incorrect, by lessor of trucks that Internal Revenue Service would consider a transaction a lease, instead of a sale, "could only be an expression of opinion as to how the IRS had treated such agreements or would treat them in the future").

39. *Stephens v. Collison*, 249 Ill. 225, 94 N.E. 664 (1911); *Tompkins v. Hollister*, 60 Mich. 470, 27 N.W. 651 (1886); *Stark v. Equitable Life Assur. Soc'y*, 205 Minn. 138, 285

### § 9. JUSTIFIABLE RELIANCE: MATERIALITY

The notion of justifiable reliance is limited by the rule of materiality: even a fraudulent misrepresentation is not actionable if the representation is "immaterial."<sup>1</sup> Matter is material, in the words of the *Restatement (Second) of Torts*, if

a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question . . . or . . . the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.<sup>2</sup>

The concept of materiality has two aspects. One of them is bound up with the distinction between fact and opinion noted in the last section and dealt with there and in the two following sections.

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N.W. 466 (1939); *Squyres v. Christian*, 242 S.W.2d 786 (Tex. Civ. App. 1951). See also *Murphy v. Country House, Inc.*, 307 Minn. 344, 352, 240 N.W.2d 507, 512 (1976) (concerning claims against president of corporation, an experienced businessman, by fellow incorporators and officers, formerly "just drivers" with no actual management control: "Disparity of business experience and invited confidence could be a legally sufficient basis for finding a fiduciary relationship . . .").

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1. RESTATEMENT (SECOND) OF TORTS § 538(1) (1977). Cf. RESTATEMENT (SECOND) OF CONTRACTS § 306(1) (Tent. Draft No. 12, 1977) (proposing that a contract be voidable if "a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation . . . upon which the recipient is justified in relying") (emphasis in original).

2. RESTATEMENT (SECOND) OF TORTS § 538 (1977). See also 41 A.L.I. PROCEEDINGS 499-506 (1964).

This definition is "substantially the same as the SEC's definition of the term 'material' in its registration forms under the 1933 and 1934 acts." 3 L. LOSS, SECURITIES REGULATION 1431 (2d ed. 1961). Cf. 6 *id.* at 3534-35 (1969) ("reliance requires that the individual plaintiff must have acted upon the fact misrepresented, whereas materiality requires that a *reasonable man* would have so acted") (emphasis in original).

The American Law Institute's proposed FEDERAL SECURITIES CODE (Proposed Official Draft 1978) provides that "[a] fact is 'material' if there is a substantial likelihood that a reasonable person would consider it important under the circumstances in determining his course of action," *id.* § 293(a), unless a person "communicating with a small number of other persons" knows that the recipient does not consider the fact important, or "that there is no substantial likelihood that he would so consider it", although a reasonable person probably would, *id.* § 293(b); or if a person "communicating with a small number of other persons" knows that a recipient does consider the fact important, or knows that there is a substantial likelihood that he does, although a reasonable person probably would not.

For a definition similar to that in the text see RESTATEMENT (SECOND) OF CONTRACTS § 304(2) (Tent. Draft No. 11, 1976).

The other aspect of materiality is not concerned with any such distinction but rather with the triviality or unimportance of the matter stated even though it be a "fact" under any definition of that term<sup>3</sup> (e.g., an external thing or event capable of objective perception). It is with this aspect that the present section deals.<sup>4</sup>

Where the fact represented would not influence the reasonable man, either because of its triviality<sup>5</sup> or because of its irrelevance to the subject dealt with,<sup>6</sup> the law will ordinarily regard that fact as

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3. Cf. P. Keeton, *Fraud — Statements of Intention*, 15 TEX. L. REV. 185, 186 (1937) (distinguishing state of mind as a fact from "something having a corporal and physical existence," and suggesting that the latter is the more usual meaning of the word "fact").

This concept of immateriality is quite distinct from any notion about the duty of self-protective care. This distinction is neatly illustrated by a statement of the Maryland Court:

If a person bought Pennsylvania Railroad shares on a misrepresentation of the latest price on the New York Stock Exchange, the fact represented would be material, but we are not prepared to say the purchaser would have the right to rely on the misrepresentation instead of picking up a daily newspaper and ascertaining the truth.

Babb v. Bolyard, 194 Md. 603, 611, 72 A.2d 13, 17 (1950).

The neatness of this conceptual distinction may, however, become blurred when the inquiry concerns the materiality of a statement which might be regarded as one of *opinion* where the parties have equal access to the facts, but as one of *fact* where the person making the statement had substantially greater informational access. In this context, knowledge or means of knowledge may be one of the variable factors which determine materiality. See § 8 at note 19, *supra*.

4. Reliance may be unreasonable for any number of other reasons, which would ordinarily be considered not to raise questions of materiality, but rather of plausibility. A statement is immaterial when it does (or should) not matter whether it is true or false. The implausible statement, in contrast, may assert a proposition the truth or falsity of which would matter; reliance on the statement is unjustified, however, because the statement is palpably untrustworthy. The distinction is sometimes overlooked. E.g., Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 880 (2d Cir. 1972) (for purposes of preliminary injunction court refuses to conclude that plaintiff is likely to prevail on issue of "materiality" because "it strains credulity" that he could have relied "reasonably" on an alleged oral agreement where there existed an apparently inconsistent written agreement with a bank).

5. See Smith v. Chadwick, 20 Ch. D. 27, 45-46 (1882) ("It may be that the misstatement is trivial — 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 . . ."); Harper & McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 1001 (1938) ("Trivial misstatements, even though fraudulently made, are not actionable."). In Miller v. Protrka, 193 Or. 585, 594, 238 P.2d 753, 758 (1951), a discrepancy of .005 between the represented and actual gross income was deemed immaterial. In other circumstances it may be difficult to decide how small an increment would be material to a reasonable person, e.g., how much additional bad news about the proposed recipient of a loan should make a difference to a lender who has already decided to extend credit with knowledge of substantial problems concerning the borrower's credit-worthiness, as in Fischer v. New York Stock Exch., 408 F. Supp. 745 (S.D.N.Y. 1976).

6. See Glass Coffee Brewer Corp. v. Embry, 299 Ky. 483, —, 166 S.W.2d 818, 823 (1942) ("One may not avoid a contract he enters into by claiming that his

immaterial and reliance on it unjustified. For example, misrepresentations in 1971 that leased heavy construction machines were 1965 models, when they were 1963 models, and that they had 500 horsepower engines, when they had 450 horsepower engines, were treated as immaterial.<sup>7</sup> Some courts have held that a misrepresentation of the purchaser's identity is immaterial in a transaction involving the sale of real estate.<sup>8</sup> And no doubt the color of a job applicant's hair would be immaterial in the ordinary case.

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adversary represented to him that the moon was made of green cheese and that he believed and relied on this misrepresentation and was thereby induced to enter into the contract since such a misrepresentation does not substantially affect his interests."); *Babb v. Bolyard*, 194 Md. 603, 611, 72 A.2d 13, 17 (1950) ("A housewife who bought a bag of flour from a grocer could not maintain an action for deceit in a misrepresentation of the Chicago price of grain 'futures.'").

The notions of triviality and irrelevance are not altogether distinct from each other. Perhaps nothing is inherently trivial — it depends on context. The price of Chicago grain futures, for example, would be very important for some purposes, though it was assumed to have no material bearing on the retail price of bread.

Even when a representation is theoretically irrelevant it is not always clear that a reasonable person would not rely on it in making a decision. See Comment, *The Element of Materiality in Deceit*, 29 TEX. L. REV. 644 (1951). Cf. *Beavers v. Lamplighters Realty, Inc.*, 556 P.2d 1328 (Okla. App. 1976) (misrepresentation by real estate vendor that a third person was about to purchase property at specified price higher than plaintiff's previous offer, inducing plaintiff to raise his offer over the misrepresented amount). To similar effect is *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 103 N.E.2d 692 (1952), Annot., 30 A.L.R.2d 923 (1953) (misrepresentation by landlord that he had been offered greater rent by prospective tenant held material where relied on by present tenant in acceding to landlord's demand for greater rent when lease renewed). The *Kabatchnick* decision overruled an earlier line of cases, see *id.* at 345, 103 N.E.2d at 694. See also *Dress Shirt Sales, Inc. v. Hotel Martinique Assoc.*, 12 N.Y.2d 339, 190 N.E.2d 10, 239 N.Y.S.2d 660 (1963) (suggesting that misrepresentation of reason stated to tenant for landlord's refusal to accept subtenant might be material but denying recovery on other grounds).

7. *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 224, 541 P.2d 1184, 1192 (1975).

8. *Finley v. Dalton*, 251 S.C. 586, 164 S.E.2d 763 (1968); Annot., 35 A.L.R.3d 1369 (1971) (misrepresentation as to identity of purchaser and purpose of the purchase). Cf. *Farnsworth v. Duffner*, 142 U.S. 43, 55 (1891) ("It would hardly do to hold that a party was induced into a contract by false and fraudulent misrepresentations, because one of the vendors represented that he had been governor of the State, and was a member of the church, and president of a bank and a railroad company.")

Other cases held that the true purchaser's identity is material at least in some circumstances. *Walker v. Galt*, 171 F.2d 613 (5th Cir. 1948), cert. denied, 336 U.S. 925 (1949); Annot., 6 A.L.R.2d 812 (1949) (rescission of purchase allowed where vendor disliked vendee because the latter reputedly operated a brothel nearby). Cf. *Merson v. Schweitzer*, 71 N.J. Super. 597, 177 A.2d 562 (1962); Annot., 2 A.L.R.3d 1119 (1965) (broker who fraudulently misrepresents to his own principal the identity of purchaser is not entitled to commission). These cases stress the seller's privilege to select the person to whom he sells. The reasons for refusal to sell appear to range from very good ones, see, e.g., *Walker v. Galt*, 171 F.2d 613 (5th Cir. 1948), cert. denied, 336 U.S. 925 (1949) (prospective purchaser was a notorious operator of brothels), to very bad ones, see, e.g., *Thompson v. Barry*, 184 Mass. 429, 68 N.E. 674 (1903) (prejudice against Roman Catholics); *Keltner v. Harris*, 196 S.W. 1 (Mo. 1917) (prejudice against

The underlying reason for this restrictive rule is to protect the stability of completed transactions. A claim of fraud is usually made by someone who has been disappointed in the way that a business transaction (*e.g.*, a sale) has turned out for him.<sup>9</sup> Such disappointments are frequent and often they come from sources (*e.g.*, a falling market) entirely unconnected with any misstatements that may have been made in the course of negotiations. If the disappointed party could too easily avoid the consequences of his bargain the general stability of business transactions would be seriously threatened. By the requirement of materiality the law screens claims of fraud and excludes a kind of claim that would be too easy to make and too hard to disprove. Of course the requirement that the plaintiff must have relied in fact on the misrepresentation<sup>10</sup> is itself some protection of stability. But if the unlikelihood of such reliance (because of the apparent triviality or irrelevance of the fact misrepresented) is great enough, the law seems unwilling to take the chance that stability might be upset by the threat of a jury's vagaries. Thus something like an objective test of materiality is worked out.

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.<sup>11</sup>

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blacks). It may be doubted whether modern courts would tolerate some of these reasons and, if they would not, their disapproval might take the form of regarding representations which tended to avoid the prejudice as immaterial.

9. Holmes, J., said of another branch of the restrictive rule of materiality that it "is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed." *Deming v. Darling*, 148 Mass. 504, 506, 20 N.E. 107, 108-09, 2 L.R.A. 743, 744 (1889).

10. See § 13 *infra*.

11. *Hall v. Johnson*, 41 Mich. 286, 289-90, 2 N.W. 55, 57-58 (1879). The need to protect the stability of transactions is especially important in the case of insurance policies, where the attempt to rescind is made by the insurer after the occurrence of

Even where a fact represented would ordinarily appear to be trivial or irrelevant, however, the evidence in a particular case may show that the person who made the statement knew that the recipient would attach peculiar importance to the fact, and misrepresented it in order to induce the recipient to act in reliance upon it. In such a case a finding of materiality will be permitted.<sup>12</sup>

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the insured event. In these cases, of course, rescission does not return the parties to the status quo ante; after the loss it is too late to procure substitute insurance. Here the normal roles of consumer and commercial enterprise are obviously reversed; misrepresentation is asserted by the insurer to defeat the expectations of its customer, the insured, instead of by a purchaser to avoid being cheated by his supplier. Accordingly, the trend of doctrinal reform designed to provide greater protection to consumers has favored more rigorous requirements of materiality in insurance law while the same reform impulses have tended toward a relaxation of materiality concepts for other types of transactions. There has, for instance, been a shift in the tendency to characterize information furnished by the insured concerning himself or his property as "warranties" (noncompliance with which would, under older doctrine, be a complete defense for the insurer regardless of materiality) to statutory and judicial requirements that such statements be considered "representations" (noncompliance with which would not be a defense unless they were material) and that their effect be subject to special safeguards. See generally, R. KEETON, BASIC TEXT ON INSURANCE LAW 369-401 (1971). Similarly, in insurance cases materiality is likely to be defined more rigorously than under the normal definition, text accompanying note 2 *supra*; see, e.g., *Santilli v. State Farm Mutual Ins. Co.*, 278 Or. 53, —, 562 P.2d 965, 967 (1977) ("[A] false representation is material only if the insurer would not have accepted the application at the premium stated had a truthful answer been given.") On balance this difference is probably favorable to the insured. While it may appear to give the insurer the benefit of a subjective test, this advantage could be illusory in practice. The ordinary function of an objective test, i.e., to offset the hazard that a jury might accept an implausible assertion of reliance, is less applicable to misrepresentation claims by insurers than to those made by ordinary purchasers because it is less likely that a jury would accept an institutional party's asserted reliance on objectively unreasonable considerations than that of a possibly idiosyncratic individual. On the other hand, in the case of nontrivial matter, on which it would be reasonable to rely, the insurer would have to establish under this formula that the matter was actually determinative, while under the general definition, text accompanying note 2 *supra*, it would be necessary, in order to rescind, to establish merely that the representation is one to which importance would have been attached.

12. See, e.g., *Brown v. Search*, 131 Wis. 109, 111 N.W. 210 (1907). Cf. *Merson v. Schweitzer*, 71 N.J. Super. 597, 600, 177 A.2d 562, 564 (1962) ("[W]hen the seller asks the broker a direct question he is entitled to a complete and truthful answer. The broker does not have the right to speculate whether the answer is material to the seller. If it is in fact material to the seller, even though the materiality is unknown to the broker, the broker may forfeit his right to commission if his answer is false.")

A leading case is *Seneca Wire & Mfg. Co. v. A.B. Leach & Co.*, 247 N.Y. 1, 6, 159 N.E. 700, 702 (1928) (statement that securities would be listed on the New York stock exchange held material: "In the first place, the parties themselves made the representations material, because Kinn told Bates that they only desired to purchase listed securities or those which were to be listed."); accord, *Smithpeter v. Mid-State Motor Co.*, 74 S.W.2d 47, 50 (Mo. App. 1934) (statement by salesman that auto driven only by him about 38 miles when it had been driven also by other salesman about 125 miles held material when "[h]e was apprised by respondent that whether said car had been driven or not was a material matter"); *Bloomberg v. Pugh Bros. Co.*, 45 R.I. 360,

Thus, while the color of a job applicant's hair will ordinarily be immaterial, it might not be in the circumstances entertainingly described in Conan Doyle's "The Red Headed League."<sup>13</sup>

The rule of materiality does not always exclude the jury's function. It does not, of course, where resolution of conflicting testimony is called for. Moreover, the jury's evaluative function may be invoked where a court is in doubt whether a reasonable man would attach importance to the fact misrepresented, under all the circumstances.<sup>14</sup>

§ 10. JUSTIFIABLE RELIANCE — STATEMENTS CONCERNING  
THE FUTURE (PREDICTIONS, PROMISES,  
STATEMENTS OF INTENTION)

A distinction should be made between predictions of external events not within the speaker's control and statements about what he himself will do in the future, *i.e.*, promises and statements of his own intention.

In the nature of things, predictions or prophesies about external events involve some degree of uncertainty or speculation. From the early books on, it has been recognized that a man "can not warrant a thing which will happen in the future."<sup>1</sup> In this respect predictive statements partake of the nature of opinion or estimate and, as in the case of opinions and estimates generally, it is often broadly said that no one has a right to rely on statements about that which is yet to come.<sup>2</sup> Here again, however, such broad pronouncements

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121 A. 430 (1923) (statement that seller of truck could transfer patronage of customers to plaintiff *held* material where defendant knew plaintiff wanted to enter trucking business with assured clientele).

Most, if not all, of these cases involve a representation which is probably material on an objective basis, given the context, and the statements which support the present proposition come close to being dicta. A better example would be the following: The seller of shares of stock represents that the certificates were engraved by the American Bank Note Co. and contain the picture of an early railroad train. If the buyer is an ordinary investor these statements would be immaterial; if he is known to be a collector of engravings and a railroad buff, and has indicated that this is one of his reasons for acquiring the certificates, the representations may well be regarded as material.

13. Recovery might well be denied in such a case on other grounds.

14. *Rochester Civic Theatre, Inc. v. Ramsay*, 368 F.2d 748 (8th Cir. 1966) (whether relatively slight discrepancy between amount actually pledged for theatre and amount represented as pledged was material *held* a jury question). *See also* *Green, Deceit*, 16 VA. L. REV. 749, 768 (1930).

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1. Choke, J., in *Anonymous*, Y.B. Pasch. 11 Edw. 4, f. 6, pl. 11 (1471).

2. *See, e.g.*, *Krumholz v. Goff*, 315 F.2d 575, 580 (6th Cir. 1963) ("[R]epresentations as to future production of oil wells are mere expressions of opinion and will not



oversimplify the matter. Predictions are by no means all equally speculative, and many have an extensive and sometimes scientific factual basis, *e.g.*, predictions about the time of sunrise or sunset for a given day and place. Moreover, even statements in the form of opinion or estimate about what is likely to happen in the future are not all equally valueless. As every lawyer knows, laymen often must base their actions on expert prophesies about what courts are likely to do and, in some contexts at least, are entitled to rely on the honesty of such prophetic opinions,<sup>3</sup> though as a rule they know they must take their chances on the lawyer's competence and on the possibility of error in a reasonably competent lawyer's opinion.<sup>4</sup>

It is not surprising, therefore, that courts have been increasingly willing to hold predictive statements material where the circumstances indicate to the addressee that the speaker has a factual basis for his prediction so that the existence of facts is implied by the representation. At the least a prediction implies that the speaker knows no facts which would make its fulfillment impossible<sup>5</sup> and it may imply a good deal more.<sup>6</sup> And here again, as in the case of

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constitute fraud, even though they turn out to be untrue."); *Goess v. Lucinda Shops*, 93 F.2d 449, 451 (2d Cir. 1937) (Statements of opinion and prophesy "will not support an action against the seller, for they do not amount to misrepresentations of existing facts."); *Leece v. Griffin*, 150 Colo. 132, 135, 371 P.2d 264, 265 (1962) (Must be representation of present or past fact, and, quoting from the court in *Bell Press, Inc. v. Phillips*, 147 Colo. 461, 466, 364 P.2d 398, 400 (1961), "a mere expression of an opinion in the nature of a prophecy as to the happening or non-happening of a future event is not actionable."); *Hayes v. Disque*, 401 Ill. 479, 488, 82 N.E.2d 350, 355 (1948) (statements about future or contingent events rather than present or pre-existing facts do not generally constitute fraud "but are regarded as mere expression of opinion or mere promises or conjectures upon which the other party has no right to rely"); Annot., 51 A.L.R. 46, 49 (1927) (stating rule with footnote citing 22 columns of supporting cases). Later cases are cited in Annot., 27 A.L.R.2d 14, 64-93 (1953).

Many of the cited authorities expressly recognized exceptions and qualifications to the rule. See, *e.g.*, *Luchow v. Kansas City Breweries Co.*, 183 S.W. 1123, 1125 (Mo. App. 1916).

