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Fraud: Misrepresentations of Opinion

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FRAUD: MISREPRESENTATIONS OF OPINION

By W. PAGE KEETON*

INTRODUCTION

IT is usually stated, in a general way, that fraud can be predicated only on a misrepresentation of an existing or past fact, and consequently, statements as to future events or occurrences cannot be made the basis of fraud which will justify either rescission of a contract or an action in tort for damages. Such statements are of themselves of little value, if any, since they furnish no criterion by which to distinguish fact from opinion. The same problem of distinguishing between fact and opinion exists in the law of warranties, where it is held that an expression of opinion cannot amount to a warranty.[1] The first and foremost criticism of the cases is that they furnish no satisfactory test—this is not surprising, for, it is submitted, it is theoretically impossible—for differentiating so-called statements of fact and statements of opinion.[1a] In the second place, the exceptions which the courts have set up to the alleged general rule are not well defined, and sometimes a court will so state an exception as to leave substantially nothing of the original principle of non-liability. In the third place, confusion has arisen from the failure of the courts to notice the difference between a situation where the truth does not conform to the expressed belief, but the expression was a true representation of the declarant's state of mind, and a case where not only does the truth not conform to the expressed belief, but the belief itself was different from what it was represented to be.

It might be well to indicate at the outset, that it has been held, and rather often intimated, that a bare misstatement of opinion

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[1]Williston, Sales, 2d ed., secs. 202-204.

[1a]See, as typical, Reeves v. Conring, (C.C. Ind. 1892) 51 Fed. 774. In this case it was said: "There is no certain rule by the application of which it can be determined when false representations constitute matters of opinion, or matters of fact. Each case must in a large measure be adjudged upon its own circumstances. In reaching its conclusion the court will take into consideration the intelligence, the situation of the parties, the general information and experience of the people as to the nature and use of the property, the habits and methods of those dealing in or with it and then determine upon all the circumstances in the case whether the representation ought to have been understood as an affirmation of fact or as a matter of opinion or judgment."

or belief is actionable even when made by an interested party, and even though the information possessed by the representee is equivalent to that of the representor. It has been indicated even more frequently that theoretically a statement of opinion or belief is a statement of a fact, namely, the state of a man's mind; for "the state of a man's mind," says an English court, "is as much a fact as the state of his digestion."[2] This latter statement was made in connection with a misrepresentation of the representor's intention to use money in a certain manner, but the statement of a person's belief is as much a state of mind as a statement of a person's intention.[3] Although most courts would be willing to accept the proposition that a statement of belief is a statement of fact—and textwriters agree[4]—it would usually be held that belief is an immaterial fact. Of course, by "fact" the courts probably meant, originally, facts of the external world existing outside of the person's mind, and having material substance; but as soon as it was held that a statement of intention was a statement of a fact, this could not be regarded as the meaning of the courts. Moreover, statements as to third persons' opinions are actionable. The attitude shown by some of the recent cases cited above is in favor of holding the representor liable.

In approaching a study of fraud, one might assume that precise rules cannot successfully be used on questions of fraud.[5] Of course, it is quite true that precise rules on the question of fairness of human conduct are impossible and undesirable, but a degree of certainty is necessary in order to eliminate so far as possible the

[2]Edgington v. Fitzmaurice, (1882) L. R. 29 Ch. Div. 459, Bohlen, Cases on Torts, 3d ed., 688.

[3]Keeler v. Ley & Co., (C.C.A. 1st Cir. 1933) 65 F. (2d) 499; Ovilette v. Theobold, (1918) 78 N. H. 544, 103 Atl. 306. The facts showed that the horse sold for only about half the price of a sound horse, which would lead one to believe that the buyer had taken a chance, and then when the mistake was discovered sued for the loss resulting from a bad bargain. Also in Milliken & Tomlinson Co. v. American Sugar Ref. Co., (C.C.A. 1st Cir. 1925) 9 F. (2d) 809, the court said: "We are prepared to admit the soundness of the proposition of law which counsel for the defendant have elaborately treated in his brief, to the effect that fraud may consist in asserting a belief or opinion."

[4]"As in the case of statements of intention, a statement of belief, opinion, information, or other condition of mind does at least involve one statement of fact, viz, that the representor or other person did entertain the alleged belief." Bower, Actionable Misrepresentation.

"Even if a statement is confessedly merely an opinion, and is understood to be such, nevertheless, it is an assertion of fact, namely that the speaker has a certain opinion and this fact may be one upon which the other party relies and perhaps justifiably in entering into the bargain." Williston, Contracts, sec. 1494, citing New Hampshire cases.

[5]12 R. C. L. 229.

personal equation in judicial decisions.[6] It is, therefore, with such an object in mind that the subject of fact and opinion statements will be studied. Some consideration of the approach of the courts will precede a proposed method differing substantially from the approach of the case law to the subject. In stating the exceptions, the language of the courts will be used freely.

Relation of Trust and Confidence. Just as the cases have imposed a duty to disclose information where a confidential or fiduciary relationship exists between the contracting parties, so also have they imposed liability on the fiduciary where he has purposely made an incorrect statement of his opinion or belief. This exception is ordinarily formulated in the rule that, whereas generally a person has no right to rely upon the opinions of others, such a principle is inapplicable to those standing in a relation of trust and confidence, where one is naturally led to rely upon the judgment and integrity of the other.[7]

But the question arises as to how far this principle should be carried. Does this exception include only a well-defined and limited number of relationships, such as have been established, or at least were established in the beginning in marking out the exception to the rule of non-liability for non-disclosure, or does it include other types of relationships? If so, what are they, and in what manner will the line be drawn? In the case of *Southern Trust Co. v. Lucas,*[8] where the plaintiff was suing for damages for an alleged fraud that had been perpetrated on him by the defendant, who, the plaintiff contended, stood in a confidential relationship to him, counsel for the defendant argued that a fiduciary relationship was one of trust and confidence and was a status, and that it could not be created by the vendor stating to the purchaser that he was relying wholly upon the judgment of the purchaser. With respect to this contention the court held:

"It is true that one cannot create a legal obligation or status by pleading ignorance or inexperience to an opposing party in a business transaction. Those who have in the law's view been strangers remain such, unless both consent by word or deed to an alteration of that status. . . . But they cannot accept her confidence

[6]Pound, Mechanical Jurisprudence, (1908) 8 Col. L. Rev. 605.