3. *Harper & McNeely, A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 993-1000 (1938). Cf. *Equitable Life & Cas. Ins. Co. v. Lee*, 310 F.2d 262, 267 (9th Cir. 1962) (statement of opinion about future not actually entertained may constitute actionable fraud where falsely made with intent to deceive); *Lietz v. Primock*, 84 Ariz. 273, 277, 327 P.2d 288, 290 (1958) ("confidential relationship of attorney and client creates an exception to the general rule, that opinion statements may not serve as a basis for actionable fraud, where such opinion is tainted with an intent to gain some advantage over the client").

4. This depends on whether the expert owes to his addressee the duty of using reasonable care. See *Harper & McNeely, A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 986-87 (1938). See generally § 6 *supra*.

5. *Hill v. Stewart*, 93 Ga. App. 792, 92 S.E.2d 829 (1956); *Evola Realty Co. v. Westerfield*, 251 S.W.2d 298 (Ky. 1952); see § 8 note 26 and accompanying text *supra*.

6. See, *e.g.*, *Eastern States Petroleum Co. v. Universal Oil Prods. Co.*, 24 Del. Ch. 11, 3 A.2d 768 (1939) (facts supporting prediction of production of oil cracking

opinions generally, the question of materiality (or right to rely) may turn on the relationship between the parties,<sup>7</sup> differences in their access to the facts,<sup>8</sup> and the question whether one of them is (or purports to be) an expert in the field.<sup>9</sup>

Promises and statements of the speaker's intention or purpose are now generally recognized as involving a statement or implication of the speaker's own state of mind. And at least since the time Lord Justice Bowen penned his oft-quoted language<sup>10</sup> the law has accepted a person's state of mind as a fact (although it may well be a special kind of fact).<sup>11</sup> The question then arises whether it is a material fact and, with the exception of one line of cases,<sup>12</sup> the law

process); *People's Furniture & Appliance Co. v. Healy*, 365 Mich. 522, 113 N.W.2d 802 (1962) (facts warranting prediction about future flooding); *Hollerman v. F.H. Peavey & Co.*, 269 Minn. 221, 130 N.W.2d 534 (1964) (facts to warrant profit prediction); *Russell v. Industrial Transp. Co.*, 113 Tex. 441, 251 S.W. 1034 (1923) (facts to warrant prediction about performance of stock); *Holcomb & Hoke Mfg. Co. v. Auto Interurban Co.*, 140 Wash. 581, 250 P. 34 (1926) (facts to warrant prediction about proceeds from vending machine); *Claus v. Farmers & Stockgrowers State Bank*, 51 Wyo. 45, 63 P.2d 781 (1936) (facts to warrant prediction about failure of bank).

In other contexts, however, (e.g., where the parties are on an equal footing) similar predictions have been held not actionable. See, e.g., *Moser v. New York Life Ins. Co.*, 151 F.2d 396 (9th Cir. 1945); *Kennedy v. Flo-Tronics, Inc.*, 274 Minn. 327, 143 N.W.2d 827 (1966); sources cited in note 2 *supra*.

7. "[W]here a relation of trust or confidence exists between two parties so that one of them places peculiar reliance in the trustworthiness of another . . . redress may be had for representations as to future conduct, and not merely as to past facts." *Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 44, 64 P.2d 101, 106 (1937). See, e.g., *Florence v. Crummer*, 93 F.2d 542 (5th Cir.), *cert. denied*, 304 U.S. 563 (1938); cases cited in Annots., 125 A.L.R. 879, 882-84 (1940), 91 A.L.R. 1295, 1299 (1934), 68 A.L.R. 635, 638 (1930), 51 A.L.R. 46, 81-84 (1927).

The factors dealt with in this and the following two footnotes often overlap and are found combined in the same case.

8. See, e.g., *Bissett v. Ply-Gem Indus., Inc.*, 533 F.2d 142 (5th Cir. 1976); *Hollerman v. F.H. Peavey & Co.*, 269 Minn. 221, 130 N.W.2d 534 (1964); *Bails v. Wheeler*, \_\_\_ Mont. \_\_\_, 559 P.2d 1180 (1977) (estimate of future income from ranch, by real estate brokers with superior knowledge of ranching and of that ranch, as to which a cash flow estimate had been prepared showing a "much lower" income); *Russell v. Industrial Transp. Co.*, 113 Tex. 441, 251 S.W. 1034 (1923); *Holcomb & Hoke Mfg. Co. v. Auto Interurban Co.*, 140 Wash. 581, 250 P. 34 (1926); *Claus v. Farmers & Stockgrowers State Bank*, 51 Wyo. 45, 63 P.2d 781 (1936); A.L.R. annotations cited in note 7 *supra*.

9. See sources cited in note 8 *supra*.

10. "[T]he state of a man's mind is as much a fact as the state of his digestion." *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (C.A. 1885).

11. See P. Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 643, 644 (1937); P. Keeton, *Fraud — Statements of Intention*, 15 TEX. L. REV. 185, 186 (1937).

12. Courts have generally held immaterial statements by a prospective purchaser (or lessee) of property of his purpose in making the purchase, where the only effect of the misstatement is to induce sale at a lower price than would be asked by the vendor (or lessor) if he knew what the real purpose of the transaction was. Thus a "dummy" for a power or railroad company sometimes buys land by making

has been readier to recognize the potential materiality of the speaker's intentions than of his opinions. Thus in the leading case of *Edgington v. Fitzmaurice*,<sup>13</sup> corporate directors represented to prospective investors that the purpose of issuing debentures was to make improvements when, in fact, it was to pay off existing liabilities. And in *Crawford v. Pituch*<sup>14</sup> a landlord misrepresented his intention with respect to the use and occupancy of premises in order to induce the tenant to surrender them without invoking the protection of the Housing and Rent Act of 1947<sup>15</sup> which would have been available to the tenant if the landlord's true intentions had been disclosed. In both cases the courts held the fact misrepresented to be material.<sup>16</sup>

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misrepresentations about its intended use (*e.g.*, farm, residence, etc.) which conceal the purpose of the principal to acquire the land for power or railroad purposes. *See, e.g.*, *Finley v. Dalton*, 251 S.C. 586, 164 S.E.2d 763 (1968); Annot., 35 A.L.R.3d 1369 (1971). Dean Keeton has suggested that these decisions may be justified on the ground that such misrepresentations are generally not regarded as unfair — presumably because the purchaser in such a situation needs protection against the greed and avarice of those who would exploit the situation if they knew the facts. P. Keeton, *Fraud — Statements of Intention*, 15 TEX. L. REV. 185, 188-91 (1937).

Where the recipient of the statement has some interest at stake beyond exacting a higher price, courts are likely to hold a misrepresentation of the purpose for the purchase to be actionable. *See, e.g.*, *Brett v. Cooney*, 75 Conn. 338, 53 A. 729 (1902); *Brentwater Homes, Inc. v. Weibley*, 471 Pa. 17, 19-20, 369 A.2d 1172, 1173 (1977) (vendor sold land near his own colonial farmhouse to developer who had indicated intention to develop "'colonial village,'" with vendor's farmhouse as "focal point"; developer instead sought zoning changes to office and commercial "'uses such as medical center nursing home also retiree apts.' and 'potential high rise site.'"); Annot., 35 A.L.R.3d 1369, 1373-76 (1971). *Cf.* P. Keeton, *Fraud — Statements of Intention*, 15 TEX. L. REV. 185, 191-92 (1973). ("More frequently the representation by the vendee of the purpose or motive which he entertains in buying property is important because it is the fulfillment of that purpose which is material to the representee.").

A typical example is where the concealed purpose is injurious to interests in other land retained by the vendor. *See, e.g.*, *Roda v. Berko*, 401 Ill. 335, 81 N.E.2d 912 (1948) (vendor — aged, sickly, and illiterate — sold land to vendee who indicated intent to build factory that would enhance value of vendor's nearby residential rental properties; vendee instead used land as a junkyard). *Adams v. Gillig*, 199 N.Y. 314, 92 N.E. 670 (1910); *Williams v. Kerr*, 153 Pa. 36, 25 A. 618 (1893).

13. 29 Ch. D. 459 (C.A. 1885).

14. 368 Pa. 489, 84 A.2d 204 (1951). *See Nyulassie v. Mozer*, 85 Cal. App. 2d 827, 193 P.2d 167 (1948); *Teare v. Sussman*, 120 Colo. 488, 210 P.2d 446 (1949); *Trepanier v. Hujber*, 134 Conn. 24, 54 A.2d 275 (1947); *Gabriel v. Borowy*, 326 Mass. 667, 96 N.E.2d 243 (1951); *Williams v. DeFabio*, 3 N.J. Super. 182, 65 A.2d 858 (1949).

15. Pub. L. No. 129, § 209, 61 Stat. 200 (1947).

16. *See also* *Daniel v. Elk Ref. Co.*, 103 F. Supp. 898 (S.D.W. Va.), *aff'd*, 199 F.2d 479 (4th Cir. 1952) (misrepresentation of intention to lease other land from plaintiff); *Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 64 P.2d 101 (1937) (intention not to foreclose on mortgage); *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958) (intention to make specified quantity of aluminum available); cases collected in A.L.R. annotations cited in note 2 *supra*.

Where the misrepresentation has been of a third person's intentions or motives, the law has encountered no difficulty in finding a statement of fact. In such cases the question of materiality usually turns on ordinary canons of importance or relevance.<sup>17</sup>

Promissory statements deserve separate treatment. "A promissory statement is not, ordinarily, the subject either of an indictment or of an action."<sup>18</sup> On the other hand, the promise itself is generally regarded as a representation of a present intention to perform. Hence, such a promise, made by one not intending to perform, is a misrepresentation — a misrepresentation of the speaker's present state of mind — and is actionable as a misrepresentation of fact.<sup>19</sup>

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17. *Cofield v. Griffin*, 238 N.C. 377, 78 S.E.2d 131 (1953); Annot., 40 A.L.R.2d 971 (1955). See P. Keeton, *Fraud — Statements of Intention*, 15 TEX. L. REV. 185, 193-94 (1937); Note, *The Legal Effect of Promises Made With Intent Not to Perform*, 38 COLUM. L. REV. 1461, 1464 (1938).

18. *Sawyer v. Prickett*, 86 U.S. (19 Wall.) 146, 160 (1873).

19. "The weight of authority holds that fraud may be predicated on promises made with an intention not to perform the same, or . . . on promises made without an intention of performance." Annot., 51 A.L.R. 46, 63 & n.14 (1927) (supported by citations to many cases); see cases cited in Annot., 125 A.L.R. 879, 881-82 (1940); 91 A.L.R. 1295, 1297-99 (1934); 68 A.L.R. 635, 637-38 (1930).

The lack of intention to perform can include not only the intention not to perform, but also "reckless disregard" as to whether the promisor would perform. *E.g.*, *Grefe v. Ross*, 231 N.W.2d 863 (Iowa 1975); *Weiss v. Northwest Acceptance Corp.*, 274 Or. 343, 546 P.2d 1065 (1976).

Representative cases are *Bissett v. Ply-Gem Indus., Inc.*, 533 F.2d 142, 145 (5th Cir. 1976); *Clayton Brokerage Co. v. Teleswitcher Corp.*, 418 F. Supp. 83 (E.D. Mo. 1976) (promisor had knowledge that performance would be impossible); *Schroerlucke v. Hall*, 249 S.W.2d 130 (Ky. 1952); *Hearns v. Hearns*, 333 Mich. 423, 53 N.W.2d 315 (1952); *Roberson v. Swain*, 235 N.C. 50, 69 S.E.2d 15 (1952). See generally Note, *The Legal Effect of Promises Made With Intent Not to Perform*, 38 COLUM. L. REV. 1461 (1938); Note, *Torts — Actionable Fraud — Promissory Representations*, 24 N.C.L. REV. 49 (1945); 2 OKLA. L. REV. 365 (1949).

Not all courts accept this notion. See, *e.g.*, *Willis v. Atkins*, 412 Ill. 245, 259, 106 N.E.2d 370, 377 (1952) ("[A]ctionable fraud cannot be predicated upon the mere failure to perform a promise, though there was no intention to perform the promise when made.") (dictum). See also cases collected in Annot., 125 A.L.R. 879, 882 (1940); 91 A.L.R. 1295, 1299 (1934); 68 A.L.R. 635, 638 (1930); 51 A.L.R. 46, 78-81 (1927). In the *Willis* case, however, the court also recognized an exception to this general rule where fraud was perpetrated and confidence gained by a scheme which included but was not limited to the promises. Cf. *Carroll v. First Nat'l Bank*, 413 F.2d 353, 358 (7th Cir. 1969) (cites *Willis* for the proposition that there is "a well recognized exception where . . . the false promise or representation of future conduct is claimed to be the scheme used to accomplish the fraud."); *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334, 371 N.E.2d 634, 641 (1977) (similar to *Carroll*).

The text suggests a distinction between promises (which imply a representation of present intention) and statements directly asserting the speaker's intention. Such a distinction is, of course, conceptually possible and there are cases where a statement of intention has no promissory flavor. See, *e.g.*, note 14 *supra*. There are, however, many ambiguous situations where the statement might be taken either way. See, *e.g.*, *Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 64 P.2d 101 (1937); *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259,

Although the notion of promissory fraud is well recognized, it may seriously collide with the policies underlying certain prophylactic legal rules like the Statute of Frauds and the parol evidence rule. Both these rules are designed to prevent fraudulent claims (or defenses) through excluding a type of evidence (*viz.*, evidence of oral agreement) which is too easy to fabricate and too hard to meet.<sup>20</sup> It could go without saying that these rules are not meant to shield fraud,<sup>21</sup> but they may well have just that effect if they prevent a party from showing that he has been deceived by an oral promise, made to induce reliance and action but without the slightest intention of keeping it. Many courts allow oral proof of fraud in such a case<sup>22</sup> and this seems sound because the affirmative burden of proving fraud (*i.e.*, present intent not to keep the promise when it was made, or even the absence of an intent to keep it) would seem to

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(1958); P. Keeton, *Fraud — Statements of Intention*, 15 TEX. L. REV. 185 (1937). Whether the distinction has any legal significance in such cases depends on the court's attitude toward promissory fraud. Under a rule like that described in *Willis*, a court might be more willing to attach liability to a direct statement of intention than to a promise. See, *e.g.*, *Ashton v. Buchholz*, 359 Mo. 296, 221 S.W.2d 496 (1949); *Comstock v. Shannon*, 116 Vt. 245, 73 A.2d 111 (1950). Under the majority rule the distinction would usually be without material significance. And since the law's implication of a present intention to keep a promise corresponds with what is usually meant by the promisor and understood by the promisee there seems to be no good reason to make the distinction unless it is helpful in avoiding the Statute of Frauds or the parol evidence rule, which should be unnecessary. See notes 20 to 25 and accompanying text *infra*.

20. See P. Keeton, *Fraud — Statements of Intention*, 15 TEX. L. REV. 185, 200-09 (1937).

21. See, *e.g.*, *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403, 408, 151 N.E.2d 833, 836, 176 N.Y.S.2d 259, 263 (1958) ("never intended as an instrument to immunize fraudulent conduct, the statute may not be so employed"). The same principle applies to other similar prophylactic rules, *e.g.*, *Russell v. Hixon*, \_\_\_\_ N.H. \_\_\_\_, 369 A.2d 192 (1977) (rule that all prior negotiations for purchase of real estate must be taken to have been merged in the deed); *cf.* *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313 (1869) (fraud treated not as basis for exception to rule but as independent ground for recovery).

22. See, *e.g.*, *Keeler v. Fred T. Ley & Co.*, 65 F.2d 499 (1st Cir. 1933), *criticized in* 28 ILL. L. REV. 717 (1934); *Nelson Realty Co. v. Darling Shop*, 267 Ala. 301, 101 So. 2d 78 (1957); *Charpentier v. Socony-Vacuum Oil Co.*, 91 N.H. 38, 13 A.2d 141 (1940); *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958); *Claude v. Claude*, 180 Or. 62, 174 P.2d 179 (1946); *Sharkey v. Burlingame Co.*, 131 Or. 185, 282 P. 546 (1929).

Although this is the prevailing view, some courts have excluded evidence of promissory fraud where the promise is required to be in writing by the Statute of Frauds. *Cohen v. Pullman Co.*, 243 F.2d 725 (5th Cir. 1957), *noted in* 7 BUFFALO L. REV. 332 (1958). Other courts have excluded such evidence where it is inconsistent with an integrated written contract. *Bank of America Nat'l Trust & Sav. Ass'n v. Pendergrass*, 4 Cal. 2d 258, 48 P.2d 659 (1935), *criticized in* Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CALIF. L. REV. 877 (1961).

be a substantial safeguard against trumped-up contracts.<sup>23</sup> Moreover, the safeguard is enhanced by the prevailing procedural rules requiring clear and convincing evidence of fraud<sup>24</sup> and holding that the mere nonperformance of a contract does not warrant an inference of the requisite fraudulent intent.<sup>25</sup>

## § 11. JUSTIFIABLE RELIANCE; STATEMENTS OF VALUE OR QUALITY

An aspect of the opinion rule concerns statements of value or quality and what was said in Section 8, *supra*, is applicable to such statements. Here, as in the case of opinions generally, broad declarations are to be found that such statements are not actionable:

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23. This is the conclusion of many commentators. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 729-31 (4th ed. 1971); P. Keeton, *Fraud — Statements of Intention*, 15 TEX. L. REV. 185, 202 (1937); Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CALIF. L. REV. 877 (1961); Note, *The Legal Effect of Promises Made With Intent Not to Perform*, 38 COLUM. L. REV. 1461, 1468-70 (1938).

24. In *Claude v. Claude*, 180 Or. 62, 84, 174 P.2d 179, 188 (1946), the court held that the Statute of Frauds did not bar evidence of promissory fraud but found that such fraud had not been established by proof "of that clear and convincing character that the law requires." See *Coleco Indus., Inc. v. Berman*, 423 F. Supp. 275, 300 (E.D. Pa. 1976); *Lubbe v. Barba*, 91 Nev. 596, 598-99, 540 P.2d 115, 117 (1975); *Bausch v. Myers*, 273 Or. 376, 379, 541 P.2d 817, 819 (1975); *Cheever v. Schramm*, 577 P.2d 951, 954 (Utah 1978); *Bardill Land & Lumber, Inc. v. Davis*, 135 Vt. 81, \_\_\_, 370 A.2d 212, 213 (1977). The required standard of proof is sometimes given as "clear, cogent, and convincing evidence," e.g., *Erlich v. Hendrick Constr. Co.*, 217 Va. 108, 116, 225 S.E.2d 665, 670 (1976); *Beckett v. Department of Social & Health Servs.*, 87 Wash. 2d 184, 487-88, 550 P.2d 529, 531 (1976). See also *Norton v. Carborundum Co.*, 530 F.2d 435, 444 (1st Cir. 1976) ("clear, unequivocal and convincing evidence"); *Knudson v. Weeks*, 394 F. Supp. 963 (W.D. Okla. 1975) ("clear, strong and convincing"); *Valvoline Oil Co. v. Krauss*, 335 So. 2d 64, 72 (La. App. 1976) ("fraud . . . must be proved by strong, convincing proof, not simply by a preponderance of the evidence"); *McGinty v. McGinty*, 195 Neb. 281, 287, 237 N.W.2d 855, 858 (1976) ("clear and satisfactory evidence"); *Thomas v. Seaman*, 451 Pa. 347, 350-51, 304 A.2d 134, 137 (1973) ("clear, precise and convincing"). See generally F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 7.6 (2d ed. 1977); P. Keeton, *Fraud — Statements of Intention*, 15 TEX. L. REV. 185, 202 (1937); Annot., 51 A.L.R. 46, 166 (1927). But see *Lioudas v. Sahadi*, 19 Cal. 3d 278, 289-90, 562 P.2d 316, 322, 137 Cal. Rptr. 635, 641-42 (1977) (in civil action for damages, fraud need be proved only by preponderance of the evidence).

The proof of fraudulent intent can, nonetheless, be circumstantial. See, e.g., *Ahmed v. Collins*, 23 Ariz. App. 54, 530 P.2d 900 (1975); *Sproul v. Fossi*, 274 Or. 749, 751-53, 548 P.2d 970, 972-73 (1976) (inference from circumstances which "had all the 'earmarks' of a confidence game": scheme supposedly to invest plaintiff's \$10,000 on chicken broiler futures; statements that "they would 'double our money or more in one week's time,'" that deal was "all rigged," and that plaintiff would get all his money back within a week with "a huge profit").

25. This is the universal rule. See, e.g., *Webb v. Clark*, 274 Or. 387, 392, 546 P.2d 1078, 1080 (1976); cases cited in Annots., 125 A.L.R. 879, 891-92 (1940); 91 A.L.R. 1295, 1306-07 (1934); 68 A.L.R. 635, 648-49, (1930); 51 A.L.R. 46, 163-70 (1927).

"Representations by a seller as to the value of his property are not usually a basis for a claim of fraud. . . . Value is a matter of opinion."<sup>1</sup> Such a rule has been said to rest on the notion that "value constitutes essentially a measurement of personal need, preference, or taste."<sup>2</sup> But here again a statement of quality or value may imply the existence of specific facts to support it,<sup>3</sup> as where articles have a recognized or standard market price.<sup>4</sup> Moreover, if the statement goes beyond mere value to include assertions of the amount which has been paid, or offered, for the property there is an increasing tendency to find that such assertions may be actionable,<sup>5</sup> though several earlier decisions treated them as mere dealer's talk.<sup>6</sup>

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1. *Garden Realty Corp. v. Hadley*, 110 N.J. Eq. 474, 475-76, 160 A. 385 (1932) (citation omitted).

2. 7 ARK. L. REV. 154, 155 (1952). See *Taylor v. Burr Printing Co.*, 26 F.2d 331, 334 (1928) (L. Hand, J.) ("Value, quality, fitness, success, are usually understood as meaning no more than that the objects conform with the declarant's individual yardstick in such matters.").

3. See *Seavey, Caveat Emptor as of 1960*, 38 TEX. L. REV. 439, 442 (1960) ("[S]tatements of values and qualities are shorthand statements denoting the existence of a substructure of fact."). See generally P. Keeton, *Misrepresentation of Opinion*, 21 MINN. L. REV. 643 (1937).

4. *Zimmern v. Blount*, 238 F. 740 (5th Cir. 1917) (bank stock which has an ascertainable market value); *Gray v. Wilkstrom Motors, Inc.*, 14 Wash. 2d 448, 128 P.2d 490 (1942) (list price of new Buick); cf. *Sacramento Suburban Fruit Lands Co. v. Melin*, 36 F.2d 907, 910 (9th Cir. 1929) (contrasting value of land, a question of opinion, with that of a bushel of wheat on the commodity exchange, a question of fact).

5. *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 103 N.E.2d 692 (1952), Annot. 30 A.L.R.2d 923 (1953), noted in 5 ALA. L. REV. 163 (1952), 7 ARK. L. REV. 154 (1953), 32 B.U. L. REV. 247 (1952), 1952 WASH. L.Q. 593, is a leading case in which the court overrules a line of narrower decisions. Here defendant-landlord induced tenant to agree to a substantially higher rent by falsely stating that a prospective tenant had offered to lease the premises at the higher rent. See, similarly, *Beavers v. Lamplighters Realty, Inc.*, 556 P.2d 1328 (Okla. App. 1976) (false representation that a third party had offered a sum certain to buy property).

Earlier cases to the same effect include *Moline Plow Co. v. Carson*, 72 F. 387 (8th Cir. 1895) (statement that third person had offered to buy stock at 15% premium); *Cahill v. Readon*, 85 Colo. 9, 11, 273 P. 653, 655 (1928) (statements that property had rental value and that "there were persons ready to rent it at" one hundred dollars a month); *Ives v. Carter*, 24 Conn. 392, 393 (1856) (representation that third party had offered \$1,500 for the property); *Door v. Cory*, 108 Iowa 725, 78 N.W. 682 (1899) (amount vendor had paid for land); *Brody v. Foster*, 134 Minn. 91, 158 N.W. 824 (1916) (value is opinion only, but prices received on specific sales and amounts of specific offers for similar properties held statements of fact); *Isman v. Loring*, 130 App. Div. 845, 115 N.Y.S. 933 (1909) (amount of offer by third person); *Caples v. Morgan*, 81 Or. 692, 694, 160 P. 1154, 1157 (1916) (similar to *Kabatchnick*).

6. In addition to the earlier Massachusetts cases cited and overruled in *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 345, 103 N.E.2d 692, 693 (1952), see *Mackenzie v. Seeberger*, 76 F. 108 (8th Cir. 1896); *Tuck v. Downing*, 76 Ill. 71 (1875) (suit in equity for rescission); *Banta v. Palmer*, 47 Ill. 99 (1868) (action for damages representing part of the price paid); *Bishop v. Small*, 63 Me. 12 (1874);

In spite of the marked trend toward narrowing the area of privileged mendacity, it is still true that misstatements of naked value which reflect only the representor's opinion or judgment will not support the granting of relief on grounds of fraud.<sup>7</sup> And the same is true of more or less generalized statements of quality which neither express nor imply a specific factual basis.<sup>8</sup> But here again, as with statements of value, courts seem increasingly willing to find at least the implication of specific facts.<sup>9</sup>

Even where a statement of value or quality would be regarded as not actionable if made between parties dealing at arm's length with equal means of knowledge, courts are likely to view it as an actionable misrepresentation of fact where there is a fiduciary relationship between the parties<sup>10</sup> or, sometimes, where there is a

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Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212 (1872); *cf.* Baker v. Wheeler, 149 Ill. App. 579 (1909) (statement that vendor would not take less than 50 dollars an acre held not actionable).

7. Byers v. Federal Land Co., 3 F.2d 9 (8th Cir. 1924); Reeder v. Guaranteed Foods, Inc., 194 Kan. 386, 399 P.2d 822 (1965); Tetreault v. Campbell, 115 Vt. 369, 375, 61 A.2d 591, 596 (1948) (recognizing, however, the "tendency on the part of the courts to restrict rather than extend the application of the common law maxim, caveat emptor.").

8. *See, e.g.*, Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856-57 (2d Cir. 1918); Law v. Sidney, 47 Ariz. 1, 4-5, 53 P.2d 64, 66 (1936); Miller v. Protkra, 193 Or. 585, 238 P.2d 753 (1951); Bertram v. Reed Auto. Co., 49 S.W.2d 517 (Tex. Civ. App. 1932); Nichols v. Lane, 93 Vt. 87, 106 A. 592 (1919).

9. *See, e.g.*, French v. Freeman, 191 Cal. 579, 217 P. 515 (1923); Palladine v. Imperial Valley Farm Lands, 65 Cal. App. 727, 225 P. 291 (1924); Allen v. Henn, 197 Ill. 486, 64 N.E. 250 (1902); Murray Bros. & Ward Land Co. v. Kessey, 183 Iowa 739, 166 N.W. 460 (1918); Thomas v. Goodrum, 231 S.W. 571 (Mo. 1921); Como Orchard Land Co. v. Markham, 54 Mont. 438, 171 P. 274 (1918); Nichols v. Lane, 93 Vt. 87, 106 A. 592 (1919).

The *Nichols* case illustrates the limits which courts are likely to put on their willingness to find facts implied in commendatory statements. Defendant assured plaintiff that the land offered for sale was as good as any in the state and also that plaintiff could maintain as many as 40 cows in the pasture. The court ruled that the first statement was obviously dealer's talk and should have been discounted as such. As to the second statement, however, it said,

The representation regarding the capacity of the pasture is of an entirely different character. It is quite customary to rate farms by the number of cows it will carry. Everybody knows what such statements mean, and a prospective purchaser ordinarily has a right to rely upon the truth of them. When this defendant told the plaintiff they could pasture 40 cows on this farm, it was not, in essence, an estimate, an opinion, trade talk, or puffing. It was a statement of an existing fact.

93 Vt. at 90, 106 A. at 593. *See also* Clements Auto Co. v. Service Corp., 444 F.2d 169 (8th Cir. 1971).

10. This is neatly illustrated by *Lee v. Brodbeck*, 196 Neb. 393, 243 N.W.2d 331 (1976). Plaintiffs, inexperienced in real estate, had inherited a farm and retained defendant broker concerning the purchase of another, much more valuable farm. The broker advised plaintiffs that "it would not be difficult to sell" their own farm for \$63,000, and in reliance on this statement they mortgaged their farm to help finance



wide discrepancy between their knowledge or means of knowledge concerning the matter in question. Thus a statement of value made by an expert may be treated as one of fact,<sup>11</sup> although the same statement would be deemed a nonactionable opinion if made by one having no superior skill or knowledge.<sup>12</sup> And several decisions have treated such statements as actionable when made by the seller of land inaccessible to the prospective buyer.<sup>13</sup> Another situation in which statements of value (or general commendations of quality) are likely to be taken as actionable statements of fact is presented where the representor has actual knowledge of special facts which belie his statement.<sup>14</sup>

### § 12. DUTY TO INSPECT

The shift in ethical standards accepted by the community and the reflection of that shift in the law of fraud<sup>1</sup> are nowhere better illustrated than by the change in the law's requirement of diligence on plaintiff's part. The great weight of authority today holds that ordinary contributory negligence is no defense to an action grounded on intentional fraud. The failure of plaintiff to use ordinary diligence

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the purchase of the other. At a subsequent foreclosure sale the defendant broker bought plaintiffs' farm for about \$34,000. *See also* Banta v. Palmer, 47 Ill. 99, 100 (1868), where the court said, "If an arrangement had been made between the parties for the purchase of the land on joint account, and the defendant had deceived the plaintiff as to the price paid, there could be no question but that the verdict of the jury [for plaintiff] was right." But since the evidence failed to show such relationship, the misstatement was held not actionable as a matter of law. *See* note 6 and accompanying text *supra*. *See also* § 8 at notes 13 to 18 *supra*.

11. *See, e.g.*, *Hitpold v. Stern*, 82 A.2d 123 (D.C. 1951); *Allen v. Henn*, 197 Ill. 486, 64 N.E. 250 (1902); *People's Furniture Co. v. Healy*, 365 Mich. 522, 113 N.W.2d 802 (1962); *J.S. Curtiss & Co. v. White*, 90 S.W.2d 1095 (Tex. Civ. App. 1935); *Mears v. Accomac Banking Co.*, 160 Va. 311, 168 S.E. 740 (1933). *See also* § 8 at notes 17 to 18 *supra*.

12. *See, e.g.*, *Kulesza v. Wyhowski*, 213 Mich. 189, 182 N.W. 53 (1921).

13. *E.g.*, *Roloff v. Hundebly*, 105 Cal. App. 645, 288 P. 702 (1930); *see* *Murray Bros. & Ward Land Co. v. Kessey*, 183 Iowa 739, 166 N.W. 460 (1918); *Long v. Freeman*, 228 Mo. App. 1002, 69 S.W.2d 973 (1934); *Como Orchard Land Co. v. Markham*, 54 Mont. 438, 171 P. 274 (1918).

14. *Benedict v. Dicken's Heirs*, 119 Conn. 541, 177 A. 715 (1935); *Fox v. Cosgriff*, 66 Idaho 371, 159 P.2d 224 (1945); *Moore v. Swanson*, \_\_\_\_ Mont. \_\_\_\_, 556 P.2d 1249 (1976) (clearly factual statement, concerning assessment of quality) (*semble*). In the *Benedict* case the representation that land was worth only \$15 was made by one who knew (though the other party did not) that it was worth many times that amount because it was now on the shore of an artificial lake. In the *Moore* case sellers of a motel told plaintiff that the motel had an American Automobile Association Triple A rating, but did not disclose that they had received a written deficiency notification from the Association that certain improvements were required.

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1. *See, e.g.*, § 1 at notes 5 to 10 *supra*; § 8 at note 4 *supra*; § 11 at notes 5 to 6 *supra*; note 7 *infra*.

to make an investigation or otherwise discover the truth of the matter will ordinarily not bar his recovery from one who has consciously deceived him.<sup>2</sup> And this is true even though the

2. A similar position is taken by RESTATEMENT (SECOND) OF TORTS §§ 540, 545A, Comments and Illustrations (1977).

[E]ven where parties are dealing at arm's length, if it appears that one party has been guilty of an intentional and deliberate fraud, the doctrine is well settled that he cannot defend against such fraud by saying that the same might have been discovered had the party whom he deceived exercised reasonable diligence and care.

*Roda v. Berko*, 401 Ill. 335, 342, 81 N.E.2d 912, 916 (1948). "A prospective buyer has a right to rely on the veracity of the seller (or his agent) without investigation." *Beavers v. Lamplighters Realty, Inc.*, 556 P.2d 1328, 1331 (Okla. App. 1976); "[W]here a seller makes material statements of fact concerning matters peculiarly within his own knowledge the purchaser is justified in relying on them." *Bergeron v. Dupont*, 116 N.H. 373, 359 A.2d 627 (1976). Here, as elsewhere in deceit doctrine, conscious deception includes reckless assertions of fact made without knowledge, with intent that they be acted upon. *E.g.*, *Stone v. Lawyers Title Ins. Corp.*, 537 S.W.2d 55, 74-75 (Tex. Civ. App. 1976).

See *Seeger v. Odell*, 18 Cal. 2d 409, 115 P.2d 977 (1941); *Gallon v. Burns*, 92 Conn. 39 (1917); *Shermon v. Salmon*, 5 Day 439, 448, 5 Am. Dec. 167, 171-72 (Conn. 1813) ("[N]o authority can be found to warrant the doctrine, that a man must use due diligence to prevent being defrauded. . . . [R]edress is most commonly wanted for injuries arising from frauds, which might have been prevented by due diligence."); Board of Pub. Instruction v. *Everett W. Martin & Son*, 97 So. 2d 21, 23-25 (Fla. 1957); *Friedman v. Jablonski*, — Mass. —, 358 N.E.2d 994, 994 & n.4 (1976) (that plaintiffs could have ascertained falsity of representation concerning right of way by examination of title in the registry of deeds does not bar their action for deceit; failure to do so is, however, relevant to running of statute of limitation, as to possible tolling of which diligence in discovery would be necessary); *Smith v. Pope*, 103 N.H. 555, 176 A.2d 321, 325 (1961) (citing 1 F. HARPER & F. JAMES, LAW OF TORTS § 7.12 (1956)); *Peter W. Kero, Inc. v. terminal Constr. Corp.*, 6 N.J. 361, 78 A.2d 814 (1951); *Mulkey v. Morris*, 313 P.2d 494, 500 (Okla. 1957); *Isenhower v. Bell*, 365 S.W.2d 354, 357 (Tex. 1963); *Boonstra v. Stevens-Norton, Inc.*, 64 Wash. 2d 621, 624-25, 393 P.2d 287, 290 (1964); *First Nat'l Bank v. Scieszinski*, 25 Wis. 2d 569, 573-74, 131 N.W.2d 308, 312 (1964). Annot., 61 A.L.R. 492 (1929); cases cited in Annot., 33 A.L.R. 853, 903-11 (1924).

*Cf. Pelkey v. Norton*, 149 Me. 247, 99 A.2d 918 (1953) (wherein the court struggles with earlier dicta requiring plaintiff's reasonable care and finds a limitation upon that rule where the fraud is actual and intentional); *Johnson v. Owens*, 263 N.C. 754, 140 S.E.2d 311 (1965), which declares that a plaintiff's reliance upon the fraudulent statement must be reasonable but also recognizes that the prudent man need not treat everyone as a rascal, and that it will often be hard to determine where reliance ceases to be reasonable and becomes such negligence as to bar an action for fraud. The court concluded:

In close cases, however, we think that a seller who has intentionally made a false representation about something material, in order to induce a sale of his property, should not be permitted to say in effect, 'You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you . . . .

*Id.* at 758, 140 S.E.2d at 314; *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E.2d 522 (1965) (plaintiff entitled to rely on such representations as would induce action by person of ordinary prudence); *Cheever v. Schramm*, 577 P.2d 951 (Utah 1978); *Bezner v. Continental Dry Cleaners, Inc.*, 548 P.2d 898, 900-01 (Utah 1976) (similar to *Fox*; defendant also obstructed plaintiff from discovering the truth; the

investigation "could be made without any considerable trouble or expense."<sup>3</sup>

court treated defendant's active concealment as a "further" element in its discussion, without suggesting this was essential to plaintiff's case).

Not all courts agree that contributory negligence is excluded as a defense to intentional fraud. *See, e.g., Swanson Petr. Corp. v. Cumberland*, 184 Neb. 323, 330-31, 167 N.W.2d 391, 396-97 (1969); *Dyck v. Snygg*, 138 Neb. 121, 129, 292 N.W. 119, 123 (1940); *Gilbert v. Mid-South Mach. Co.*, 267 S.C. 211, 214-15, 227 S.E.2d 189, 193 (1976) (jury question whether purchasers exercised reasonable prudence for their own protection); *cf. Foxley Cattle Co. v. Bank of Mead*, 196 Neb. 1, 241 N.W.2d 495 (1976) ("ordinary prudence" requirement applies only to plaintiff who "does not need to make any additional investigation to discover a patent defect or the patent truth of the matter," but "does not apply where the defects are latent"; "an unknowing person who relies on a material representation does not need to make an investigation, or additional investigation, to discover the truth"); *Growney v. CMH Real Estate Co.*, 195 Neb. 398, 238 N.W.2d 240 (1976) (on weak facts, *i.e.*, clearly expression by defendant of non-expert opinion, rather than representation of fact; court relies on statement that "where ordinary prudence would have prevented the deception, an action for fraud . . . will not lie"); text accompanying notes 8 to 10 *infra*.

Sometimes there is a statutory requirement that the complaining party in a suit for deceit shall not have failed to obtain knowledge of the truth by lack of due diligence, *e.g., GA. CODE ANN. §§ 37-211, 37-212, discussed in Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91, 94 (5th Cir. 1976) (no requirement to "exhaust all means at his command"; "standard is one of reasonable diligence"; careful consideration of information in financial statements — here misleading and fraudulent — should be enough because "prevalent use of financial statements is testimony to the faith placed in them by the business community.")

The present section deals with contributory negligence as a possible defense to intentional fraud. Contributory negligence is generally regarded as a defense to an action based on a negligent misstatement. *See* § 6 at notes 34 to 37 *supra*. *But see* *Neff v. Bud Lewis Co.*, 89 N.M. 145, 148, 548 P.2d 107, 110-11 (1976) (defendant, plaintiff's agent and fiduciary, apparently concealed actual knowledge of defects in building's heating and cooling system; in discussion of the theory of negligent misrepresentation, however, the court states the "issue is whether plaintiff had a right to rely on the negligent representation of a fiduciary," and "not that the plaintiff had a duty to exercise reasonable care in making a determination whether to rely on defendants' negligent representation") (dictum). Ordinary contributory negligence is probably not, however, a defense where liability for misrepresentation is strict. *See, e.g., Perry v. Rogers*, 62 Neb. 898, 87 N.W. 1063 (1901); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 716 n.41 (4th ed. 1971).

Even where negligent reliance is a defense to negligent misrepresentation, reliance without inspection can be reasonable and hence not negligent. *E.g., Rempel v. Nationwide Life Ins. Co.*, 471 Pa. 404, 409-10, 370 A.2d 366, 368-69 (1977) ("Consumers . . . view an insurance agent . . . as one possessing expertise in a complicated subject. It is therefore not unreasonable for consumers to rely on the representations of the expert rather than on the contents of the insurance policy itself. . . . [A] specialized language is used [in the application] which will have no meaning to the consumer except the meaning attributed to the words by the representations of the agent. . . . The receipt of the policy is the acceptance of the offer previously made. . . . By the time the written policy is received, it has lost its importance to the insured. . . . It is not unreasonable, therefore, for a purchaser of insurance to 'pass' when the time comes to read the policy. . . . The idea that people do not read or are under no duty to read a written insurance policy is not novel."); *see R. Keeton, Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 968 (1970). *But cf. Doub v. Weathersby-Breeland Ins. Agency*, 268 S.C. 319, 233 S.E.2d 111 (1977) (unreasonable for insured businessman to have failed to read insurance policy where 18 months had elapsed between issuance of insurance policy and casualty).