[7]Hulett v. Kennedy, (1891) 4 Ind. App. 33; Swimm v. Bush, (1871) 23 Mich. 99; Fisher v. Budlong, (1873) 10 R. I. 525; Nichols v. Colgan, (1891) 130 Ind. 341. See for collections of other cases on this point the following annotations: 35 L. R. A. 429; 37 L. R. A. 613; 51 A. L. R. 46. See also, 1 Bigelow, Fraud 365.

[8](C.C.A. 8th Cir. 1917) 245 Fed. 286, discussed in (1918) 27 Yale L. J. 838. Another case using similar language is Hassman v. First State Bank of Swatara, (1931) 183 Minn. 453, 236 N. W. 92.

and abuse it to hurt her. They cannot consent that she rely upon them, and deceive her through that very reliance. . . . A statement of value is from its very nature, in one sense, an expression of opinion. In most instances it arises to no greater dignity. But where it is made under conditions which show that it was intended by the one uttering it to be treated as an important factor inducing action, and was made with knowledge that it would be accepted as a basis of action, instead of a mere element to be investigated by the other before action, it becomes for all practical and effective purposes a statement of fact, and is classed as such."

It will not be contended that this case reaches an undesirable result, as will appear hereafter, but it is believed that the case adopts an improper method of reaching what may be a desirable result. Many cases on this particular exception start out with the principle that to misstate a person's opinion is not actionable, and then proceed to make an exception so broad that, if carried out literally in all cases, it would destroy altogether the original proposition. The usual requirements of a cause of action for fraud include scienter and the intention to induce the particular person to rely on the statement who actually does rely on it. Taking these requirements together, it might be said that an intention to deceive is, generally speaking, a necessary element of a cause of action for damages. So, necessarily, the statement of an opinion must have been made with the intention of making it an important factor in inducing action. Moreover, in all cases where a person has been deceived, is it not because such person has confided in or acted upon the statement of another, whether the statement is of opinion or belief? The dividing line is very narrow, and would seem to cover only cases where the defendant intended to deceive, but was in doubt as to whether the deceit would be accomplished. What influenced the court was the fact that one of the parties, being illiterate, put more trust and confidence in the defendant than the ordinary intelligent person would have done. In addition to those cases holding that great discrepancies in the degrees of intelligence of the contracting persons establish the necessary relationship, are cases holding that friendship and preexisting business associations will be sufficient to show the proper relation of trust and confidence at the time the deceit was accomplished.[9]

[9]Hassman v. First State Bank of Swatara, (1931) 183 Minn. 453, 236 N. W. 92, where it appears that the representee had habitually sought the representor's advice for some ten years, and that fact coupled with the additional fact that the representee's judgment had become impaired was sufficient to create a confidential relationship; Voss v. Scott, (1930) 180 Minn. 88, 230 N. W. 262 where friendship coupled with the fact that the plaintiff was an inexperienced woman, was sufficient to establish the fiduciary rela-

The cases on this question, of course, are not unanimous or even substantially so. It is quite often stated that the fiduciary status cannot be imposed by one pleading ignorance and inexperience.[10]

Expert Opinions. Another exception to the general rule of non-liability for misstatement of opinions has been resorted to even more frequently than the previous one. In fact, the exception nominally is well-settled, although the content may be different in some jurisdictions from that which prevails in others. This is usually expressed in the rule that where the parties are not dealing upon equal terms but one of them has or is presumed to have special knowledge or experience regarding the subject-matter, then the misstatement of opinion or belief is actionable or is, at least, sufficient for rescission.[11] These cases would seem to be capable of classification into two general kinds. In the first class are those cases in which one of the parties can properly be called an expert: as, where a jeweler gives a false statement of his opinion concerning the value of a diamond ring,[12] or where a

tionship; Pullian v. Gentry, (1925) 206 Ky. 763, 268 S. W. 557, where it was alleged in the petition that the plaintiff and defendant resided in the same town and had business associations together, and because of such negotiations the plaintiff reposed special trust and confidence; Casper Bankers Life Ins. Co. v. Nebraska, (1927) 238 Mich. 300, 212 N. W. 970, in which the court held that "between Gray and Cooper was a relation of confidence. Cooper put Gray on his honor as a friend to advise him on a matter of which Gray had superior knowledge." (Another so-called exception was stressed by the court to the effect that the parties were not on an "equal footing," but this is discussed infra.) In Nichols v. Colgan, (1891) 130 Ind. 341, it was held that if a person through his professed friendship for another sells him a farm when the latter states that he knows nothing about the farm, and will have to rely on the knowledge of his friend, there might be sufficient fraud in the misstatement of value of the farm to justify rescission.

Some cases involving a true pre-existing confidential or fiduciary relationship are: Cheney v. Gleason, (1878) 125 Mass. 166 (principal and agent); Teachant v. Van Holsen, (1888) 96 Iowa 113, 40 N. W. 96 (partners); Hulett v. Kennedy, (1891) 4 Ind. App. 33, 30 N. E. 310 (heir and co-heir); and see the collection of cases in 35 L. R. A. at page 429.

[10]Comment, (1928) 13 Corn. L. Q. 140; (1918) 27 Yale L. J. 838.