3. RESTATEMENT (SECOND) OF TORTS § 540, Comment a (1977). This comment remained unchanged from the first *Restatement*. *See* 41 A.L.I. PROCEEDINGS 509-10 (1964). There was a controversy about a proposed change in § 540, *see* note 9 *infra*; it did not, however, concern the basic proposition, but only cases in which the defrauded

This was not always the rule. Earlier courts, imbued with notions of caveat emptor and individual self-reliance, held that a plaintiff could not recover for damage caused by reliance on a misrepresentation which reasonable diligence on his part would have exposed as false;<sup>4</sup> and the standard of diligence required was sometimes pretty high.<sup>5</sup> The older rule reflected a low ethical

party had "what courts have called notice that the representation made to him is or may be false." The Reporter (Dean Prosser) explained on the floor of the Institute:

Now, it's quite clear that in the absence of such notice he doesn't have to go around investigating. He can take the assertion made to him by the defendant and rely upon it, even though all he has to do to determine its falsity is to walk across the street to the courthouse and check the public record, which would take him five minutes.

41 A.L.I. PROCEEDINGS at 509. See also *Loverin v. Kuhne*, 94 Conn. 219, 108 A. 554 (1919); *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E.2d 522 (1965); Annot., 33 A.L.R. 853 (1924).

4. A leading early case is *Sherwood v. Salmon*, 2 Day 128 (Conn. 1805). Here defendant, in the closing years of the eighteenth century, represented to plaintiff, in Connecticut, that, among other things, land in Virginia consisted in part of good arable bottom land, and in part of good side-hill pasture, worth two dollars and one dollar an acre, respectively. In truth, the land was entirely worthless rocky mountain land. After verdict for plaintiff, the supreme court of errors held that judgment should have been arrested because "[t]he maxim *caveat emptor* applies forcibly to this case. The law redresses those only who use diligence to protect themselves . . ." *Id.* at 136. The true condition of the land was obvious to anyone who looked at it, "[a]nd the course that prudence has established, requires that [purchaser] should look; if not with his own eyes, by those of an agent, or someone in whom he can reasonably place a confidence." *Id.* This decision, it should be noted, was not in the mainstream of Connecticut law even in its own time. See, e.g., *Sherwood v. Salmon*, 5 Day 439, 5 Am. Dec. 167 (Conn. 1813) (similar facts, opposite result). See generally note 2 *supra*.

For more early cases to the same effect as the first *Sherwood* decision, see *Schwabacker v. Riddle*, 99 Ill. 343, 346 (1881) (no recovery for fraud "unless the plaintiff himself exercised ordinary prudence"); *Graffenstein v. Epstein*, 23 Kan. 314 (1880) (vendor has no right to rely upon vendee's statement of market price of wool, absent confidential relationship or peculiar means of knowledge); *Osborne v. Missouri Pac. Ry.*, 71 Neb. 180, 183, 98 N.W. 685, 686 (1904) ("The general rule is that, where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie."); *Wheelright v. Vanderbilt*, 69 Or. 326, 328, 138 P. 857, 858 (1914) ("The misrepresentation must have been such as would have deceived a person of ordinary prudence."); see Harper & McNeeley, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 956-57 (1938) (" 'Caveat emptor' was a law of wide application . . . 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.").

5. An example is *Sherwood v. Salmon*, 2 Day 128 (Conn. 1805), described in note 4 *supra*. The court said: "Whether lands be five or 500 miles from the purchaser's residence does not vary the requisition of diligence, though it may the expense of complying with it." 2 Day at 136. This case is commented upon in Seavey, *Caveat Emptor as of 1960*, 38 TEX. L. REV. 439, 446 (1960).

standard and a cynical view of human nature.<sup>6</sup> It has been largely replaced by the attitude expressed by the Missouri court:

It has sometimes been loosely said that the negligence of the vendee will prevent recovery for the fraud of the vendor. The word 'negligence' used in that connection, as we understand its meaning in the law of negligence, is an unhappy expression. Fraud is a willful, malevolent act, directed to perpetrating a wrong to the rights of another. That such an act in a vendor should not be actionable because of the mere negligence or inadvertence of the vendee in preventing the fraud ought to be neither good ethics nor good law. 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] called upon to rip up transactions of that sort. . . . And, generally speaking, 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 every one must deal with his fellow man as if he was a thief and a robber, it ought not to be held that trust can not be put in a positive assertion of a material fact, known to the speaker and unknown to the hearer, and intended to be relied on.<sup>7</sup>

Although the modern rule excludes ordinary negligence as a defense to intentional fraud, there is a limit to how far the recipient

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6. See § 8 at notes 2 & 3, *supra*; Harper & McNeeley, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 957 (1938).

This was the court's attitude in *Sherwood v. Salmon*, 2 Day 128 (Conn. 1805), discussed in notes 4 & 5 *supra*. "Whatever morality may require, it is too much for commerce to require, that the vendor should see for the purchaser." 2 Day at 136. *Cf. Burns v. Lane*, 138 Mass. 350, 356 (1884) (Holmes, J.) ("The standard of good faith required in sales is somewhat low . . ."); *Graffenstein v. Epstein*, 23 Kan. 314, 317 (1880) (justifying older rule as a protection against "misconstruction of statements, misrecollection of words, and willful perjury" which would be encouraged on the part of persons disappointed in bargains if the requirement of plaintiff's diligence were relaxed).

7. *Judd v. Walker*, 215 Mo. 312, 337-38, 114 S.W. 979, 980-81 (1908). Missouri courts are still concerned with the question whether reliance was reasonable, although they have departed from the rigor of older standards of diligence; for a discussion of the factors considered see *Abbey v. Heins*, 546 S.W.2d 553, 554 (Mo. App. 1977) (on facts upon which plaintiff could probably win no matter what the standard might be: fraudulent representation by insurance agent that a general release was only a partial release; agent had attempted to establish a relationship of trust and confidence with the plaintiff — a schizophrenic whose reading glasses were broken; agent had refused plaintiff's request to leave the release with him so that he could have someone study it).

A similar statement may be found in *Bell v. Bradshaw*, 342 S.W.2d 185, 189-90 (Tex. Civ. App. 1960):

In fact, it seems the tendency is to hold those who practice the highly developed art of salesmanship to a stricter system of ethics than found on the

of a statement may shut his eyes to the obvious and rely blindly on a statement which flies in the face of reality. If a statement is patently preposterous in the light of common knowledge<sup>8</sup> or if it would be shown up as false upon the most casual inspection immediately available to the recipient, he will not under ordinary circumstances be justified in relying upon it.<sup>9</sup> If he does so his conduct constitutes something different from ordinary negligence; it is the sort which some writers call assumption of risk.<sup>10</sup> In dealing with this defense courts use a subjective test: if the recipient of the statement is

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horse-trading lot. With both State and Federal laws regulating and licensing brokers and salesmen, requiring fair trade practices, truth in advertising and full revelation in security transactions, becoming effective and more restrictive each year, the position of the ignorant buyer who relies on the skillful seller is better than that he must always beware.

See generally Harper & McNeeley, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 957-60 (1938); Seavey, *Caveat Emptor as of 1960*, 38 TEX. L. REV. 439 (1960).

8. Classic examples of representations preposterous on their face are found in *Hirschberg Optical Co. v. Michaelson*, 1 Neb., Unoff. 137, 95 N.W. 461 (1901); *Ellis v. Newbrough*, 6 N.M. 181, 27 P. 490 (1891).

9. "The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." RESTATEMENT (SECOND) OF TORTS § 541 (1977). See *Seeger v. Odell*, 18 Cal. 2d 409, 415, 115 P.2d 977, 981 (1941); *Williams v. Rank & Son Buick*, 44 Wis. 2d 239, 245-46, 170 N.W.2d 807, 811 (1969); Harper & McNeeley, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 959 n.42 (1938).

Dean Prosser, Reporter for the *Restatement*, proposed to amend § 540 so as to provide that the recipient of a statement "is justified in relying upon its truth without investigation, unless he knows or has reason to know of facts which make his reliance unreasonable." RESTATEMENT (SECOND) OF TORTS at 126 (Tent. Draft No. 10, 1964) (emphasis supplied). The change was thought to be supported by such cases as *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670 (9th Cir. 1936); *Dalhoff Constr. Co. v. Block*, 157 F. 227 (8th Cir. 1907); *Security Trust Co. v. O'Hair*, 103 Ind. App. 56, 197 N.E. 694 (1935); and *Kaiser v. Nummedor*, 120 Wis. 234, 97 N.W. 932 (1904). The advisers were unanimous in rejecting this proposal but the Council supported it by a narrow margin. After an illuminating discussion on the floor, the Institute disapproved the Reporter's proposed revision by a vote of 67 to 57. See 41 ALI PROCEEDINGS 509-13 (1964); 42 ALI PROCEEDINGS 322-31 (1965). Those who opposed the proposal did not disagree with the decisions cited by the Reporter but felt that they were adequately covered by § 541.

Additional recent decisions barring recovery because of a recipient's failure to see what was obvious include *Godfrey v. Navratil*, 3 Ariz. App. 470, 411 P.2d 470 (1966); *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E.2d 881 (1957); *Ralston v. Grinder*, 8 Ohio App. 2d 208, 221 N.E.2d 602 (1966), which show how uncertain the borderline may be between this notion and contributory negligence.

10. See *Frenzel v. Miller*, 37 Ind. 1, 17, 10 Am. Rep. 62, 72 (1871); 1 F. HARPER & F. JAMES, *LAW OF TORTS* 581 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 717 (4th ed. 1971).

The use of the term in this sense seems unobjectionable and indeed useful. See James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 & n.4 (1968).

unusually gullible,<sup>11</sup> or has unusual beliefs,<sup>12</sup> and the maker of the statement knows this and intentionally exploits it, the latter will not be heard to defend himself on the ground that his victim was a fool to believe him.

There is another way in which an evaluation of plaintiff's conduct may be involved in determining whether fraud is actionable. We have seen that there are some classes of statements upon which the recipient will not be justified in relying.<sup>13</sup> In one of its aspects the requirement of justifiable reliance is simply another way of stating the point made in the last paragraph: no one of ordinary intelligence has a right to rely on a patently false or silly statement. But the rule of justifiable reliance is broader than that, and covers (as we have also seen)<sup>14</sup> statements of opinion, prophesy, and the like — statements which may not be patently false but which bargainers must be expected to make whether true or false. A recipient of such a statement is usually not justified in relying on it where the parties have equal access to the underlying facts,<sup>15</sup> and the inquiry into the recipient's means of knowledge which this rule invites may substantially duplicate the inquiry which a rule of contributory

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11. See, e.g., *Seeger v. Odell*, 18 Cal. 2d 409, 415, 115 P.2d 977, 981 (1941); *Cole v. McLean*, 93 Ind. App. 526, 532, 177 N.E. 348, 350 (1931) (a requirement of diligence "is not to be carried so far that the law shall ignore or protect positive intentional fraud successfully practiced upon the simple-minded or unwary"); *Erickson v. Fisher*, 51 Minn. 300, 53 N.W. 638 (1892); *Boonstra v. Stevens-Norton, Inc.*, 64 Wash. 2d 621, 393 P.2d 287 (1964); cf. *Neas v. Siemens*, 10 Wis. 2d 47, 102 N.W. 2d 259 (1960) (fraud perpetrated on person unfamiliar with English language).

12. *Hyma v. Lee*, 338 Mich. 31, 60 N.W.2d 920 (1953) (representation that "voices" advised retention of oil stock, made to believer in spiritualism). Cf. *Burchill v. Hermesmeyer*, 262 S.W. 511, 513 (Tex. Civ. App. 1924) (similar facts, opposite result: no link shown between defendant and the representations).

In the cases cited in note 8 *supra*, the courts indicated that the recipient of the statement was a person of ordinary intelligence. Other courts have attached importance to this factor. See e.g., *Ellis v. Newbrough*, 6 N.M. 181, 191, 27 P. 490, 493 (1891) (plaintiff's admission of this fact "precludes any inquiry as to whether [his] connection with the Faithists . . . gave evidence of such imbecility as would entitle him to maintain the suit").

13. Sections 8 to 11 *supra*.

14. See §§ 8, 10 & 11 *supra*.

15. RESTATEMENT (SECOND) OF TORTS § 542, Comment d (1977); § 8 at notes 17 to 22 & 33 *supra*; § 10 at notes 6 & 8 *supra*; § 11 at note 13 *supra*. See *Sacramento Suburban Fruit Lands Co. v. Klaffenbach*, 40 F.2d 899 (9th Cir. 1930); *Sacramento Suburban Fruit Lands Co. v. Melin*, 36 F.2d 907, 910 (9th Cir. 1929) (value of real estate generally a matter of opinion only; an assurance that a piece of land is of a stated value will be treated as actionable fraud only under exceptional circumstances as where "the land is remotely situated, or, for other reasons, the sources of information are not reasonably available to the purchaser"); *Board of Pub. Instruction v. Everett W. Martin & Son*, 97 So. 2d 21, 25 (Fla. 1957); *Kulesza v. Wyhowski*, 213 Mich. 189, 182 N.W. 53 (1921).

negligence would entail.<sup>16</sup> Where the representation is regarded as one of fact, however, the recipient's means of knowledge are irrelevant<sup>17</sup> unless they attain such proportions as to render the representation obviously false within the rule stated in the last paragraph. And the increasing judicial tendency to find facts implied by statements of opinion<sup>18</sup> will make increasingly narrow the scope of the area in which plaintiff's means of knowledge are significant in cases of intentional fraud.

Although his reliance need not be reasonable, plaintiff must have relied in fact upon a fraudulent misrepresentation in order to have legal relief for its consequences;<sup>19</sup> and the unreasonableness of an asserted reliance may be considered by the trier in determining whether there was reliance in fact.<sup>20</sup> Once the claim of reliance is found genuine, however, the fact that the reliance may have been foolish will not cause the action to fail.<sup>21</sup>

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### § 13. CAUSAL RELATION — RELIANCE

The usual principles of causation are applicable to the tort of deceit. It must appear that the defendant's tortious conduct has in fact caused the plaintiff damage which occurred in such a manner as to come within the rules of legal causation. The questions of the interests protected and the general kind of harm for which the defendant is liable in deceit have already been discussed. The problem of legal or proximate causation is of little difficulty in view of the general rule that all intended consequences are proximate.<sup>1</sup>

16. See sources cited note 15 *supra*; *Kennedy v. Flo-Tronics, Inc.*, 274 Minn. 327, 143 N.W.2d 827 (1966); *Harper & McNeely, A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 960 (1938). See also *Schmidt v. Landfield*, 20 Ill. 2d 89, 169 N.E.2d 229 (1960).

17. See sources cited notes 2 & 3 *supra*.

18. See § 8 at notes 20 to 30 *supra*; § 10 at notes 5 & 6 *supra*; § 11 at note 9 *supra*.

19. Section 13 *infra*.

20. See, e.g., *Stanger v. Gordon*, — Minn. —, —, 244 N.W.2d 628, 631 (1976) (evidence sufficient for jury finding that employee relied reasonably on employer's oral misrepresentation about pension plan, despite failure to examine written plan); *Condon v. Sandhowe*, 97 N.J. Eq. 204, 127 A. 101 (1925).

21. "The test to be applied is whether in fact there was a reliance on the truth of the representation; whether the reliance was reasonable is immaterial." *State Farm Mut. Auto. Ins. Co. v. Wall*, 87 N.J. Super. 543, 556, 210 A.2d 109, 115-16 (1965), modified on other grounds and *aff'd*, 92 N.J. Super. 92, 222 A.2d 282 (1966).

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1. See RESTATEMENT OF TORTS § 280 (1934).

Apart from intended consequences, the question of which damages caused by misrepresentation are proximate is treated in the *Restatement* as follows: the victim's justifiable reliance must be "a substantial factor in determining the course of conduct that results in his loss" and the misrepresentation is a legal cause of the loss "if, but only if, the loss might reasonably be expected to result from the reliance." RESTATEMENT (SECOND) OF TORTS §§ 546, 548A (1977). See also note 18 *infra*.



Whether the defendant's misconduct has in fact caused plaintiff any damage at all, however, is frequently presented as a problem of "reliance" on the part of the plaintiff upon the misrepresentation. Thus, where the recipient knows the true facts which are misrepresented<sup>2</sup> or for any reason does not believe the misrepresentation,<sup>3</sup> he cannot be found to rely on it. Reliance, however, is insufficient to establish causation if plaintiff would have suffered the same damage even if he had not relied on the misrepresentation,<sup>4</sup> or if plaintiff's damage otherwise results from causes other than his reliance.<sup>5</sup>

The misrepresentation need not be the sole inducement of the recipient's action in order to be actionable; it is enough that it was a substantial factor in inducing such action.<sup>6</sup> This requirement is

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2. *Providence State Bank v. Bohannon*, 426 F. Supp. 886 (E.D. Mo. 1977); *Montgomery Ward & Co. v. Williams*, 330 Mich. 275, 47 N.W.2d 607 (1951); *Cox v. Johnson*, 227 N.C. 69, 40 S.E.2d 418 (1946); *Shaw v. Gilbert*, 111 Wis. 165, 180-81, 86 N.W. 188, 192-93 (1901).

3. *Edwards v. Hudson*, 214 Ind. 120, 124, 14 N.E.2d 705, 707 (1938) ("When the person who claims to have been defrauded solemnly states under oath that he did not believe the alleged false representations, the inevitable conclusion must be that he was not deceived thereby."); *Wegefath v. Wiessner*, 134 Md. 555, 570, 107 A. 364, 369 (1919) ("The law will not permit one to predicate damage upon a statement which he did not believe to be true.").

In *David v. Moore*, 46 Or. 148, 157, 79 P. 415, 417 (1905), defendant complained of an instruction which required plaintiff's reliance upon defendant's statement but omitted "the element of belief." The instruction was upheld because "reliance . . . implies . . . belief."

4. See, e.g., *Day v. Avery*, 548 F.2d 1018 (D.C. Cir. 1976), cert. denied, 431 U.S. 908 (1977), where a partner in a Chicago-based law firm, who was chairman of its Washington office committee but not a member of the firm's executive committee, was told by an executive committee member that he would not be "worse off" as a result of a proposed merger with another firm, which he voted to approve in reliance on that explanation. In fact, he was made cochairman of the merged Washington office; then his authority was substantially undercut. All this may have been planned in the merger negotiations which had been carried on by the executive committee. The court held the defendant not liable, however, because, *inter alia*, the plaintiff lacked the voting power to block the merger even if he had tried to do so.

5. See, e.g., *Diener Enterprises, Inc. v. Miller*, 35 Md. App. 410, 371 A.2d 439 (1977), where the vendor of land misrepresented that "no legal action had been or would be filed" to prevent the issuance of a permit for construction of an apartment hotel on the conveyed property. In fact, there had been considerable litigation to prevent such a permit. At the time of the conveyance the county had, however, agreed to issue a permit, and such a permit was then issued to plaintiff and remained valid for one year. The permit lapsed because the buyer failed to initiate construction within the required period, and the county was thereafter unwilling to renew it. The court held there was no liability for misrepresentation because the misrepresentation was not the cause of plaintiff's inability to build.

6. "It is not necessary that the false representations should have been the sole or even the predominant motive; it is enough if they had material influence upon the plaintiff, although combined with other motives." *Safford v. Grant*, 120 Mass. 20, 25 (1876); RESTATEMENT (SECOND) OF TORTS § 546 (1977).

sometimes stated in terms of a "but for" or sine qua non rule.<sup>7</sup> If the recipient would not have taken a detrimental action "except for such representations, there is such a reliance thereon as entitles her to maintain the action."<sup>8</sup> This raises the question whether each of two independent representations may be a basis of liability.<sup>9</sup> Clearly they may be "if the representations of both were necessary to induce" the action.<sup>10</sup> On general principles the same result seems called for where each alone would have induced the action,<sup>11</sup> though we have found no decision on the point.

A problem of growing practical importance is presented when the recipient makes his own investigation of the subject matter represented.<sup>12</sup> If the trier of fact concludes from sufficient evidence that reliance was in fact placed upon the investigation rather than upon the statement,<sup>13</sup> or if that is the only reasonable conclusion,<sup>14</sup> then of course the requisite causal relation does not exist. On the other hand, the mere making of an investigation which does not disclose the falsity of the misrepresentation does not preclude a finding of reliance in fact upon the misrepresentation.<sup>15</sup> Close questions may be presented where the investigation discloses some

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7. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 20.2 at 1110 (1956). See generally *id.* § 20.2 (1956 and Supp. by F. James 1968).

8. *Strong v. Strong*, 102 N.Y. 69, 75, 5 N.E. 799, 801 (1886). But see *Cabot v. Christie*, 42 Vt. 121, 127, 1 Am. Rep. 313, 316 (1869) ("If the false representations were material and relied upon, and were intended to operate, and did operate, as one of the inducements to the trade, it is not necessary to inquire whether the plaintiff would or would not have made the purchase without this inducement.").

9. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 20.2 at 1115-16 (1956) where this problem is treated in general terms.

10. *Addington v. Allen*, 11 Wend. 374, 381 (N.Y. 1833).

11. See, e.g., *Corey v. Havener*, 182 Mass. 250, 65 N.E. 69 (1902); Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 413-14 (1939); Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1129-31 (1934); Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 433-34 (1937). See generally 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 20.3 (1956 and Supp. by F. James 1968).

12. Many enterprises, such as insurance companies and credit agencies, often resort to bureaus and agencies which make it their business to investigate applicants.

13. *Imperial Assur. Co. v. Joseph Supornich & Son*, 184 F.2d 930 (8th Cir. 1950); *Hayes v. Disque*, 401 Ill. 479, 82 N.E.2d 350 (1948); *State Farm Mut. Auto. Ins. Co. v. Wall*, 87 N.J. Super. 543, 556, 210 A.2d 109, 115-16 (1965), modified on other grounds and *aff'd*, 92 N.J. Super. 92, 222 A.2d 282 (1966).

14. E.g., *Morrow v. Laverty*, 77 Neb. 245, 249, 109 N.W. 150, 151 (1906), wherein a verdict for the defendant, which imported a finding of reliance upon plaintiff's own investigation rather than upon defendant's representations, was upheld with the observation that it "is the only one which a court would sustain."

15. E.g., *John Hancock Mut. Life Ins. Co. v. Cronin*, 139 N.J. Eq. 392, 398, 51 A.2d 2, 5 (1947), quoted in *Parker Precision Prods. Co. v. Metropolitan Life Ins. Co.*, 407 F.2d 1070, 1074-75 (3d Cir. 1969).

discrepancies from the statement. If these are serious enough, doubt may be cast on the genuineness of the claim of reliance.<sup>16</sup>

In the simpler society in which the action of deceit grew up the requirement of reliance made good sense. In a community of self-reliant individuals it was natural that one should have no redress for a misrepresentation which did not in fact deceive *him*. Yet in the more complex world of today such a requirement will sometimes defeat recovery for the victim of fraud in circumstances where the need for protection is increasingly recognized. In the case of securities, for instance,

[w]hile statements in prospectuses doubtless influence the market even after secondary distribution has ended, subsequent purchasers are, perhaps generally, not influenced consciously or directly by such statements. The security may pass from investor to investor with complete safety and cause a loss to a purchaser who was never aware of the representation which proved false or of the significant matter which was concealed.<sup>17</sup>

This kind of consideration has led to the abolition of the reliance requirement in some statutes which seek to protect buyers from loss through misstatements in some modern business contexts.<sup>18</sup> The

16. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Wall*, 87 N.J. Super. 543, 210 A.2d 109 (1965), *modified on other grounds and aff'd*, 92 N.J. Super. 92, 222 A.2d 282 (1966).

It is sometimes said that if a recipient of a statement makes an independent investigation of his own he "must be charged with what it is reasonable to assume [he] found, or could have found, if [his] investigation was made with the care and completeness to be expected of one who deals at arm's length with another." *Condon v. Sandhowe*, 97 N.J. Eq. 204, 207, 127 A. 101, 102 (1925). This form of statement may suggest that reliance must be reasonable, *see, e.g.*, *Attwood v. Small*, 7 Eng. Rep. 684, 726 (H.L. 1838), and to the extent that it does so it imports unfortunate vestiges of the defense of contributory negligence into an area where it does not belong. *Compare* § 12 note 3 and accompanying text *supra* with § 12 note 9 and accompanying text *supra*. It is submitted that this is unfortunate and that a better, more accurate analysis is found in *Wall*, in which the court stated, "The test to be applied is whether in fact there was a reliance on the truth of the representation; whether the reliance was reasonable is immaterial." 87 N.J. Super. at 556, 210 A.2d at 115-16.

17. Shulman, *Civil Liability and the Securities Act*, 43 YALE L.J. 227, 229-30 (1933) (footnote omitted).

18. *E.g.*, *id.* at 248 describing a provision (§ 11) of the original Securities Act of 1933: "He may sue even though he never read or knew of the untrue or misleading statement prior to his purchase." Subsequent changes in this provision have reinstated the reliance requirement in some narrow contexts; these and additional legislation dealing with the matter are described in 3 L. LOSS, SECURITIES REGULATION 1702-03, 1724-25, 1752-54 (1961). For an example of the effect of such a change see *Rudnick v. Franchard Corp.*, 237 F. Supp. 871, 873 & n.1 (S.D.N.Y. 1965).

In the American Law Institute's proposed *Federal Securities Code* "[r]eliance as such does not figure at all in Part XVII [on "Civil Liability"] except for provisions (successors to . . . § 11(a), last ¶ [of the Securities Act of 1933]) that permit a plaintiff to recover on the basis of a false filing that has been corrected if he shows that he

reasoning behind these legislative innovations may cast legitimate doubt on the continuing validity of requiring reliance in other contexts also.<sup>19</sup>

justifiably relied on the uncorrected filing (§§ 1703(d)(2), 1704(d), 1705(d), 1707(d)). Instead the emphasis is on causation . . . ." FEDERAL SECURITIES CODE lvi (Proposed Official Draft 1978). Section 220 of the proposed *Code* provides: "A loss is 'caused' by specified conduct to the extent that the conduct (a) was a substantial factor in producing the loss and (b) might reasonably have been expected to result in loss of the kind suffered." *Id.* at 60. Plaintiff's actual knowledge of the falsity of a representation, or the obviousness of a falsity, would remain a defense. *Id.* § 1704(e).

The *Code's* definition of causation is influenced by, but somewhat different from, that in the RESTATEMENT (SECOND) OF TORTS (1977); see notes 1 and 2 and accompanying text *supra*. A similar provision is found in the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1709 (1974). See Coffey & Welch, *Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth*, 21 CASE W. RES. L. REV. 5, 59-60 (1969).

Though reliance has largely been eliminated as a requirement, under all these statutes it is an affirmative defense that the purchaser knew of the untruth or omission. See 15 U.S.C. § 77k(a) (1970); 15 U.S.C. § 1709(a) (1970).

19. It is generally held, for instance, that a recipient who investigates the subject matter of the misrepresentation cannot recover his expenses in making the investigation, however reasonable. *Enfield v. Colburn*, 63 N.H. 218 (1884); *Wheelright v. Vanderbilt*, 69 Or. 326, 138 P. 857 (1914). A mechanical insistence upon reliance would justify this result on the assumption that one investigating the truthfulness of a statement should not be said to be relying upon its truth. But if such an expense has been in fact caused by the fraud — and caused through the direct effect of the fraud on plaintiff rather than on some third party — the fraud has induced the recipient to act. Where that is the case it is doubtful whether reliance should be erected into an independent requirement. Usually reliance both supplies and evidences the causal relation between fraud and loss so that the requirement may be stated in the form of reliance or causation without affecting the result. But where the misstatement exerts its influence on plaintiff himself and leads to loss, the requisite causal link is established and pursuit of reliance may miss the point. The only possible justification for it seems to be a pragmatic one: that otherwise liability would invite too many questionable claims. But the obstacles put in the way of proving intentional fraud should be a sufficient safeguard against this danger. See § 10 at notes 23 to 25 *supra*.

Where defendant's fraud adversely affects plaintiff through inducing action by a third person, denying recovery on the ground that there has been no actual reliance by the plaintiff is harder to justify. See, e.g., *Rosenbluth v. Sackadorf*, 190 Misc. 665, 76 N.Y.S.2d 447 (1947), *rev'd on other grounds*, 274 App. Div. 794, 79 N.Y.S.2d 524 (1948). In this case a landlord made fraudulent misstatements to the Office of Price Administration and to the court in order to evict a tenant who was protected in occupancy by federal statutes except where the premises were wanted for certain limited purposes (e.g., self-occupancy). (In addition to the problem of reliance, such cases also pose questions of collateral attack upon judicial or administrative action which do not concern the present section.) The same problem is raised by the assertion which is occasionally encountered, and which is sometimes equally difficult to justify, that for an action in deceit defendant's misrepresentation must have been made "to the plaintiff." Cf. *Columbia Real Estate Title Ins. Co. v. Caruso*, \_\_\_ Md. App. \_\_\_, \_\_\_, 384 A.2d 468, 473 (1978) (supposed deceit doctrine quoted in context of conspiracy action). By contrast, see § 2 notes 7-19 and accompanying text *supra*; *Handy v. Beck*, \_\_\_ Or. \_\_\_, 581 P.2d 68 (1978).

For a perceptive treatment of the tort problems posed by *Rosenbluth v. Sackadorf*, see 33 MINN. L. REV. 194 (1949).

## § 14. CONCEALMENT AND NONDISCLOSURE

It has often been said that there is no affirmative duty of disclosure between parties dealing at arm's length.<sup>1</sup> "Silence as such, i.e., mere non-disclosure, does not constitute [actionable] concealment."<sup>2</sup> Thus the vendor's failure to disclose to his purchaser that a home for sale was infested with termites has been held to afford no basis for an action even though the vendor knew the condition and knew that it constituted a concealed risk.<sup>3</sup>

The harshness of this rule has been mitigated by limitations and exceptions which have gone a long way toward swallowing up the rule — but not yet all the way. In the first place, the rule does not extend to the case where defendant actively conceals a defect, as by painting over it,<sup>4</sup> or where he prevents inves-

1. See, e.g., 37 AM. JUR. 2d *Fraud* § 145 (1968) ("Mere silence is not representation, and a mere failure to volunteer information does not constitute fraud."); 37 C.J.S. *Fraud* § 15 (1943) (similar); sources cited at notes 2 & 3 *infra*.

Good treatments of the subject matter of this section are Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5 (1956); P. Keeton, *Rights of Disappointed Purchasers*, 32 TEX. L. REV. 1, 2-7 (1953); P. Keeton, *Fraud — Concealment and Nondisclosure*, 15 TEX. L. REV. 1 (1936).

2. Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 441 (1964) (contrasting the common law doctrine of caveat emptor, from which the quoted rule was derived, with the German law which "appears to have gone to extremes in imposing upon a party to a contract the duty to disclose material matters inaccessible to the other party"). *Id.* at 438.

For typical recent expressions of the traditional rule that silence does not constitute fraudulent concealment, see *Van Buren v. Pima Community College Dist. Bd.*, 113 Ariz. 85, 546 P.2d 821 (1976) (no duty to disclose to teacher who resigned tenured position in Alaska to accept one-year contract in Arizona that salary for Arizona position was specially funded; the funding, it turned out, was not renewed; implicit also were related questions concerning materiality of and reasonableness of reliance on mistaken inference concerning probability of renewal of contract); *Friedman v. Jablonski*, \_\_\_ Mass. \_\_\_, \_\_\_, n.3, 358 N.E.2d 994, 997 n.3 (1976).

3. *Swinton v. Whitinsville Sav. Bank*, 311 Mass. 677, 42 N.E.2d 808 (1942). The court conceded that the case "possesses a certain appeal to the moral sense," and that the condition "constitutes a concealed risk against which buyers are off their guard," but concluded, "The law has not yet, we believe, reached the point of imposing upon the frailties of human nature a standard so idealistic as this." *Id.* at 678, 679, 42 N.E.2d at 808-09.

*Swinton* was cited and followed in *Hendrick v. Lynn*, 37 Del. Ch. 402, 144 A.2d 147 (1958); *Fegeas v. Sherrill*, 218 Md. 472, 478, 147 A.2d 223, 226 (1958). *Cf.* *Perin v. Mardine Realty Co.*, 6 N.Y.2d 920, 161 N.E.2d 210, 190 N.Y.S.2d 995 (1959) (vendor of property under no duty to warn that sewer connection improperly ran through adjoining lands).

4. *Herzog v. Capital Co.*, 27 Cal. 2d 349, 164 P.2d 8 (1945); see RESTATEMENT (SECOND) OF TORTS § 550 (1977); *cf.* *Southern v. Floyd*, 89 Ga. App. 602, 80 S.E.2d 490 (1954) (seller concealed broken place in furnace boiler with temporary filling); *Griffith v. Byers Constr. Co.*, 212 Kan. 65, 510 P.2d 198 (1973) (defendant-developer graded, developed, and advertised for sale, for use as homesites, part of an abandoned oil field containing salt water disposal areas which were concealed by the grading; building

tigation;<sup>5</sup> in either case there is more than mere nondisclosure. Moreover, the telling of a half-truth<sup>6</sup> or the making of an ambiguous statement<sup>7</sup> will constitute fraud if it is intended to create a false impression and does so. Though a vendor may have no duty to speak, yet "if he does assume to speak, he must make a full and fair disclosure as to the matters about which he assumes to speak. He must then avoid a deliberate nondisclosure."<sup>8</sup> And

[i]f an ambiguous term is used in making a representation in a business transaction, and the other party, to the knowledge of the one making the representation, interprets the term in the sense in which it is false, there is liability for fraud if the erroneous impression created by the ambiguous representation is not corrected.<sup>9</sup>

The rule of nonliability has never applied to fiduciary relationships. The trustee or other fiduciary is bound to exercise reasonable

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contractors purchased the sites from the developer and then resold sites to homebuyers who discovered that because of salinity the soil would not sustain vegetation: developer *held* liable to homeowners for nondisclosure of this impediment to normal landscaping, of which the developer "knew or should have known," despite lack of privity); *Campbell v. Booth*, 526 S.W.2d 167 (Tex. Civ. App. 1975) (seller used deodorant to conceal fact that carpets had been soaked with dog urine).

5. *See Chisholm v. Gadsden*, 32 S.C.L. (1 Strob.) 220 (S.C. 1847); *Schneider v. Heath*, 170 Eng. Rep. 1462 (C.P. 1813); P. Keeton, *Fraud — Concealment and Nondisclosure*, 15 TEX. L. REV. 1, 2-5 (1936).

6. *Moline Plow Co. v. Carson*, 72 F. 387, 391-92 (8th Cir. 1895) (true statement that K had offered 15% premium for company stock but nondisclosure that K had withdrawn offer on examining company's condition: "Nothing is more deceitful than half the truth."); *see Peerless Mills, Inc. v. American Tel. & Tel. Co.*, 527 F.2d 445, 449 (2d Cir. 1975) (defendant "stressed the high earnings of the last six months of 1968 but no mention was made of the losses in the early months of 1969, though they were known to him. There is no question but that one party to a business transaction is under a duty to disclose to the other such additional matters known to him in order to prevent his partial statement of the facts from being misleading."); *Taylor v. Burr Printing Co.*, 26 F.2d 331 (2d Cir. 1928); *Dyke v. Zaiser*, 80 Cal. App. 2d 639, 650, 182 P.2d 344, 352 (1947); *Franchay v. Hannes*, 152 Conn. 372, 379, 207 A.2d 268, 271 (1965); *RESTATEMENT (SECOND) OF TORTS* § 551(2)(b) (1977).

7. *Sullivan v. Ulrich*, 326 Mich. 218, 40 N.W.2d 126 (1947); *Sheridan Drive-In, Inc. v. State*, 16 App. Div. 2d 400, 408, 228 N.Y.S.2d 576, 585 (1962).

8. *Franchay v. Hannes*, 152 Conn. 372, 379, 207 A.2d 268, 271 (1965). *But see DuShane v. Union Nat'l Bank*, \_\_\_ Kan. \_\_\_, 576 P.2d 674 (1978) (bank which undertook to give credit reference about its customer to third person *held* not liable for misleading nondisclosure of material facts; nonliability explained on dubious ground that bank was not under a legal or equitable obligation to communicate anything).

9. *Sheridan Drive-In, Inc. v. State*, 16 App. Div. 2d 400, 404, 408, 228 N.Y.S.2d 576, 581, 585 (1962) (Halpern, J.). In this case a state highway agent induced plaintiff to accept a favorable settlement of his condemnation claim by assuring him the "final" plans for highway construction afforded access to a neighboring site for the drive-in (which could be acquired at a reasonable price). In the department's parlance "final plans" were subject to change but plaintiff interpreted the term as meaning *irrevocable*, "and the State's agents knew that this was his interpretation." The plans

care to disclose to those for whom he is acting "matters known to him that [they are] entitled to know" because of the relationship between them.<sup>10</sup> And this duty has been extended to relations of trust and confidence beyond technical trusts.<sup>11</sup>

A party has the duty to disclose facts discovered after he has made a representation to another if he knows or believes that these

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were changed and the drive-in was left virtually without access. The court held this would afford a basis for recovering damages for fraud.

In *Sullivan v. Ulrich*, 326 Mich. 218, 40 N.W.2d 126 (1949), the court conceded that defendant-vendor did not expressly tell plaintiffs that the house was not infested with termites but concluded that "the result [of defendant's evasiveness] has been to convey to plaintiffs a negative answer to their inquiry about termites, and plainly such result was intended." In ordering a judgment for plaintiff the court declared that "[n]o one can evade the force of the impression which he knows another received from his words and conduct, and which he intended him to receive, by resorting to the literal meaning of his language alone." *Id.* at 227, 229, 40 N.W.2d at 131, 132.

10. RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1977). Typical cases include *Murphy v. Country House, Inc.*, 307 Minn. 344, 350, 240 N.W.2d 507, 511-12 (1976) (possible fiduciary duty of more experienced corporate director to have anticipated that less experienced director would not understand effect of proposal to issue additional shares, in which case there would be liability "for fraudulent misrepresentation by silence") and *Vogt v. Town and Country Realty*, 194 Neb. 308, 314-15, 231 N.W.2d 496, 501 (1975) (real estate agent owes fiduciary duty to make full disclosures to his client of all material facts affecting his interests; customer for realty was an officer and shareholder of defendant agency).

A fiduciary's responsibility of disclosure can include the correction of the misrepresentations of others. *See, e.g., Tcherepnin v. Franz*, 393 F. Supp. 1197, 1213-17 (N.D. Ill. 1975) (liability of state banking officials having custody over the assets of a defrauded savings and loan association, for knowing failure to advise the association's depositors of the falsity of representations made to them by dishonest officers of the organization; in reliance on those misrepresentations the depositors approved a "voluntary liquidation" which avoided a court-supervised receivership and which led to further looting by the management).

11. Members of the same family often stand in such a relationship to each other that full disclosure is required, but this may be varied by circumstances. *See, e.g., Burroughs v. Wynn*, — N.H. —, 370 A.2d 642 (1977). Plaintiff was handicapped life tenant in property inherited from mother; defendant was plaintiff's sister and remainderman of property. Defendant volunteered to pay property taxes, did so for several years, then without notice failed to make several tax payments, secretly purchased the property at a tax collector's sale, and concealed from plaintiff the transfer of title to the property: plaintiff prevailed on grounds of fraud.

Lists of confidential relationships are found in *Appeal of Darlington*, 147 Pa. 624, 629-30, 23 A. 1046, 1047 (1892); *Berger & Hirsch, Pennsylvania Tort Liability for Concealment and Nondisclosure in Business Transactions*, 21 TEMP. L.Q. 368, 371 n.17 (1948); Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5, 32 (1956).