[11]Comment, (1928) 13 Corn. L. Q. 140; (1934) 13 Or. L. Rev. 369; Trust Co. of Norfolk v. Fletcher, (1929) 152 Va. 868, 148 S. E. 785; Marshall v. Seelig, (1900) 49 App. Div. 433, 63 N. Y. S. 355; Heal v. Stroll, (1921) 176 Wis. 137, 185 N. W. 242. A large number of authorities are collected in 35 L. R. A. 430, and 37 L. R. A. 610, holding that false statements of opinions concerning the value of land located at a distance from the place of the transaction may be relied on by the buyer. See also, 37 A. L. R. 610, at 612 and 35 L. R. A. 426.

[12]Picard v. McCormick, (1862) 11 Mich. 68, reported in Bohlen, Cases on Torts, 3d ed., p. 731. "In the case before us the alleged fraud consisted of false statements of a jeweler to an unskilled purchaser of the value of the articles which none but an expert could be reasonably supposed to understand."

stockbroker represents that certain bonds are first-class securities.[13] Other examples of experts are doctors, lawyers, and engineers.[14] In this connection, the distinction between an expert and a non-expert might be a very difficult one on occasion; for this reason, the distinction should be avoided, if possible. In the second class the situation is not that of an expert, but one who merely has more information than the other, and this discrepancy is, therefore, regarded as putting the parties on an "unequal footing." It is with respect to the latter type of situation that the question of opinion misrepresentations has most frequently been litigated.

Knowledge of facts by representor making the opinion false. The last exception is in turn divisible into three smaller subdivisions, in any one of which two courts might, with authority supporting each, reach different results. First, the so-called opinion might be stated about a matter, the information as to which is and can be only within the knowledge of the representor; i.e., where in the very nature of things the speaker is the only person who could have direct information of the facts upon which the opinion is based. Such is the English case of *Smith v. Land and House Property Corp.* [15] There, the owner-vendor of real property stated to the prospective purchaser that one Fleck was a desirable tenant. It was held by the Court of Appeals that the description of Fleck as a most desirable tenant contained an implied assertion that the vendors knew nothing to the contrary. The action in that case was for specific performance, and the fraud was set up as a defense, and of course one would expect a court to be more liberal, but the case has had a very great influence on the law of fraud generally. The opinion of the vendor of a business concerning the expected earnings would fall under this heading.[16]

[13]McDonald v. Lastinger, (Tex. Civ. App. 1919) 214 S. W. 829. See also annotation, 71 A. L. R. 622.

[14]Hedin v. Minneapolis Medical Inst., (1895) 62 Minn. 146, 64 N. W. 158, 54 Am. St. 628, 35 L. R. A. 417 (physician falsely represented his ability to cure); Rodec v. Seaman, (1914) 33 S. Dak. 184, 145 N. W. 441 (real estate expert); Owens v. Norwood-White Coal Co., (1919) 211 Mich. 326, 174 N. W. 851 (lawyer).

[15](1884) L. R. 28 Ch. Div. 7, 51 L. T. 718, 49 J. P. 182.

[16]Norfolk v. Fletcher, (1929) 152 Va. 868, 148 S. E. 785; Cruess v. Fessler, (1870) 39 Cal. 336; and see the cases cited in the annotations: 51 A. L. R. 46; 68 A. L. R. 635; 91 A. L. R. 1295. Representations by the owner of a business as to future profits properly belong in this category, because the declarant generally knows of past facts in connection with the business which make his statement an incorrect description of that information. A statement as to the value of an article of personal property where he has knowledge of an intrinsic defect would also fall within this category.

Under the second subdivision would fall all those cases where the facts which made the opinion false could not be regarded as peculiarly within the knowledge of the speaker, but where the other person, considering his knowledge, intelligence, and experience, could not be found careless or negligent in failing to discover them. In one case a vendor of real property asserted that the climate in a distant state was "very healthy,"[17] when he had knowledge of facts which would make him and any reasonable man conclude that it was unhealthful; in another case a person stated that a note was as good as gold, the representor knowing at the time that the maker was insolvent and that the representee had no reasonable opportunity to discover the fact of insolvency;[18] and in a third case a vendor represented that a bond was of the very best and safest kind and was an A No. 1 Bond, when the speaker knew that the earnings of the corporation had not been sufficient to pay the interest.[19]

It is not argued that any such distinction should be made, nor does it appear that most of the cases would make any such distinction. On the contrary, a tendency can certainly be observed in the cases to hold the representor for more and more of his opinions when at the time of his statement he has knowledge of a fact which makes the opinion false in the judgment of any reasonable person. There are cases, however, adopting a different position. Those courts which have taken the majority view do not profess to hold the defendant responsible merely because he has knowledge of a fact which makes the opinion false. Without attempting to define the concept at all, they have set up a vague standard of negligence; that is, if the information upon which the opinion is based is equally available to both parties, then it is said that they are on equal footing or on equal terms, and the law should not protect the careless and the imprudent.[20] It would seem relevant to raise the query as to whether the parties are on an equal footing merely because the information is as readily accessible to the deceived person as it is to the deceiver, when the latter actually knows of the fact and the other does not. It is this last type of case that constitutes the third subdivision. Assum-

[17]Marshall v. Seeling, (1900) 49 App. Div. 433, 63 N. Y. S. 355.

[18]Belcher v. Costello, (1877) 122 Mass. 189.

[19]Deming v. Darling, (1889) 148 Mass. 504, 20 N. E. 102, 2 L. R. A. 743 per Mr. Justice Holmes.

[20]Bress v. Anderson, (1922) 154 Minn. 123, 191 N. W. 266. This is a typical case. The court holds that statements as to quantity are generally regarded as mere matters of opinion and not actionable if the truth could be discovered by reasonable inspection.

ing that the majority rule is to the effect that negligence of the deceived person will be the test for determining when the opinion misstatement is actionable, then for all practical purposes the courts are holding contributory negligence a bar to recovery. Fraud, of course, is an intentional wrong in those jurisdictions requiring scienter, or its equivalent, recklessness; and even though it be assumed that fraud can exist as a result of negligent misrepresentations, a case of intentional deceit should not be treated in the same way as a case of negligent deceit.[21] Consequently, negligence of the injured person should not be a bar to recovery if there is intentional deceit. This is the majority rule with respect to misrepresentations of fact,[22] and cases adopting this result have received Professor Bohlen's sanction.[23]

Negligence of Representee as the Test. Why have the courts adopted one result with respect to statements of fact and the opposite result as to opinion statements, and whatever may the answer be to the query, is the distinction sound? It is said that misstatements of opinion are not actionable because the person to whom the statement is directed has *no right to rely thereon.*[24] This is based on the argument that each person should rely upon his own judgment about matters over which there can be a difference of opinion. It is often assumed, but fallaciously it would seem, that the reason for this is that the ordinary prudent person would rely upon his own judgment rather than upon the judgment of someone else, and therefore, a person who relies on the opinion of another is negligent. But it would seem that the attitude which the courts took toward opinion statements was probably the result of the individualistic attitude of the common law, resulting in the position that each person should be the best judge of his own interest, and therefore, ought to be required to judge for himself.

The opinions of Grose J, and Buller J, in the great case of *Pasley v. Freeman*[25] are instructive on the present inquiry. Their opinions and the cases cited in support of the statements contained

[21]Bohlen, Misrepresentations as Deceit, Negligence, or Warranty, (1927) 42 Harv. L. Rev. 773.

[22]Gaethe v. The Ebarr Co., (1935) 195 Minn. 393, 263 N. W. 448; Curtley v. Security Savings Society, (1907) 46 Wash. 50, 89 Pac. 180; Watson v. Atwood, (1856) 25 Conn. 313; Rollins v. Quimby, (1908) 200 Mass. 162, 86 N. E. 350, 102 Am. St. Rep. 158; David v. Park, (1870) 103 Mass. 501.

[23]Bohlen, Misrepresentations as Deceit, Negligence or Warranty, (1927) 42 Harv. L. Rev. 773. See also, Carpenter, Responsibility for Intentional, Negligent, and Innocent Misrepresentations, (1930) 24 Ill. L. Rev. 749.

[24]Pomeroy, Equity Jurisprudence, sec. 878. Also, Homer v. Perkins, (1878) 124 Mass. 431; Evans v. Boling, (1843) 5 Ala. 550; Williams v. McFadden, (1886) 23 Fla. 143; Note, 35 L. R. A. 424.

[25](1789) 3 Durf. & East 51.

therein confirm the notion that the rule of non-liability for opinion statements came down from a period which Pound refers to as the "Strict Law" era, a period in which the law was characterized by extreme individualism, and by its unmoral attitude.[26] Each person was assumed to be capable of looking out after his own interests. The stock argument of the courts was that the situation was produced by the party's own folly, and that he must abide the consequences. But it has been shown that the reason for the individualism of the court was that it had not progressed to the stage where protection was afforded to many interests, and the reason given by some modern admirers that if the law takes such a position, it will serve as an agency for moulding strong will and character, was certainly not the original cause for the law's extreme individualism. This seems to be the idea of Pomeroy when he states that the reason for the doctrine lies in the fact that each person is assumed to be quite as able to form his own opinions and come to a correct judgment in respect to the matter, as the party with whom he is dealing, and cannot justly claim to have been misled.[27]

Having been misled into believing that the reason the opinion of another could not be relied upon was the fact that such reliance would constitute negligence, the courts carried the principle over into the cases where the misstatement is in the form of an opinion, but where the speaker has information which the representee does not have, and it is such information that makes the statement false. If the information known to the representor could have been known to the representee by the exercise of due care, there is no liability. If the basis of the holding in these cases is that there is an implied representation that he has no knowledge of a fact which makes the opinion false, then should the courts say that negligence is a defense, when if the misrepresentation is of a so-called fact, negligence is not a defense? Certainly, a representation that a fact does not exist is equally as actionable as a representation that a fact does exist.[28] Moreover, no justifiable reason exists for treating implied-in-fact representations differently from express rep-

[26]Pound, The End of Law as Developed in Legal Rules and Doctrines, (1914) 27 Harv. L. Rev. 195.

[27]Pomeroy, Equity Jurisprudence, sec. 878; Harper, Torts, sec. 223. The latter author states, "Opinions vary and one is ordinarily bound to act upon his own opinion rather than upon that of another."

[28]Bower, Actionable Misrepresentation, sec. 13. It is commonly asserted, says Bower, that a statement, in order to constitute a representation, must be one of an existing fact. This is not adequate or strictly accurate. A statement wholly denying a fact is not literally, a "statement of fact," and yet it is certainly a representation.

resentations. The availability of the facts may be an important consideration, it is true, but only for the purpose of interpretation of the representation. In denying a recovery where the plaintiff has carelessly relied on a so-called opinion statement, the courts have not set up any minimum standard as to the amount of knowledge and experience which a person must employ with respect to reliance resulting in injury. All that seems to be necessary is that the representee exercise a degree of care commensurate with his knowledge, experience, and intelligence. For example in *Bickel v. Munger,*[29] the California Court said:

"We do not doubt, however but that a cause of action might be predicated upon representations made as to the condition and quality of soil and like matters, even though the same was exhibited to the party complaining, where such party was ignorant and inexperienced in such matters, and the party making the representation knew this, and knew that the person with whom dealings were, had relied upon him to express the truth as to such things."

It will be noted that many courts in dealing with ignorant and illiterate persons have for one reason or another protected them, even though the statement which deceived them would be regarded as an opinion, and non-actionable if made to a person with average intelligence.