Parties to certain types of contracts may also stand in a similar relationship to one another. *See, e.g., Traylor v. Gray*, 547 S.W.2d 644, 652-54 (Tex. Civ. App. 1977) (principal and agent; estoppel by misleading silence); *Atlantic Trust & Deposit Co. v. Union Trust & Title Corp.*, 110 Va. 286, 67 S.E. 182 (1909) (principal and surety).

facts make untrue or misleading the original statement (even though the statement may have been true, or believed true, when made).<sup>12</sup>

The many and important exceptions to the rule of nonliability for silence are perhaps only an indication of a trend toward a broader rule of liability.<sup>13</sup> Thus there are decisions<sup>14</sup> holding that a vendor may be liable for fraud in situations practically indistinguishable from the termite cases cited earlier in this section.<sup>15</sup> The *Restatement (Second) of Torts* has tried to formulate a rule embodying this trend by requiring one party to a business transaction to disclose to the other, before the transaction is consummated, "facts basic to the transaction" if the former knows that the other is about to act under a mistake as to such facts "and

12. *Bursey v. Clement*, \_\_\_ N.H. \_\_\_, 387 A.2d 346 (1978); *Bergeron v. Dupont*, 116 N.H. 373, 359 A.2d 627 (1976); *McGinn v. McGinn*, 50 R.I. 236, 241, 146 A. 636, 638 (1929) ("Complainant had made a positive statement of fact, believing it to be true. When within a few days she learned that it was untrue, the law no longer left her free if she so chose to keep silence in her negotiations with respondents"; specific performance of the agreement produced by these negotiations was denied); *RESTATEMENT (SECOND) OF TORTS* § 551(2)(c), Comment h & Illustrations 1, 2 (1977). Cf. *Fruit Dispatch Co. v. Wolman*, 124 Me. 355, 128 A. 740 (1925) (defendant breached affirmative promise to disclose any change in financial condition).

13. See P. Keeton, *Rights of Disappointed Purchasers*, 32 TEX. L. REV. 1, 2-7 (1956); P. Keeton, *Fraud — Concealment and Nondisclosure*, 15 TEX. L. REV. 1, 31-40 (1936). But cf. Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5, 43-44 (1956) ("Fully aware of the dangers of generalization and of the importance of knowing the exceptions, this writer is willing to state that in the typical transaction, nondisclosure of material facts on the part of a vendor or purchaser is not fraudulent. This is the older law, and, notwithstanding a movement in the other direction, manifested by the gradual multiplication of qualifying exceptions, it is the modern law as well.").

14. See *Saporta v. Barbagelata*, 220 Cal. App. 2d 463, 33 Cal. Rptr. 661 (1963) (failure to disclose termite and fungus infestation unknown and unobservable to buyer); *Kallgren v. Steele*, 131 Cal. App. 2d 43, 279 P.2d 1027 (1955) (failure to disclose that resort was within state right of way); *Rothstein v. Janss Inv. Co.*, 45 Cal. App. 2d 64, 113 P.2d 465 (1941) (failure to disclose that land included concealed fill); *Kaze v. Compton*, 283 S.W.2d 204 (Ky. 1955) (failure to disclose existence of drain tile and potential for flooding); *Marsh v. Webber*, 13 Minn. 109, 114 (1868) (dictum); *Grigsby v. Stapleton*, 94 Mo. 423, 7 S.W. 421 (1888) (failure to disclose concealed disease of cattle); *Weintraub v. Krobatsch*, 64 N.J. 445, 317 A.2d 68 (1974) (failure to disclose material insect infestation); *Musgrave v. Lucas*, 193 Or. 401, 238 P.2d 780 (1951) (failure to disclose that proposed action by War Department engineers had threatened continuation of gravel business); Annot., 8 A.L.R.3d 550, 559-61 (1966).

In some other cases the concealed condition had been created by defendant himself. See *Weikel v. Sterns*, 142 Ky. 513, 134 S.W. 908 (1911); *Mincy v. Crisler*, 132 Miss. 223, 96 So. 162 (1923). This fact has been regarded as critical, *Corry v. Sylvia y Cia.*, 192 Ala. 550, 68 So. 891 (1915), although apparently it is not so considered in Kentucky. Compare *Weikel*, 142 Ky. 513, 134 S.W. 908 (1911) with *Kaze*, 283 S.W.2d 204 (Ky. 1955). In any event this line of cases involves a departure or exception from the rule of nonliability even though some of the cases may espouse a narrower exception than that involved in the cases cited in the first paragraph of this footnote.

15. See note 3 *supra*.



that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.”<sup>16</sup> Facts “basic to the transaction” are those that go to its essence (e.g., the character of the thing sold), and the concept is narrower than materiality, which covers also facts which are important only as “inducements to enter into” the transaction.<sup>17</sup>

### § 15. REMEDIES FOR MISREPRESENTATION

One who has been defrauded in a way described in the foregoing sections may have a fairly wide choice of remedies although not all the options may be available in any given case. The basic choice is between an action for damages for the loss caused by the fraud

16. RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977). See, e.g., *Service Oil Co. v. White*, 218 Kan., 87, 96, 542 P.2d 652, 660 (1975) (lessor of realty for use as filling station failed to disclose that he had previously conveyed to city a ten-foot strip, thereby altering boundary of property so as to cause noncompliance with requirements of ordinance relating to location of gas pumps; the court declined to impose on leases of business or commercial property an implied warranty of suitability for lessee's use, but held lessor liable for failure to disclose the prior conveyance as “actionable fraudulent concealment.”); *Richfield Bank and Trust Co. v. Sjogren*, — Minn. —, 244 N.W.2d 648 (1976) (bank had duty to disclose to borrower the fact that its depositor — upon whose solvency the borrower was depending — was insolvent and unable to deliver the goods, the loan for which the borrower had obtained by promissory note to bank).

17. RESTATEMENT (SECOND) OF TORTS § 551, Comment j (1977). The Reporter stated that the advisers were “unanimous in wishing to limit [§ 551(2)(e)] to facts ‘basic to the transaction’” and concluded, “[t]he law may be moving in the direction of requiring disclosure of ‘material’ facts, but it is not yet sufficiently clear to justify more than ‘basic.’” RESTATEMENT (SECOND) OF TORTS § 551 at 166-67 (Tent. Draft No. 10, 1964).

The proposed section and comments were extensively debated at the 1965 meeting of the Institute and the section was brought back with minor changes to the 1966 meeting at which it was approved. See *id.*, § 551 (Tent. Draft No. 12, 1966); 42 ALI PROCEEDINGS 370-83 (1965); 43 ALI PROCEEDINGS 411-13 (1966).

Questions were raised as to, *inter alia*, whether this proposal goes far enough. See 42 ALI PROCEEDINGS 374-75 (1965).

A distinction may be made between a *vendor's* duty to disclose (discussed at note 14 *supra*) and the duty of a *purchaser*: the latter may well be much more limited. See Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5, 26-31 (1956); 42 ALI PROCEEDINGS 370-72, 377 (1965). But see 42 ALI PROCEEDINGS 379-80 (1965).

As finally published in 1977, § 551, Comment *l* states,

There are indications . . . that with changing ethical attitudes in many fields of modern business, the concepts of facts basic to the transaction may be expanding and the duty to use reasonable care to disclose the facts may be increasing somewhat. This Subsection is not intended to impede that development.

(which proceeds on the assumption that the transaction stands) and a remedy which seeks to undo the transaction (in whole or in part) and place the parties back where they stood before the transaction. Moreover, in some cases the defrauded party can get a satisfactory remedy by waiting until he is sued on the contract and then using the fraud which induced it as a defense. And there are yet further variations and refinements of remedy which will be explored in this section.

*Action for damages for fraud and deceit.* This is the modern successor to the common law action on the case for deceit.<sup>1</sup> An essential element in this action is actual damage caused by the misrepresentation. If the fraud did not cause any actual loss to the plaintiff he has no basis of recovery under this theory.<sup>2</sup> In this respect the action is like that for negligence rather than that for such torts as trespass to land where nominal damages can be awarded even if no actual damage is shown.<sup>3</sup>

All courts agree that recovery is limited to damages proximately caused by the fraud,<sup>4</sup> but two different rules prevail for the measurement of such damages in the ordinary case. The out-of-pocket, or tort, rule adopted in a minority of states measures damages by the difference between the value of what was received by the defrauded party and the value of that with which he parted, e.g., the price he paid.<sup>5</sup> The loss-of-bargain, or warranty, rule takes

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1. See § 1 *supra*.

2. *Gaffney v. Graf*, 73 Cal. App. 622, 238 P. 1054 (1925); *Finn v. Monk*, 403 Ill. 167, 176, 85 N.E.2d 701, 706 (1949); *Lustine Chevrolet v. Cadeaux*, 19 Md. App. 30, 35, 308 A.2d 747, 750-51 (1973); *Mosher v. Sawyer-Weber Tool Mfg. Co.*, 224 Mich. 303, 194 N.W. 979 (1923); *Urtz v. New York Cent. & Hudson River R.R.*, 202 N.Y. 170, 95 N.E. 711 (1911).

It should be noted, however, that where the loss-of-bargain rule is adopted, see text at note 6 *infra*, a plaintiff may recover where he has suffered no out-of-pocket loss. See note 9 *infra*.

3. See generally 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 1.8 (1956).

4. See RESTATEMENT (SECOND) OF TORTS § 549(1) (1977). Illustrative decisions are *Lack Indus., Inc. v. Ralston Purina Co.*, 327 F.2d 266, 276-77 (8th Cir. 1964) (under Minnesota out-of-pocket rule); *Waddell v. White*, 56 Ariz. 420, 426-27, 108 P.2d 565, 568-69 (1940) (under loss-of-bargain rule); *Morrell v. Wiley*, 119 Conn. 578, 178 A. 121 (1935) (under loss-of-bargain rule) (*semble*).

5. A leading case is *Reno v. Bull*, 226 N.Y. 546, 124 N.E. 144 (1919). See *Lamasters v. Springer*, 251 Iowa 69, 99 N.W.2d 300 (1959); *Browning v. Rodman*, 268 Pa. 575, 111 A. 877 (1920).

The Reporter for the *Second Restatement* found that nine jurisdictions embraced this rule: Arkansas, California, Iowa, Maryland, Minnesota, Montana, New York, Pennsylvania, and the United States; the rule also has been applied in Texas but "has . . . been changed by statute as to transactions in real estate or corporate stock." RESTATEMENT (SECOND) OF TORTS § 549, at 161-62 (Tent. Draft No. 10, 1964) (citing cases). Other cases are collected in Annot., 124 A.L.R. 37, 52-66 (1940) (slightly different list of jurisdictions). Maryland has since adopted the *Selman* rule (discussed

as its measure the difference between the value of what was received by the defrauded party and the value of what he would have received had the representations been true. A substantial majority of courts embrace the latter rule.<sup>6</sup> Both rules also allow recovery for consequential pecuniary loss, *e.g.*, expenses incurred as a result of the fraud;<sup>7</sup> punitive damages are likewise available under the criteria normally applicable to such awards.<sup>8</sup>

The out-of-pocket rule is defended on the ground that it is consistent with the general principle that tort damages should be

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in text accompanying notes 17 & 18 *infra*). See *Hinkle v. Rockville Motor Co.*, 262 Md. 502, 511-12, 278 A.2d 42, 47-48 (1971).

The first *Restatement* adopted the out-of-pocket rule. See *RESTATEMENT OF TORTS* § 549(a) & Comment b (1938).

6. See, *e.g.*, *Preston Motors Corp. v. Wood*, 208 Ala. 172, 94 So. 70 (1922); *Nielson v. Hansford*, 78 Colo. 456, 242 P. 677 (1925); *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 A. 104 (1898); *Nysewander v. Lowman*, 124 Ind. 584, 24 N.E. 355 (1890); *Watkins & Faber v. Whiteley*, 578 P.2d 514 (Utah 1978); *RESTATEMENT (SECOND) OF TORTS* § 549, at 162-64 (Tent. Draft No. 10, 1964) (listing thirty-one jurisdictions as apparently applying the loss-of-bargain rule); *Annot.*, 124 A.L.R. 37, 39-52 (1940) (stating that "the great weight of authority" sustains the view and citing cases).

7. See, *e.g.*, *Bechtel v. Liberty Nat'l Bank*, 534 F.2d 1335, 1341-42 (9th Cir. 1976); *Applied Data Processing, Inc. v. Burroughs Corp.*, 394 F. Supp. 504 (D. Conn. 1975); *RESTATEMENT OF TORTS* § 549(b) & Comment d (1938); *RESTATEMENT (SECOND) OF TORTS* § 549(1)(b) & Comments a, d (1977).

In unusual situations the circumstances can justify awards for other kinds of damage. *E.g.*, *Holcombe v. Whitaker*, 294 Ala. 430, 318 So. 2d 289 (1975) (recovery for mental suffering alone where defendant, a married physician, claimed to be divorced, and fraudulently induced plaintiff into void marriage); *Bonhiver v. Graff*, \_\_\_\_ Minn. \_\_\_\_, 248 N.W.2d 291, 304 (1976) (loss of business reputation). Only net damages, of course, are to be awarded. Thus the value of any gains received by the claimant should be offset against his damages under any rule. See, *e.g.*, *Dunn v. Dean Vincent, Inc.* 278 Or. 117, 562 P.2d 972 (1977) (applying out-of-pocket rule).

8. See, *e.g.*, *Byrnes v. Faulkner, Dawkins & Sullivan*, 550 F.2d 1303, 1314 (2d Cir. 1977) (under New York law punitive damages do not lie for "ordinary fraud," but only "where the fraud . . . is gross and involves high moral culpability"). At least some compensatory damages must be proved before punitive damages may be awarded, *e.g.*, *Day v. Avery*, 548 F.2d 1018, 1029-30 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 908 (1977), since damage is an essential element of the tort, text at note 2 *supra*, but the proof of even nominal actual damages can support punitive damages. *Bissett v. Ply-Gem Indus., Inc.*, 533 F.2d 142 (5th Cir. 1976); *Bolton Ford, Inc. v. Little*, 344 So. 2d 1208 (Ala. 1977) (out-of-pocket rule); *Lloyd v. DeFerrari*, 314 So. 2d 224 (Fla. App. 1975) (punitive damages recoverable; unclear whether court applied out-of-pocket or loss-of-bargain rule); *Ford v. Guarantee Abstract and Title Co.*, 220 Kan. 244, 553 P.2d 254 (1976) (out-of-pocket rule); *Johnson v. Doran*, 167 Mont. 501, 540 P.2d 306 (1975) (punitive damages recoverable; unclear whether court applied out-of-pocket or loss-of-bargain rule); *Oestreich v. American Nat'l Stores, Inc.*, 290 N.C. 118, 131-39, 225 S.E.2d 797, 806-10 (1976) ("aggravated" conduct required beyond "simple fraud"); *Dunn v. Dean Vincent, Inc.* 278 Or. 117, 562 P.2d 972 (1977). See, *e.g.*, *Beavers v. Lamplighters Realty, Inc.* 556 P.2d 1328 (Okla. App. 1976) (actual damages of \$250 sufficient to support award of punitive damages). On punitive damages in the case of rescission see note 35 *infra*.

compensatory only;<sup>9</sup> the loss-of-bargain rule allows recovery for disappointed expectations even in cases where there has been no actual loss at all.<sup>10</sup> Moreover, there are some cases (e.g., where defendant is a third party who has made no bargain with plaintiff) in which the out-of-pocket rule is probably the preferable measure.<sup>11</sup> And in many cases the amount paid is more readily susceptible of proof than the hypothetical value of what the defrauded party would have received had the representations been true (a condition contrary to fact).<sup>12</sup>

On the other hand, the more restrictive out-of-pocket rule overlooks "[t]he fact that the fraudulent statements induced the innocent vendee to expect something which he did not receive,"<sup>13</sup> as well as the fact that a fraudulent statement may cost its maker nothing if the out-of-pocket rule is applied.<sup>14</sup> Moreover, if the

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9. Hannigan, *The Measure of Damages in Tort for Deceit*, 18 B.U. L. REV. 681, 683 (1938); see, e.g., *Smith v. Bolles*, 132 U.S. 125 (1889); RESTATEMENT OF TORTS § 549, Comment b (1938); cf. *Nelson v. Gjestrum*, 118 Minn. 284, 288, 136 N.W. 858, 859 (1912) (extended discussion of rationale for rule, which court states is "not . . . a defense of the rule"). But cf. Annot., 124 A.L.R. 37, 56 (1940) ("The chief virtue of the [out-of-pocket] rule is its certainty and ease of application . . .").

10. "Actual loss," as used in the text, does not include lost expectations. Courts applying the loss-of-bargain rule, however, treat lost expectations as a type of loss. The classic example is *Murray v. Jennings*, 42 Conn. 9, 19 Am. Rep. 527 (1875), in which plaintiff was induced to exchange her pair of oxen for defendant's horse by the latter's fraudulent representation that the horse was sound. It appeared that the oxen were worth one hundred dollars and the horse, even in its unsound condition, was worth \$125, so there was no out-of-pocket loss. Nevertheless, plaintiff was allowed damages based on the difference between actual value of the horse (\$125) and the sum (\$225) it would have been worth had it been sound as represented. See *Spreckels v. Gorrell*, 152 Cal. 383, 92 P. 1011 (1907); Annot., 124 A.L.R. 37, 50-51 (1940).

11. *MacDonald v. Roeth*, 179 Cal. 194, 200-02, 176 P. 38, 41 (1918); see *Sorensen v. Gardner*, 215 Or. 255, 334 P.2d 471 (1959). But cf. *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 138-41, 65 So. 1015, 1019-20 (1914) (loss-of-bargain rule applied where defendant was third party to the bargain, but "there would have been no contract but for defendant's intervention"). Where rescission is granted the result is like that produced by the out-of-pocket rule.

12. See Annot., 124 A.L.R. 37, 56 (1940). The difficulty of proving such hypothetical value may be mitigated by a rule that the amount paid constitutes evidence of represented value. See *Morrell v. Wiley*, 119 Conn. 578, 178 A. 121 (1935); *Page v. Parker*, 40 N.H. 47, 71-72 (1860); *Selman v. Shirley*, 161 Or. 582, 609, 85 P.2d 384, 394 (1938), *aff'd on rehearing*, 161 Or. 582, 637-39, 91 P.2d 312, 322 (1939). Where the amount paid is the only evidence of represented value the practical effect of the two rules would seem to be the same. See *Haynes v. Cumberland Builders, Inc.*, 546 S.W.2d 228, 234 (Tenn. App. 1976). See generally *Rice v. Price*, 340 Mass. 502, 509-11, 164 N.E.2d 891, 895-96 (1960).

13. *Selman v. Shirley*, 161 Or. 582, 625, 91 P.2d 312, 317 (1938), *aff'd on rehearing*, 161 Or. 582, 85 P.2d 384 (1939).

14. A principal objection to the minority rule is that it "does not discourage fraud, since the fraudulent party takes no chance of losing anything because of his fraud: if he is not called to account, he enjoys his plunder; if he is called to account, he merely

misrepresentation also amounts to a warranty, recovery should be had "for loss of the bargain because a fraud accompanied by a broken promise should cost the wrongdoer as much as the latter alone."<sup>15</sup>

It should be noted that the arguments on either side do not all have equal weight in all types of situations and probably neither rule is or should be followed with entire consistency in any jurisdiction. This has been frankly recognized in several well-considered decisions<sup>16</sup> and in the second Restatement.<sup>17</sup> An influential decision by the Oregon court indicates that the apparently conflicting decisions warrant the following conclusions:

(1) If the defrauded party is content with the recovery of only the amount that he actually lost his damages will be measured under that rule; (2) if the fraudulent representation also amounted to a warranty, recovery may be had for loss of the bargain . . . ; (3) where the circumstances disclosed by the proof are so vague as to cast virtually no light upon the value of the property had it conformed to the representations, the court will award damages equal only to the loss sustained; and (4) where . . . damages under the benefit-of-the-bargain rule are proved with sufficient certainty, that rule will be employed.<sup>18</sup>

The loss-of-bargain rule, the out-of-pocket rule, and the above (*Selman*) rule are all aptly suited to the ordinary case: the sale of a tangible chattel or land is induced by fraud and the loss occurs when the transaction is completed and is discovered almost immediately.<sup>19</sup>

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submits to what is in effect a rescission, and does not stand to lose anything because of his fraud." Annot., 124 A.L.R. 37, 56-57 (1940).

15. *Selman v. Shirley*, 161 Or. 582, 609, 85 P.2d 384, 394 (1938), *aff'd on rehearing*, 161 Or. 582, 91 P.2d 312 (1939).

16. See *Weitzel v. Jukich*, 73 Idaho 301, 251 P.2d 542 (1952) (dictum); *Rice v. Price*, 340 Mass. 502, 509, 164 N.E.2d 891, 895 (1960); *Zeliff v. Sabatino*, 15 N.J. 70, 104 A.2d 54 (1954); *Selman v. Shirley*, 161 Or. 582, 593-611, 85 P.2d 384, 387-94 (1938), *aff'd on rehearing*, 161 Or. 582, 625-27, 91 P.2d 312, 317-18 (1939); *Salter v. Heiser*, 39 Wash. 2d 826, 239 P.2d 327 (1951).

17. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 733-36 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* § 549 & Comments (1977).

18. *Selman v. Shirley*, 161 Or. 582, 609, 85 P.2d 384, 394 (1938), *aff'd on rehearing*, 161 Or. 582, 91 P.2d 312 (1939).

19. Although it is seldom stated explicitly, the general rule (under these measures of damages) contemplates actual values at the time of the sale or other transaction. See *Morrell v. Wiley*, 119 Conn. 578, 178 A. 121 (1935) (applying loss-of-bargain rule). It is recognized that market price (of the thing received) at that time may not truly reflect actual value because this price may be "due to the widespread belief of other buyers in misrepresentations similar to that made to the person seeking recovery, as when the market price of securities, such as bonds or shares, is the result of widely spread misrepresentations of those who issue or market them." *RESTATEMENT*

In such cases there is seldom any serious question about the causal connection between the fraud and the loss (as defined by any of these rules). Situations exist, however, which these rules do not adequately cover. Where the transaction induced by the fraud is, for example, a continuing one, the loss may occur or come to light after a substantial interval of time and after the occurrence of intervening events. The normal rule for damages, either loss-of-bargain or out-of-pocket or *Selman*, may need to be adjusted in light of those intervening events in order to avoid damages which are either excessive or inadequate. For instance, the question may arise whether the loss or part of it is fairly attributable to the fraud.<sup>20</sup> Defendant is not liable for losses to which his fraud did not substantially contribute according to the rules of proximate or legal cause.<sup>21</sup> Nor may "the victim . . . irresponsibly accumulate his losses to the detriment of the representer."<sup>22</sup> Thus where the loss resulted from a source which was unrelated to the misrepresenta-

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(SECOND) OF TORTS § 549, Comment c at 110 (1977); see 3 L. LOSS, SECURITIES REGULATION 1630 (2d ed. 1961).

20. See, e.g., *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 184-86 (8th Cir. 1971) (continuing losses in using data processing machines which defendant induced plaintiff to buy); *Lack Indus., Inc. v. Ralston Purina Co.*, 327 F.2d 266, 280 (8th Cir. 1964) (negligent misrepresentations induced defendant to enter into complicated business venture; representations urged as defense; the court found the amount of out-of-pocket damages "not immediately ascertainable because there was no exchange of consideration pursuant to any contract to determine the difference between 'what was parted with and what was gotten'"); *Hanson v. Ford Motor Co.*, 278 F.2d 586, 598 (8th Cir. 1960) (plaintiff induced to invest in auto dealerships); *Rice v. Price*, 340 Mass. 502, 164 N.E.2d 891 (1960) (plaintiff induced to become salesman for defendant); *Hotaling v. A.B. Leach & Co.*, 247 N.Y. 84, 159 N.E. 870, 57 A.L.R. 1136 (1928) (plaintiff induced to buy bond for long-term investment); *Hartwig v. Bitter*, 29 Wis. 2d 653, 139 N.W.2d 644, 16 A.L.R.3d 1303 (1966) (plaintiffs induced to become real estate salesmen for defendant).

21. *Hanson v. Ford Motor Co.*, 278 F.2d 586, 591 (8th Cir. 1960); sources cited in note 4 *supra*; notes 22-25 *infra*; see § 13 *supra*.

22. *Hanson v. Ford Motor Co.*, 278 F.2d 586, 598 (8th Cir. 1960) (Blackmun, J.). Thus a defendant would not be liable for losses due to plaintiff's own shortcomings as an auto dealer even though he had been fraudulently induced by defendant to invest in a dealership; but the evidence in *Hanson* was held to warrant a jury finding that plaintiff's losses were not due to such shortcomings. See *Bechtel v. Liberty Nat'l Bank*, 534 F.2d 1335, 1343 (9th Cir. 1976); *Bezner v. Continental Dry Cleaners, Inc.*, 548 P.2d 898 (Utah 1976). This will be recognized as an application of the rule of avoidable consequences. See 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.4 (1956 and Supp. by F. James 1968).

One who is induced by misrepresentation to embark on a continuing course of action need not, however, abandon it at the first disappointing signs and it will often be a question of fact how long a pursuit of the undertaking in attempts to salvage what has already been invested is reasonable. *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 184-86 (8th Cir. 1971); see *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 149 N.W.2d 37 (1967); *Bezner v. Continental Dry Cleaners, Inc.*, 548 P.2d 898 (Utah 1976).

tion,<sup>23</sup> or from an economic depression of such dimensions as to make the misrepresented facts altogether insignificant, the loss is not recoverable.<sup>24</sup> On the other hand, where a company would probably have survived depressed conditions in the industry had its condition been as represented, an investor in its securities whose purchase and retention for investment were induced by the misrepresentation may recover for the virtually total loss to which the depression also contributed,<sup>25</sup> instead of being limited to the difference between what he paid and the value of the security when he bought it for investment before the depression.

Even where one of the competing rules is fully applicable, difficulty of proof may be encountered. These rules measure damages by a process of subtracting one amount from another. The larger amount (minuend) is usually easily provable under the out-of-pocket rule<sup>26</sup> and any difficulty there may be in proving the hypothetical value of what was represented can usually be met, as we have seen,<sup>27</sup> by showing what was actually paid. More serious difficulty is sometimes met in proving the amount to be subtracted (subtrahend), which is the same under either rule, *viz.* the actual value of what was received at the time the sale or other transaction was consummated.<sup>28</sup> This difficulty is not encountered in rescissions,<sup>29</sup>

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23. *Boatmen's Nat'l Co. v. M.W. Elkins & Co.*, 63 F.2d 214 (8th Cir. 1933); *Morrell v. Wiley*, 119 Conn. 578, 178 A. 121 (1935); *Ward Cook, Inc. v. Davenport*, 243 Or. 301, 413 P.2d 387 (1966); RESTATEMENT (SECOND) OF TORTS § 549, Comment c at 111 (1977).

24. *Waddell v. White*, 56 Ariz. 420, 108 P.2d 565 (1940); *People v. S.W. Straus & Co.*, 156 Misc. 642, 282 N.Y.S. 972 (Sup. Ct. 1935); *cf. Haentze v. Loehr*, 233 Wis. 583, 290 N.W. 163 (1940) (principle recognized; but on facts jury found low value of property at time of sale).

25. *Hotaling v. A.B. Leach & Co.*, 247 N.Y. 84, 159 N.E. 870, 57 A.L.R. 1136 (1928).

26. The minuend here is the value of the consideration parted with, *e.g.*, the amount actually paid. See text at note 5 *supra*.

27. See note 12 *supra*.

28. There is often no serious difficulty. Where land or a tangible chattel is concerned, expert testimony of its actual value as of the time of sale is usually available and, in some circumstances at least, the owner himself may give his opinion of value. 3 J. WIGMORE, EVIDENCE §§ 714, 716 (3d ed. 1940). But see *Mullin v. Gano*, 299 Pa. 251, 149 A. 488 (1930) (value of Florida land "after the bubble burst" no proper measure of its value before that event).

Where intangible property like securities is involved, the difficulties may be substantial. If the securities had no readily ascertainable market value, their value would depend on such factors as the actual worth of the corporate assets at the time of sale. See, *e.g.*, *Morrell v. Wiley*, 119 Conn. 578, 178 A. 121 (1935). Even where past market values are readily ascertainable (as where the security is listed) they will not reflect actual value "when there is a widespread belief in misrepresentations similar to those made to the plaintiff." 3 L. LOSS, SECURITIES REGULATION 1630 (2d ed. 1961). See note 19 *supra*.

29. See note 47 *infra*.

and statutory provisions may avoid it, as where damages are sought under the Securities Act.<sup>30</sup>

*Other actions for damages.* Where actions are available for negligent misrepresentation,<sup>31</sup> recovery typically covers out-of-pocket loss plus consequential damages.<sup>32</sup> For innocent misrepresentation "in a sale, rental or exchange transaction," the *Second Restatement* suggests recovery of out-of-pocket loss alone, without provision for consequential damages.<sup>33</sup> This appears sound where the theory of recovery is merely restitutionary but may not always be adequate.<sup>34</sup>

*Rescissions and restitution.* A different remedial concept, originally devised by equity, involves undoing the transaction which was induced by the misrepresentation and putting the parties back in the positions they held before the transaction took place.<sup>35</sup>

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30. See, e.g., 3 L. LOSS, *SECURITIES REGULATIONS* 1727-29 (2d ed. 1961); Hanna, *The Securities Exchange Act of 1934*, 23 CAL. L. REV. 1, 6-8 (1934); Shulman, *Civil Liability and the Securities Act*, 43 YALE L.J. 227, 242-44 (1933).

These statutes, for example, extend the availability of rescission, and also provide that damages may be computed on the value of the securities at the time of suit or at the time of sale if that is before suit.

An entirely new scheme of remedies for securities fraud is suggested in the American Law Institute's proposed *Federal Securities Code*. These remedies have been designed to make "rescission and damages as nearly identical in value as possible, so as to eliminate questions of election of remedies as well as the 'gamesmanship' factor, except when the defendant reverses his position at a profit greater than the normal measure of damages." FEDERAL SECURITIES CODE lvii and §§ 1702(d)-(e), 1703(h), 1708 (Proposed Official Draft 1978). These revised remedies are keyed to a proposed reformulation of the standards of culpability applicable to liability under the *Code* for misrepresentation and nondisclosure. See, e.g., table and notes, *id.* at 108-22 and §§ 1073(f) and (g).

31. See §6 *supra*.

32. See, e.g., RESTATEMENT (SECOND) OF TORTS §552B (1977).

33. See RESTATEMENT (SECOND) OF TORTS §552C & Comment f (1977). As to the relationship between this remedy and an action for restitution or breach of warranty, see *id.*, Comment b. See generally Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40 (1974); Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679 (1973).

34. See, e.g., §7 at notes 19-32; Hill, *supra* note 33, 74 COLUM. L. REV. at 41-44, 73 COLUM. L. REV. at 722-24.

35. See generally D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* ch. 4 (1973); H. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* §§ 79-87 (2d ed. 1948); 3 J. POMEROY, *EQUITY JURISPRUDENCE* §§ 872-899 (5th ed. S. Symons, 1948); W. WALSH, *A TREATISE ON EQUITY* §§ 105-109 (1930); see also RESTATEMENT OF RESTITUTION 4-10 (1937).

In addition to undoing the transaction, other adjustments may be necessary to save the victim of the misrepresentation from loss, e.g., consequential damages may accompany rescission, see *Banco Frances e Brasileiro S.A. v. Doe*, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534 (1975) (rescission of illegal foreign exchange transaction; recovery of penalty paid abroad because of such illegal transaction); or to prevent enrichment to the victim which would result from simple rescission, see *Bezner v. Continental Dry Cleaners, Inc.*, 548 P.2d 898 (Utah 1976) (rescission of sale



Basically, this means that each party has restored to him what he parted with in the transaction. The underlying rationale is that one who has made a false statement ought not to benefit at the expense of another who has been prejudiced by relying on the statement.<sup>36</sup>

The nature of the remedy and its underlying reasoning impose some limitations on its availability which prevent it from overlapping completely the action for damages. In the first place, the party misled by the statement must be in a position to return substantially what he received in the transaction.<sup>37</sup> In many cases this is altogether impossible, as where the representer has sold services rather than tangible objects.<sup>38</sup> In other cases it is difficult, or raises questions, as where the thing has been altered.<sup>39</sup> In still others rescission is possible but undesirable from the viewpoint of the victim of the falsehood.<sup>40</sup>

of business, but defendant-seller allowed offset of reasonable rental for the business during time plaintiff was in possession).

Where a misrepresentation was made with scienter, rescission may also be accompanied by punitive damages, *see, e.g.*, *Flaks v. Koegel*, 504 F.2d 702, 706-07 (2d Cir. 1974); *Z. D. Howard Co. v. Cartwright*, 537 P.2d 345 (Okla. 1975).

In the case of transactions in goods, remedies for fraud under the Uniform Commercial Code may include remedies available for non-fraudulent breach, *e.g.*, damages for non-delivery, and rescission does not bar the claim for damages. *See* U.C.C. §§ 2-711, -721. Conversely a statutory damage action, such as under the Motor Vehicle Information and Cost Savings Act for failure to disclose at time of sale that a vehicle's odometer mileage reading was inaccurate, may be accompanied in appropriate circumstances by the exercise of pendent equity jurisdiction to grant rescission. *E.g.*, *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328, 1337-38 (D. Conn. 1977) (legal remedy inadequate because of difficulty of ascertaining value of vehicle and because of possibility of defendant's counterclaim to an action at law).

36. *See Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760); *Cory v. Board of Freeholders*, 47 N.J.L. 181, 182-83 (1885). *See generally* RESTATEMENT OF RESTITUTION at 26-28, § 1 & Comments, § 28 & Comments (1937).

37. Where rescission at law is attempted, the thing received must have been returned or tendered back to the representer before the action to recover the thing parted with was begun. *Wilbur v. Flood*, 16 Mich. 40 (1867); *Cook v. Gilman*, 34 N.H. 556 (1857); *Byard v. Holmes*, 33 N.J.L. 119, 127 (1868).

Where rescission was sought in equity, such prior tender was not required but the remedy would be granted only if the court by its decree could put the parties back in status quo. *W. WALSH, A TREATISE ON EQUITY* § 107 (1930) (describing and contrasting the requirements in law and equity). *See Garner, Neville & Co. v. Leverett*, 32 Ala. 410 (1858); *Thomas v. Beals*, 154 Mass. 51, 27 N.E. 1004 (1891); *Gould v. Cayuga County Nat'l Bank*, 86 N.Y. 75 (1881) (dictum).

38. *See* RESTATEMENT OF RESTITUTION § 66, Comment d (1937). There are other exceptions to the rule that the thing received must be returned, as where the thing received "has been continuously worthless," *id.* § 65(c), or where the circumstances are such as to justify the substitution of payment of value for the thing itself, *id.* § 66(3) & (4).

39. *See* RESTATEMENT OF RESTITUTION § 66(1), (3) & Comments a-c & Illustration 5 (1937).

40. *See* § 7, at 316 *supra*.

Moreover rescission is primarily a remedy between principals to the transaction.<sup>41</sup> Third parties who have induced a transaction by falsehood have not received the consideration with which the victim parted and may not have been enriched at all. Of course it is possible to compel such a third person to take what the victim has received and to yield to the victim what someone else has taken from him; but this is a forced sale rather than rescission and must be justified on some ground other than unjust enrichment.<sup>42</sup>

Other restrictions on the remedy are not inherent but have been fashioned by the courts. Unreasonable delay (after discovery of the facts) in resorting to the remedy will defeat it "if the interests of the transferee or of a third person are harmed . . . by such delay."<sup>43</sup> And conduct which clearly affirms the transaction may in some circumstances bar resort to rescission.<sup>44</sup> On the other hand, some of

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41. *Huffman v. Bankers' Auto Ins. Co.*, 112 Neb. 283, 200 N.W. 994 (1924). See *Van Looyengoe v. Allencrest Gardens Corp.*, 265 Mich. 182, 251 N.W. 317 (1933); *Hafner v. A.J. Stuart Land Co.*, 246 Mich. 465, 224 N.W. 630 (1929); *Ritzwoller v. Lurie*, 225 N.Y. 464, 122 N.E. 634 (1919).

But some courts have allowed rescission against an agent or officer whose knowing fraud has induced plaintiff to enter into a transaction with the principal. See, e.g., *Pridmore v. Steneck*, 120 N.J. Eq. 567, 186 A. 513 (1936), *aff'd on other grounds*, 122 N.J. Eq. 35, 191 A. 861 (1937); *Loud v. Clifford*, 254 N.Y. 216, 172 N.E. 475 (1930) (criticizing *Ritzwoller*); *Mack v. Latta*, 178 N.Y. 525, 71 N.E. 97 (1904).

42. This, as we have seen at note 30 *supra*, is a solution sometimes provided by securities regulations. See *Cady v. Murphy*, 113 F.2d 988, 991 (1st Cir. 1940); 3 L. LOSS, *SECURITIES REGULATION* 1712-21 (2d ed. 1961) (under SEC statutes); cf. *id.* at 1637-38 (liability of brokers and agents under Blue Sky Laws).

43. RESTATEMENT OF RESTITUTION § 64 & Comment c, Illustrations 5-10 (1937). See, e.g., *Roberts v. James*, 83 N.J.L. 492, 85 A. 244 (1912); W. WALSH, *A TREATISE ON EQUITY* 500-01 (1930); Friedman, *Delay as a Bar to Rescission*, 26 CORNELL L.Q. 426 (1941); cf. RESTATEMENT OF RESTITUTION § 148 (1937) (laches in restitutionary actions). See also sources cited in note 44 *infra* (relating to affirmation of contract as bar to rescission).

44. RESTATEMENT OF RESTITUTION § 68(1) & Comment e (1937). Delay in pursuing the remedy of rescission after discovery of one misrepresentation often is accompanied by continuing performance of the contract by the party misled. Such a combination affords a double reason for denying rescission. See *Romanoff Land & Mining Co. v. Cameron*, 137 Ala. 214, 33 So. 864 (1903); *Day v. Fort Scott Inv. & Improvement Co.*, 153 Ill. 293, 305, 38 N.E. 567, 570 (1894) (the person misled "is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission"). Cf. *Parsons v. McKinley*, 56 Minn. 464, 57 N.W. 1134 (1894) (conduct, after discovery of falsity, calculated to induce belief that contract would be performed); *Mullin v. Gano*, 299 Pa. 251, 149 A. 488 (1930) (purchaser of land continued to act as beneficial owner of property after discovery of misrepresentation until Florida land bubble burst).

This notion, which is sound at the core, has sometimes been used to produce harsh results through a procedural doctrine of election of remedies. A party misled by a misstatement may not of course have the benefits of both affirming and disaffirming the transaction; accordingly at common law he could not have both compensatory damages for deceit and also rescission. But injustice and unnecessary hardship may result from ruling that the misled party had made an irrevocable

the requirements of the action of deceit are not imposed where rescission is sought. For instance, by the great weight of authority, scienter is not required — an innocent misrepresenter will not be allowed to benefit at his victim's expense when the latter has suffered loss because of the misrepresentation.<sup>45</sup> Moreover, the requirement of actual damage is not insisted on, at least to the same extent, where the remedy of rescission is pursued.<sup>46</sup> And the very nature of the remedy will often avoid what may be troublesome problems in proving damages in deceit.<sup>47</sup>

Although the remedy of rescission was devised in equity, the common law courts eventually afforded a similar remedy. The legal concept was that a transaction induced by misrepresentation was voidable at the election of the party misled, and that such party exercised his option by tendering back what he had received in the

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election by taking some preliminary procedural step (e.g., bringing an action for deceit) or from requiring him to observe a formal consistency in his pursuit of remedy. Procedural election of this sort should not be received or imposed unless and until either the misled party has pursued a remedy to full satisfaction, or the other party would be substantially prejudiced by allowing a change of theory. See, e.g., *Edward Greenband Enterprises v. Pepper*, 112 Ariz. 115, 538 P.2d 389 (1975); *Mills v. Keith Marsh Chevrolet, Inc.*, 549 S.W.2d 604, 608 (Mo. Ct. App. 1977). See generally the admirable treatment in *Yerkes, Election of Remedies in Cases of Fraudulent Misrepresentation*, 26 S. CAL. L. REV. 157 (1953). And note that under § 2-721 of the Uniform Commercial Code ("Remedies for Fraud"), "[n]either rescission or a claim for rescission of the contract for sale . . . shall bar or be deemed inconsistent with a claim for damages or other remedy."