Statement of Opinion Expressed as a Fact. It is in connection with those cases where the information known to the representor could not have been discovered by reasonable diligence, that so much confusion has arisen. As previously indicated, the reason quite frequently given is that the statement of the opinion carries with it an implied representation that the speaker knows of facts which justify the opinion, or at least that he knows of no fact which makes it false. But sometimes another reason is given to this effect: though a misstatement of an opinion per se may not be actionable, yet if it is expressed as an assertion of fact with the purpose that it shall be so received, then it is actionable.[30] This method of disposing of cases seems to have been fostered by Pomeroy.[31] It is also the principle applied by the Minnesota case of *Adan v. Steinbrecher.*[32] It would seem that this furnishes no criterion, but that it is merely a convenient way of describing a result. But let us see the effects of this principle in action. A

[29](1912) 20 Cal. App. 633, 129 Pac. 958.

[30]Adan v. Steinbrecker, (1911) 116 Minn. 174, 133 N. W. 477; Arnold v. Somers, (1918) 92 Vt. 512, 105 Atl. 260; James v. Brandt, (1921) 173 Wis. 539, 181 N. W. 813; see (1924) 10 Va. L. Rev. 581.

[31]Pomeroy, Equity Jurisprudence, sec. 879.

[32](1911) 116 Minn. 174, 133 N. W. 477.

statement to the effect that an exchange of corporate stock would be attractive, is a fact;[33] a representation that the climate of a certain city is "very healthy" is a representation of fact;[34] a representation that a bond is a first class security which the seller knows to be good is a mere matter of opinion;[35] a representation that a note is as good as gold, according to one court, is a representation of fact;[36] a representation that a note is as good as gold according to another court is a representation of opinion.[37] Examples could be multiplied indefinitely, and instances of apparent conflict would be numerous. Frequently, the results are justifiably different, but it has led to confusion of thought to dispose of the cases in this manner. This methodology has led many courts to hold in borderline cases that the question is one of fact for the jury to pass on, as if the problem were to be treated as one of construction of the language used without reference to the circumstances.[38] In other words, the question will be submitted to the jury in this manner: is the statement that the city is "very healthy" a statement of fact or opinion? Is the statement that a note is as good as gold one of fact or opinion? No doubt the jury will consider the circumstances, but the method of treatment cannot but cause confusion.

Vendor and Vendee. The term generally employed to describe those opinions which are held non-actionable, is variously named dealer's talk, puffing, or sales talk. No distinction seems ever to have been made as to the extent to which the vendor and the vendee may go in vaunting or disparaging the subject-matter of the sale. In fact, it is generally regarded as a true proposition that the buyer has the same privilege to disparage the virtues of a commodity in order to obtain a good bargain, as the seller has to enhance and applaud them for the same purpose.[39] It has been said,

[33]Trust Co. of Norfolk v. Fletcher, (1929) 152 Va. 868, 148 S. E. 785.

[34]Marshall v. Seelig, (1900) 49 App. Div. 433, 63 N. Y. S. 355.

[35]Kimber v. Young, (C.C.A. 8th Cir. 1905) 137 Fed. 744, 70 C. C. A. 178.

[36]Dooley v. Hulsey, (Tex. Civ. App. 1917) 192 S. W. 364. A statement that cotton seed would germinate 90 percent was also held a representation of fact. Horner v. Caldwell, (Tex. Civ. App. 1923) 256 S.W. 1023.

[37]Belcher v. Costello, (1871) 122 Mass. 189; in Holcomb & H. Mfg. Co. v. Auto Interurban Co., (1926) 140 Wash. 581, 250 Pac. 34, 51 A. L. R. 39, a statement was made by the agent of a vendor of a popcorn machine as to the amount of profits which the purchaser would derive from its operation, and this was held, under the circumstances, a representation of fact.

[38]Olston v. Oregon Water Power & Ry. Co., (1908) 52 Or. 343, 96 Pac. 1095, 97 Pac. 538; Ward v. Jensen, (1918) 87 Or. 314, 170 Pac. 538; Smith v. Anderson, (1914) 74 Or. 90, 144 Pac. 1158.

[39]1 Bigelow, Fraud 365. See also Cheney v. Gleason, (1878) 125 Mass. 166, where the court says, "As between such parties [buyer and seller] statements which concern the value of the land or its condition, or

for example, that a buyer, in general, is not liable for misrepresenting a seller's chance of obtaining a good price for his property, unless there be some peculiar relation between the parties implying or leading to special confidence.[40] It occurs to the writer that no criticism can be made of this result. Is there not just as much reason to expect a buyer to underestimate in attempting to make a good bargain, as there is to expect the vendor to overestimate?

Opinion Misstatements of Apparently Disinterested Persons. Although the parties to the contract apparently are given equal latitude in their exaggerations, a number of cases have distinguished between representations of value made by an apparently disinterested person, and representations of value made by persons interested in the transaction. In a Minnesota case,[41] an action of deceit was brought against the defendant for representations concerning the value of land. As a matter of fact the defendant was representing the vendor, but was posing as a disinterested person. In holding the defendant's conduct fraudulent, the court placed emphasis on the fact that he appeared to be a disinterested person. The question is, is it practical to treat differently the opinion of a really disinterested person and the opinion of an apparently disinterested person? Now, of course, there is a greater likelihood that a representee will give credence to the statement of a disinterested person than to that of an interested one, and this seemingly is the only justification for differentiating the opinions of such persons. But of what importance is this if the reason why opinion statements are not actionable is that each person must make up his own mind concerning a matter about which there is a difference of opinion?

It would seem that the answer the courts would give is to be found by referring back to the view that the reason many statements of opinion are not actionable is because reliance on them would constitute negligence. It is negligence ordinarily to rely upon the opinion of a party to the contract. Moreover, if this be the basis of the distinction, then there is no cause for making different rules as to the actually disinterested person and the apparently disinterested person. One might conceivably take the position that an opinion statement of neither a disinterested nor an interested person is actionable, but that the failure to disclose the connection with the transaction is fraudulent, since under the

adaptation to particular uses, which are only matters of opinion and estimate, are not actionable. The maxim, Caveat Emptor, applies."

[40]Fisher v. Budlong, (1873) 10 R. I. 525.