45. *Jacobson v. Chicago, M. & St. P. Ry.*, 132 Minn. 181, 156 N.W. 251 (1916); *Newton v. Tolles*, 66 N.H. 136, 19 A. 1092 (1890); *Bloomquist v. Farson*, 222 N.Y. 375, 118 N.E. 855 (1918); W. WALSH, A TREATISE ON EQUITY § 109 (1930); P. Keeton, *Actionable Misrepresentation: Legal Fault as a Requirement*, 2 OKLA. L. REV. 56, 58-60 (1949).

This rule is quite consistent with the willingness of equity to grant restitution of a benefit obtained as the result of a serious mistake of fact (without any wrongdoing by either party). See *Barker v. Fitzgerald*, 204 Ill. 325, 68 N.E. 430 (1903); RESTATEMENT OF RESTITUTION at 26-28 (1937). See generally *id.* §§ 6-69 ("Mistake, Including Fraud").

46. *Brett v. Cooney*, 75 Conn. 338, 53 A. 729 (1902); *Kirby v. Dean*, 159 Minn. 451, 199 N.W. 174 (1924); *Harlow v. La Brum*, 151 N.Y. 278, 45 N.E. 859 (1897); *McCleary, Damage as Requisite to Rescission for Misrepresentation*, 36 MICH. L. REV. 1, 24-27 (1937). In *Kirby v. Dean*, 159 Minn. 451, 199 N.W. 174 (1924), the court said,

Whether the fraud damages its intended victim by giving him a less value than he bargained for is immaterial. The law is not concerned with that question. The only inquiry is whether the party . . . seeking to rescind a contract induced by fraud is not getting or will not get, in substance at least, what he contracted for, and was by fraudulent misrepresentation induced to believe he would get.

159 Minn. at 453-54, 199 N.W. at 175.

47. Since the thing received is tendered or returned and the party misled is entitled to get back what he parted with, troublesome questions of putting a value on what was received are avoided. See note 28 and accompanying text *supra*.

transaction.<sup>48</sup> The transaction being thus voided, the misled party was, in an appropriate legal action (e.g., general assumpsit for money<sup>49</sup> or a possessory action for a chattel<sup>50</sup>), entitled to recover that with which he had parted.

In granting the remedy just described, the law courts, for the most part, retained the rules devised by equity.<sup>51</sup> But so long as the remedies and their procedural incidents remained distinct, deserving suitors who sought remedy in the wrong form were sometimes denied relief.<sup>52</sup> Such results were unfortunately perpetuated by some courts under the early codes,<sup>53</sup> but, as is now widely recognized, these results should not be tolerated under a merged procedure.<sup>54</sup>

*Miscellaneous remedies.* Other remedies, largely of equitable origin, are available in appropriate cases. *Reformation* may be obtained where the parties came to an agreement, or a "meeting of

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48. See, e.g., *Wilbur v. Flood*, 16 Mich. 40 (1867); *Cook v. Gilman*, 34 N.H. 556 (1857); *Byard v. Holmes*, 33 N.J.L. 119 (1868). This legal concept may provide a useful remedy to one who has sold goods on credit on the faith of a promise to pay for them by a buyer who had no means and no genuine intention to pay. Because the seller cannot, by hypothesis, get the purchase price, he may at least get back the goods themselves by invoking this remedy. And because avoiding the transaction reverts title in the goods to the seller, he may get them back even where the buyer has gone into bankruptcy by a petition for reclamation. See, e.g., *Donaldson v. Farwell*, 93 U.S. 631 (1876); *Sternberg v. American Snuff Co.*, 69 F.2d 307 (8th Cir. 1934); *In re Penn Table Co.*, 26 F. Supp. 887 (S.D. W. Va. 1939).

49. *Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760). See *Cory v. Freeholders*, 47 N.J.L. 181 (1885).

50. *Pritchett v. Fife*, 8 Ala. App. 462, 62 So. 1001 (1913) (detinue); *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 A. 390 (1906) (trover); *Hall v. Gilmore*, 40 Me. 578 (1855) (replevin). Cf. bankruptcy cases cited at note 48 *supra* (petitions for reclamation).

51. Thus an innocent misrepresentation suffices for rescission at law as well as in equity. *Montgomery Door & Sash Co. v. Atlantic Lumber Co.*, 206 Mass. 144, 92 N.E. 71 (1910); *Seneca Wire & Mfg. Co. v. A.B. Leach & Co.*, 247 N.Y. 1, 159 N.E. 700 (1928); *McKinnon v. Vollmar*, 75 Wis. 82, 43 N.W. 800 (1889); see *Pritchett v. Fife*, 8 Ala. App. 462, 62 So. 1001 (1913), and unreasonable delay will bar rescission at law as it will rescission in equity. *Roberts v. James*, 83 N.J.L. 492, 85 A. 244 (1912). See generally W. WALSH, A TREATISE ON EQUITY § 107 (1930).

52. Thus in *Byard v. Holmes*, 33 N.J.L. 119 (1868), plaintiff sued in assumpsit for money had and received and showed that he had been induced by defendant's fraud to buy certain shares of stock; he did not, however, show that he had tendered back the stock before bringing the action though he offered to return the certificate at the trial. The court held that the plaintiff's verdict must be set aside.

53. See, e.g., *Gould v. Cayuga County Nat'l Bank*, 86 N.Y. 75 (1881); *E.T.C. Corp. v. Title Guar. & Trust Co.*, 271 N.Y. 124, 2 N.E.2d 284 (1936).

54. See NEW YORK LAW REV. COMM., REPORT, RECOMMENDATIONS & STUDIES 31-38 (1946) (criticizing the decisions cited in note 53 *supra*, and recommending legislation to obviate their harshness which was enacted and is now found in N.Y. CIV. PRAC. LAW § 3004 (McKinney 1974)). See generally W. WALSH, A TREATISE ON EQUITY §§ 103-109 (1930) (an excellent treatment of effect of merging law and equity which, however, is too kind to the *Gould* case, see *id.* at 498 & n.20). Consider also the interrelated problem of election of remedies discussed in note 44 *supra*.

the minds," but, through mutual mistake, reduced their agreement to words which constituted a different contract. And where the mistake is unilateral, the mistaken party may have the contract reformed if the other party was guilty of fraud<sup>55</sup> or even made an innocent misrepresentation which induced the mistake.<sup>56</sup> Where a party obtained property by actual fraud (with scienter<sup>57</sup>) or other oppressive or unjust conduct, equity would enforce restitution through the device of the *constructive trust* in order to prevent his unjust enrichment;<sup>58</sup> this device is available under merged procedures.<sup>59</sup> In other situations equity may order a conveyance from one party to another set aside because of fraud on a third party.<sup>60</sup> *Equitable estoppel* or *estoppel in pais* is also occasionally invoked to prevent a misrepresenter from asserting the truth of the matter which he has misrepresented to the prejudice of another party who has acted in reliance upon the misrepresentation.<sup>61</sup>

*Misrepresentation as a ground of defense or of avoiding a defense.* When the obligations of a party misled by a misrepresentation remain unfulfilled (in whole or in part), he has the option of waiting until an action is brought against him for nonperformance and then setting up the misrepresentation as a defense.<sup>62</sup> Where this

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55. *Welles v. Yates*, 44 N.Y. 525 (1871). See *Shelton & Co. v. Ellis*, 70 Ga. 297 (1883); D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 9.5 (1973).

56. *Roszell v. Roszell*, 109 Ind. 354, 10 N.E. 114 (1887); *Harding v. Randall*, 15 Me. 332 (1839).

57. See § 3 *supra*.

58. See, e.g., *Harper v. Adametz*, 142 Conn. 218, 113 A.2d 136 (1955); *Levine v. Schofer*, 184 Md. 205, 40 A.2d 324 (1944); *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378 (1919). See generally D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 241-48 (1973); 4 J. POMEROY, *EQUITY JURISPRUDENCE* §§ 1044, 1047 (5th ed. S. Symmons 1941); *RESTATEMENT OF RESTITUTION* § 160 & Comments (1973); Pound, *Progress of the Law, 1918-1919, Equity*, 33 HARV. L. REV. 420, 420-23 (1920).

59. *Brazil v. Silva*, 181 Cal. 490, 185 P. 174 (1919); *Harper v. Adametz*, 142 Conn. 218, 113 A.2d 136 (1955); *Hall v. Indiana Dep't of State Revenue*, 351 N.E.2d 35 (Ind. App. 1976).

60. See *Burroughs v. Wynn*, 117 N.H. \_\_\_, 370 A.2d 642 (1977).

61. See, e.g., *Chambers v. Bookman*, 67 S.C. 432, 46 S.E. 39 (1903); *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328, 78 N.W. 440 (1899); *Williston, Liability For Honest Misrepresentation*, 24 HARV. L. REV. 415, 423-27 (1911). These authorities hold that estoppel may be based on an honest misrepresentation. But see *Bishop v. Minton*, 112 N.C. 524, 17 S.E. 436 (1893); cf. *Idaho Title Co. v. American States Ins. Co.*, 96 Idaho 465, 531 P.2d 227 (1975) (estoppel denied where there was no detrimental reliance on misrepresentation). Dean Prosser agreed with these holdings but suggested that where the estoppel is based on mere standing-by (rather than active representation) scienter should be required. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 692-93 (4th ed. 1971).

62. See, e.g., *American Life Ins. Co. v. Stewart*, 300 U.S. 203 (1937); *Coleco Indus., Inc. v. Berman*, 423 F. Supp. 275 (E.D. Pa. 1976) (dictum); *Harris v. Delco Products, Inc.*, 305 Mass. 362, 25 N.E.2d 740 (1940); *Richfield Bank & Trust Co. v. Sjogren*, \_\_\_, Minn. \_\_\_, 244 N.W.2d 648 (1976); *Societe Titanor v. Sherman Mach. & Iron Works*,

is done relief should be granted him on the same conditions as would obtain if he initiated the action. Thus if the case is one where the plaintiff would normally be entitled to rescission (or reformation) and restitution, an innocent misrepresentation should suffice as a defense. However, the defendant (the party misled) should be required to have acted with reasonable promptness and should be precluded from the remedy by acts affirming the transaction. In addition the plaintiff should have restored to him that with which he parted.<sup>63</sup> If a remedy along these lines is not appropriate,<sup>64</sup> defendant's claim should be subjected to tests for an action of deceit.<sup>65</sup> Although there is some confusion in the cases<sup>66</sup> and some vestiges of the old distinctions between law and equity,<sup>67</sup> there is authority for the rule stated above.<sup>68</sup>

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172 Okla. 213, 45 P.2d 144 (1935); *Brentwater Homes, Inc. v. Weibley*, 471 Pa. 17, 369 A.2d 1172 (1977); *Engel v. Van den Boogart*, 255 Wis. 81, 37 N.W.2d 852 (1949), *noted in* 1950 Wis. L. REV. 551; cases cited at 37 AM. JUR. 2d *Fraud & Deceit* § 340 (1968). *Cf. Z.D. Howard Co. v. Cartwright*, 537 P.2d 345 (Okla. 1975) (defendants allowed to file cross-petition in fraud).

63. See notes 35 to 54 and accompanying text *supra*.

64. See, e.g., *Peck v. Brewer*, 48 Ill. 54 (1868) (where defendant had in effect affirmed the contract before being sued on it); notes 37 to 44 and accompanying text *supra*.

65. See §§ 1 & 3 *supra*.

66. Some decisions, for example, have required scienter without paying any attention to whether the defense is in practical effect one seeking rescission or one in which such a remedy would be unavailable. See, e.g., *Public Motor Serv., Inc. v. Standard Oil Co.*, 99 F.2d 124 (D.C. Cir. 1938).

67. Thus in *Heaton v. Knowlton*, 53 Ind. 357 (1876), fraud was disallowed as a defense to an action for the purchase price of a machine because defendant had not tendered return of the machine, though he still had it, before interposing the defense (so that the machine's return could have been ensured as a condition to a judgment in his favor). *Cf. Gould v. Cayuga County Nat'l Bank*, 86 N.Y. 75 (1881) (plaintiff could not recover because he failed to return proceeds of compromise agreement before commencement of action). *But cf. Harris v. Equitable Life Assurance Soc'y*, 64 N.Y. 196 (1876) (offer of consent judgment that would return premiums on fraudulently obtained insurance policy held sufficient compliance with duty to tender return of payments received).

A distinction used to be made between fraud in the factum (whereby a party was deceived as to the nature of the act he was induced to do) and fraud in the inducement (where he knew what he was doing but was induced by fraud to do it). The former was recognized as a defense in an action at law much earlier than the latter was, so that redress for fraud in the inducement often required resort to equity. With the merger of law and equity the significance of the distinction has largely disappeared except for an occasional question of the right to jury trial upon the issue. See F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 8.8 (2d ed. 1977); *Abbot, Fraud as a Defense at Law in the Federal Courts*, 15 COLUM. L. REV. 489 (1915); *Hinton, Equitable Defenses Under Modern Codes*, 18 MICH. L. REV. 717, 720-23 (1920).

68. See, e.g., *New York Life Ins. Co. v. Marotta*, 57 F.2d 1038 (3d Cir. 1932) (*semble*); *Taylor v. Burr Printing Co.*, 26 F.2d 331 (2d Cir. 1928) (defense assimilated to rescission and upheld without scienter); *Montgomery S. Ry. v. Matthews*, 77 Ala. 357, 366 (1884) (treated as failure of consideration) (*semble*); *Frenzel v. Miller*, 37 Ind. 1

Misrepresentation may also avoid a defense. The commonest case is where a defendant sets up release or accord and satisfaction as a defense to plaintiff's claim (*e.g.*, in tort or for breach of contract).<sup>69</sup> A showing that the release or settlement was induced by misrepresentation should avoid the defense if the conditions for rescission are met since it is always feasible to restore to the defendant that with which he parted by simply deducting the amount received in settlement from whatever is recovered on the original claim.<sup>70</sup> Misrepresentation may similarly toll a statute of limitations and, for this purpose, where there is a fiduciary relationship, such as that of physician to patient, "fraudulent concealment" sometimes shades into nondisclosure of relevant facts "known to the doctor or readily available to him through efficient diagnosis."<sup>71</sup>

*Class suits and public actions.* The current movement toward increased protection for consumers has manifested itself in the area of remedies for fraud.<sup>72</sup> Aside from any inadequacies there may be in the substantive law, a serious procedural and practical difficulty

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(1871) (treated as breach of warranty); *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N.W. 923 (1904) (dictum).

69. See, *e.g.*, *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952); *Vickers v. Gifford-Hill & Co., Inc.*, 534 F.2d 1311 (8th Cir. 1976); *Haigh v. White Way Laundry Co.*, 164 Iowa 143, 145 N.W. 473 (1914); *Parker v. Howarth*, 340 So. 2d 434 (Miss. 1976); *Abbey v. Heins*, 546 S.W.2d 553 (Mo. App. 1977); *Albrecht v. Milwaukee & Superior Ry.*, 87 Wis. 105, 58 N.W. 72 (1894). In such cases the misrepresentation may be of the contents or legal effect of the release signed by plaintiff. Where that is the case some courts hold that in the absence of unusual circumstances plaintiff is barred as a matter of law by his failure to read and understand the instrument; others rule that the reasonableness of his conduct is a question for the jury. Contrast, for example, the opinions in the *Dice* and *Albrecht* cases. In addition, see *Dice v. Akron, Canton & Youngstown R. Co.*, 155 Ohio St. 185, 98 N.E.2d 301 (1951) (the lower court opinion reversed by the Supreme Court in *Dice*).

70. In spite of this, fraud with scienter is sometimes required to avoid a release. *Haigh v. White Way Laundry Co.*, 164 Iowa 143, 145 N.W. 473 (1914).

71. *Nardone v. Reynolds*, 538 F.2d 1131, 1135 (5th Cir. 1976) (applying Florida law); see *George Young & Sons, Inc. v. Industrial Comm'n*, 66 Ill. 2d 220, 362 N.E.2d 1040 (1977).

72. See, *e.g.*, Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663 (1970); Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357 (1972); Starrs, *The Consumer Class Action*, 49 B.U. L. REV. 211, 407 (1969); Tydings, *The Private Bar — Untapped Reservoir of Consumer Power*, 45 NOTRE DAME LAW. 478 (1970); Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966).

See also § 1 at notes 6 to 10 *supra*. In *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971) the court said, "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society."

prevents effective remedy in many situations. As the California Supreme Court has said:

Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct.<sup>73</sup>

In such a case a class action may provide a useful remedy for a group of consumers as well as a more effective deterrent to antisocial conduct.<sup>74</sup>

The class suit derived by equity has fairly old roots,<sup>75</sup> but its availability in the consumer rights field is a recent development. Because each consumer's case depends on its own individual circumstances (*e.g.*, as to the misrepresentation, scienter, reliance, etc.) and each consumer is entitled to an individual remedy (damages for *his* injury, rescission of *his* contract, etc.) the requirements that there be a class and that the claims of its numbers present common questions of law and fact have generally been found unsatisfied.<sup>76</sup> Recent decisions, however, have opened the way to a broader use of class suits in consumer fraud cases in some states;<sup>77</sup>

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73. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971).

74. *Id.* Jones and Boyer note, however, that the class suit device "cannot reach the many disputes in which there are unique elements in the underlying transactions." 40 GEO. WASH. L. REV. at 368. *Vasquez* is treated in 21 BUFFALO L. REV. 233 (1971); 8 CALIF. W.L. REV. 165 (1971). See generally 76 DICK. L. REV. 342 (1972).

75. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.18 (2d ed. 1977).

76. See, *e.g.*, *Willcox v. Harriman Sec. Corp.*, 10 F. Supp. 532 (S.D.N.Y. 1933); *Hall v. Coburn Corp.*, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970); *Brenner v. Title Guar. & Trust Co.*, 276 N.Y. 230, 11 N.E.2d 890 (1937); Annot. 114 A.L.R. 1015, 1016 (1938) (although the availability of such a remedy was urged by Professor Pomeroy, "it seems that the doctrine stated by the learned author has not thus far been so applied as to permit the maintenance of a representative tort action based on similar frauds separately practiced by the same defendant upon different individuals").

77. See *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); *Beckstead v. Superior Court*, 21 Cal. App. 3d 780, 98 Cal. Rptr. 779 (1971); *Brooks v. Midas-International Corp.*, 47 Ill. App. 3d 266, 361 N.E.2d 815 (1977). Cf. *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 460 (1971) (New Jersey Consumer Fraud Act empowered state Attorney General to bring suit on behalf of consumers).

In *Vasquez* it was alleged that the same representations were made to each class member because defendant's salesmen "memorized a standard statement containing the representations (which in turn were based on a printed narrative and



and recent legislation has liberalized the remedy in others,<sup>78</sup> and sometimes has provided new remedies.<sup>79</sup>

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sales manual) and that this statement was recited by rote to every member of the class." 4 Cal. 3d at 811-12, 484 P.2d at 971, 94 Cal. Rptr. at 803. As for reliance the court found that either an inference or a presumption of reliance would arise as to the entire class "if the trial court finds material misrepresentations were made to the class members" and that they made the purchases which defendant sought to induce. *Id.* at 814, 484 P.2d at 973, 94 Cal. Rptr. at 805.

78. For a review of recent federal legislative proposals see Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663 (1970); Tydings, *The Private Bar — Untapped Reservoir of Consumer Power*, 45 NOTRE DAME LAW. 478 (1970).

79. Some statutes provide for an action brought by the state attorney general in which the remedy of restitution may be sought. See *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 460 (1971); CAL. BUS. & PROF. CODE § 17535 (West Cum. Supp. 1977); N.Y. GEN. BUS. LAW § 349(b) (McKinney Cum. Supp. 1977-78).