[41]Sorenson v. Greysolon Co., (1927) 170 Minn. 259, 212 N. W. 457.

circumstances the law should impose a duty to speak so that the opinion could be judged in its proper light. In some of the cases where a distinction between the interested and the disinterested person was made, there had been collusion between the owner and the third person;[42] such cases would seem analogous to that of the apparently disinterested person. This, however, does not appear to have been the case in *Medbury v. Watson*.[43]

Judging from these cases, opinions could be classified upon the basis of their source: on one hand the opinions of those not interested or apparently not interested; and on the other hand the opinions of those interested in the transaction. But to what extent will this be carried? Where will the line be drawn? Apparently, the courts have had in mind interest in a pecuniary way; consequently, no distinction would be made between the statement of a broker or agent selling on commission and that of the owner. But, in principle, an interest arising out of a blood relationship between the vendor-owner and the third person could have just as much effect on the unbiased nature of the opinion as an interest of an economic nature. Having admitted this, the argument could be made that friendship would show the necessary interest, and, if this is true, is there much left to the distinction, since in nearly every case where a third person intentionally deceives another it is because he is interested in seeing one person benefit over another? As a matter of fact, if the question is one of negligence, are not all of these degrees of interest of importance? As stated above, the cases have set up a vague notion of negligence, with the court in each case passing on the question as a matter of law. There are at least three objections to this treatment of the problem: deceit is an intentional wrong, and negligence should not be a defense; if negligence is used as a defense, it should be defined; and negligence is a standard of fair conduct, and it should not be treated as a precept or rule—i.e., as something to be applied mechanically. The suggestion has been made, and is developed hereafter that some misstatements of opinion are not actionable because the con-

[42]Kenner v. Harding, (1877) 85 Ill. 264, 28 Am. Rep. 615 (the action was against the owner, but the statement which was the foundation of the action was made by the third person, who was in collusion with the owner); Adams v. Seele, (1860) 33 Vt. 538 (the owners of a lease employed another to exaggerate greatly the value of the property to the landlord, and to purchase the land for more than its value); Samp v. Long, (1926) 50 So. Dak. 492, 210 N. W. 733. A statement from Kenner v. Harding is significant: "Any person who confides in them is considered as too careless of his own interests to be entitled to relief, even if the statements are false and intended to deceive."

[43](1843) 6 Metc. (Mass.) 246, 39 Am. Dec. 726.

duct cannot be regarded as unfair, and the connection which the representor has with the transaction and his relationship to either of the adversaries has an important bearing on this question.

Proposed Method.

Criticism of Present Approach. It would seem that the distinction between fact and opinion has caused considerable confusion and has quite frequently led to unjust results. Of course, even though it has been pointed out that the statement of a person's belief is a statement of fact, that in itself is not conclusive to show that the distinction is unsound, since it could be said that it is an immaterial fact. Every statement, however positive it may be, is a representation of the state of mind of the declarant, but the declarant may be substantially certain of the existence of the external fact of which he is speaking in one case, whereas in another case, he may entertain some doubts as to its existence. This is a distinction merely between what is generally regarded as knowledge and belief. For this reason, the suggestion might be made that the real distinction behind the cases is between representations of knowledge, representations of belief, and representations of intention. But it is submitted that this would involve us in practically the same difficulty that already exists. It has been pointed out, from time to time, that there cannot be a representation of fact concerning a matter which is not susceptible of knowledge. So also, if the above suggestions were adopted, it would seem that there could not be a representation of knowledge about a matter which is not susceptible of knowledge. But what can be known and what cannot be known?

Perhaps, it is well to point out that the subjects of fraud and warranties are not the only fields of the law which have suffered from the use of this catch-word distinction—opinion and fact. As Wigmore states:

"There is perhaps, in all the law of evidence, no instance in which the use of a mere catch-word has caused so much error of principle and vice of policy: error in principle, because the distinction between 'opinion' and 'fact' has constantly and wrongly been treated as an aim in itself, and a self-justifying dogma; vice of policy, because if this specious catch-word had not been so handily provided for ignorant objectors, the principle involved would not have received at the hands of the Bar and Bench the extensive and vicious development which it has had in this country.[44]

[44]3 Wigmore, Evidence, sec. 1919.

Precisely the same statement could be made in connection with the catch-word distinction in the law of fraud, proof of which, it is submitted, is afforded by the previous discussion of the cases. Wigmore then indicates that it is scientifically impossible to distinguish fact from opinion. One argument in behalf of the distinction is to the effect that opinion is an inference from observation of data, whereas fact is original perception. Such a distinction is not only contrary to our general notions as to the meaning of the term "fact," but it is scientifically impossible. When a person represents that he saw an object of a certain shape or size, or heard the report of a gun, or smelled gasoline, or felt something hot, is he not representing that such was his opinion or belief based upon the impression of his five senses: sight, hearing, touch, smell, or taste? In all of the examples given, there is a question of judgment involved, and therefore, the existence of an object before the eyes, or the existence of something heard, would be a mere matter of opinion.

In refutation of that argument, it has been contended that the essential idea of an opinion seems to be that it is a matter about which doubt can reasonably exist, about which two persons can, without absurdity, think differently. But suppose a situation where two parties have equal information with respect to Blackacre, and one of them expresses the view that it is worth $5,000 under circumstances where no reasonable man could have entertained such belief. Is he misrepresenting a fact, or if one desires it his knowledge, because he is representing something as existing which no reasonable man would say exists? Wigmore's observation on this contention is as follows: "If then our notion of the supposed firm distinction between 'opinion' and 'fact' is that one is certain and sure, and the other not, surely a view of their psychological relations serves to demonstrate that in strict truth nothing is certain."[45]

It would seem then, that any attempt to distinguish between representations of knowledge and representations of belief, would involve the same confusion which now exists, unless a meaning were attributed to the term "knowledge" different from that ordinarily applied to it. It has been correctly said that a person has knowledge of a fact when he has such information concerning the fact that he has no substantial doubt of its existence.[46] Instead of changing the content of the term "knowledge" and having it used

[45]3 Wigmore, Evidence, sec. 1919.
[46]Restatement, Agency, sec. 156 (Tent. Draft).

in different parts of the law with varying meanings, it would seem better to adopt a different approach from that pursued in the cases.

Conclusions of Fact. In the place of distinguishing between representations of fact and opinion, and then holding that all representations of fact are actionable, it would seem more desirable to separate all representations into the following three kinds: first, representations amounting to a statement of a conclusion of fact based upon information or knowledge which the representor professes to have over and above that possessed by the representee, as well as an opinion as to either the existence of a present fact, the occurrence of a past fact, or the occurrence of something in the future; second, representations amounting only to a statement of the representor's or some third person's opinion—i.e., the same as the latter part of the first type of statement; and third, representations amounting to a statement of the representor's or some third person's intention.

The term "fact" is used here with its ordinary meaning; that is, something in existence in the external world; but it appears in both the first and second types of statements. Furthermore, the distinction between the two statements is *not in the relative certainty* of the declarant, *but it consists in the fact that in the first type, 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.* In all the cases where the courts have found the existence of a representation of fact, it will be discovered that the representor's intention is to impart to the representee supposed information or knowledge concerning the existence of a fact which is either not possessed by the representee or is assumed not to be possessed by him. The important consideration, therefore, is not the form of the statement, whether it is a positive expression or an expression of doubt, but whether the parties are assumed to be on an "equal footing" as to the information and knowledge concerning the existence of the fact about which the statement is made.

Let us assume first a misrepresentation which would, it is obvious, be treated by the courts as a misrepresentation of fact, and which would not therefore provoke any difference of opinion as to whether it is the kind of misrepresentation that is actionable: A represents to B on B's inquiry that Blackacre contains 80 acres. Even this statement involves an expression of opinion as to the existence of 80 acres in the tract, but it involves more than that; it is a shorthand rendition by A to B of A's information on the

subject. The representee does not know what the precise information is upon which the assertion is made. It may be because representor has himself had it surveyed; it may be because the deed to him expresses the existence of 80 acres; or it may be because previous owners represented to him orally that it contained 80 acres. But whatever the information may be, his statement, as reasonably construed, means that he has sufficient information at least to justify a reasonable person in making the assertion, and that he has no information which causes him as a reasonable man to entertain a contrary belief.

Suppose A goes to B, a banker, and makes inquiry as to the genuineness of a signature on a certain note purporting to be that of C. Let us assume that the banker, before and in the presence of A, compares this signature with other signatures supposed to be C's on notes that have been paid. He then states that the signature is genuine. Subsequent developments disclose that the signature was not genuine. It may be assumed further, either that the banker was honest or dishonest in making the statement. Now, this question is important both in law and equity, because if this be considered a misrepresentation of fact within the meaning given that expression by the courts, then a rescission is possible even though the declarant is honest; and even if the declarant is dishonest, an action at law for damages might not lie if the statement be regarded as an expression of belief only. Furthermore, in some jurisdictions, an innocent misrepresentation of a so-called fact is actionable at law.[47] Some courts would undoubtedly treat this as actionable merely because it was in the form of a positive assertion, and because it was the statement of an expert.[48] It would be said that this was a representation that

[47]Trust Co. of Norfolk v. Fletcher, (1929) 152 Va. 868, 148 S. E. 785; in Texas the courts have for the most part failed to recognize the distinction between the remedies of rescission and damages as to whether scienter is necessary. The rescission cases have been cited in support of the conclusion that scienter is unnecessary for an action of damages based on a misrepresentation. In Collins v. Shipman, (1906) 41 Tex. Civ. App. 563, 95 S. W. 666 the court made a distinction between the two remedies, but subsequent cases have failed to require scienter even in the tort action. (1933) 11 Tex. L. Rev. 125.

[48]An interesting case involving the opinion of an expert is that of Wilson v. Jones, (Tex. Comm. App. 1932) 45 S. W. (2d) 572. The plaintiff bought from S a note purporting to be signed by M, having been induced to do so on the representation of the defendant banker that he knew that the signature was genuine. The banker was honest in his belief. In Texas, an innocent misrepresentation of fact is sufficient upon which to base a tort action of damages, and the court held that this expert's opinion was to be treated as a statement of fact, and so liability was imposed. But the argument might well be made that there was not even any misrepresentation of any kind in this case. If the opinion was based on sufficient

the signature was genuine; the signature was not genuine, and therefore, it is a misrepresentation of fact. Although subsequent developments prove that the signature is not genuine, this is not at all conclusive of liability in the absence of a guarantee or a warranty. Like all statements, it is a representation of his opinion—i.e., his belief that the signature was genuine, but it is also a representation involving a conclusion of fact, a shorthand rendition of the information which he assumed to have over and above the information of A. His representation in detail is that his knowledge of handwriting in general and his knowledge produced by comparison of the two signatures leads him as a reasonable man in his position to believe that the signature is genuine.

Suppose, in the preceding illustration, that B, the banker, had merely stated, "I *believe* the signature is genuine," whereas his information on the matter derived from a careful comparison of the signature was to the contrary, and no reasonable man of his experience and skill would have ventured to make the assertion with such information. In this case, A assumed that the banker had more knowledge than he had of signatures generally, and for that reason that his statement was a shorthand rendition of the information acquired by the use of his special and technical knowledge. In other words, in the language frequently used in the cases, the parties were not on "an equal footing."

Statements of Capacity. A statement of capacity is a type of representation that has been litigated quite frequently, and is also one which has led to irreconcilable decisions.[49] A represents to B that the X Corporation is capable of making a $5,000 profit next year, or A represents to B that a certain machine has the capacity of lifting 2,000 pounds. Subsequent developments convince the jury that the business, irrespective of good management, was not capable of making $5,000 annually at the time the statement was made, or that the machine did not have the capacity to lift 2,000 pounds. Assuming that an opinion statement is not actionable,

information to justify a reasonable banker in making the statement, has there been any misrepresentation? See note in (1933) 11 Tex. L. Rev. 125.

[49]National Equipment Corp. v. Valden, (1934) 190 Minn. 586, 252 N. W. 444 (statement of capacity of machine treated as a representation of fact); Bickel v. Munger, (1912) 20 Cal. App. 633, 129 Pac. 859 (statement as to what a ranch would produce in the future regarded as expression of opinion); Paxton Ekman Chemical Co. v. Mundell, (1916) 62 Ind. App. 45, 112 N. W. 546 (statement by defendant that he had by research compounded drugs which would prevent hog cholera, regarded as representation of fact). For a large number of cases on predictions as to future earnings, see annotations: 51 A. L. R. 94; 68 A. L. R. 635; 91 A. L. R. 1301.

would such findings by the jury make either of the statements an actionable misrepresentation? Such a finding, although necessary, is not at all conclusive as to whether the statement is an actionable one; in fact, such a finding does not even establish the existence of a misrepresentation which is necessary in the absence of liability resulting from actionable non-disclosure.

Let us consider the machine case first. Suppose that it has just arrived from the factory and has been placed in the hands of a dealer. It would therefore be assumed by both parties that this particular machine has not as yet been used. A statement as to its capacity cannot be a conclusion of fact drawn from information about this particular machine, since both parties are assumed to have equal information in that respect, and this is true even though the vendor may have no substantial doubt that the machine will lift 2,000 pounds, since other machines made under the same process have been known to lift that much. However, what has already been said indicates that this may be, and often is, more than a mere statement of the representor's opinion; it is generally a shorthand rendition of professed information and knowledge concerning machines of this type, knowledge which the other person is not assumed to possess. Under circumstances where the information of the parties is not deemed to be equal, it is a representation that the speaker's information, of machines of this kind generally, is such as would have justified a reasonable person in making the statement as well as a statement of his opinion of what the machine would do.[50]

Assume now a situation, slightly different from that just discussed, where the machine instead of being new has been used, and the vendor makes the same assertion as before. Assume further that subsequent developments prove that the machine when sold did not have the capacity it was asserted to have. There is, of course, a difference in the nature of the representation here and the one just discussed; but even so, in the absence of a showing that the representor guaranteed the machine, responsibility for an actionable misrepresentation is not established merely by a jury's finding that the machine would not do what it was asserted it was capable of doing. Here, the circumstances will usually be such that the representor does not profess to have information about machines of this general kind, but he does profess to have infor-

[50]See National Equipment Corp. v. Valden, (1934) 190 Minn. 586, 252 N. W. 444, for a situation where the representor's statement is a shorthand description of information as well as an expression of opinion.

mation concerning what this particular machine has done in the past, a circumstance which leads him as a reasonable person to entertain the opinion expressed as what it would do in the future.

What has been said in discussing the above illustrations, indicates that in adopting this line of approach, the circumstances of each case must be taken into consideration for the purpose of determining the respective parties' relative information before any conclusion can be made concerning the precise nature of the representation. The form in which the assertion is made is not at all controlling. If, moreover, in the illustrations discussed, it could be established to the satisfaction of the court or jury that the representor knew that his information was not what his statement, reasonably construed, attributed to him, then the necessary element of a cause of action for damages based on fraud, that element which is usually characterized as scienter, is present. If, for example, in the last case, the representor knew that the machine three days before did not lift the amount he now asserts it will lift, obviously there is a misrepresentation and there is scienter.

Statement Containing Adjectives. Another type of statement which has resulted in some considerable confusion is one where an adjective is used either for the purpose of describing existing qualities in the subject-matter of the sale or for the purpose of describing past events. An example of the first class of this general species would be the statement that certain notes taken by the plaintiff as collateral security were first-class investments. An illustration of the second class would be a representation that "experiments have been made therewith (a machine) which have proved successful."[51] Some courts have regarded such statements only as expressions of opinion simply because of the use of the adjective. The purpose in giving these illustrations is to emphasize the point that the use of an adjective does not per se make the statement solely an expression of opinion. The court dealing with the representation last given held that the only material part of the statement was that the apparatus upon experiment worked well, an assertion which was in its nature mere opinion and not a statement of any definite fact. These two adjectives, namely, *first-class* and *successful,* are terms used not only for the purpose of stating a person's opinion, but they are also used on many occasions for the purpose of giving a shorthand rendition of what the representor knows over and above that possessed by the representee. It is, of course, true that there is a line where men differ as to what

[51]Belcher v. Costello, (1877) 122 Mass. 189.

is successful and what is not, what is first-class security and what is not; but at least such statements may be a representation by the person who makes them that he has sufficient knowledge not possessed by the representee to justify him as a reasonable person in entertaining such belief. Contrary, therefore, to the general assumption that ordinarily statements involving the use of adjectives are expressions of opinion only,[52] it would seem that they are shorthand renditions of information.

Parties Possessing Equal Information. It is only where the information is assumed to be equal, or where the statement is based upon certain facts, that the expression is a representation of opinion only. If, for instance, an experiment is conducted in the presence of both A and B, both being equally observant, and the conclusions of both from direct observation being the same, and A says to B that the experiment was successful, then certainly A's statement can only be an expression of his opinion, regardless of his certainty that the experiment was successful. Or suppose A and B both have equal information concerning the past earnings of a corporation; both also have equal information concerning earnings of corporations generally. A says to B that stock in the corporation is a first-class security. There also the statement is an assertion of opinion or belief only. Finally, if A and B have equal information concerning market conditions of land, and have equal information also concerning a particular tract, which is the subject-matter of the sale, and A says to B that his property is worth $70,000, such a statement is a representation of belief only.[53] It is not meant to be asserted that the only instance where a statement can be solely an expression of opinion is in a fact situation where the information is equivalent, for it would seem that circumstances might exist where although the information on both sides is not the same, the statement is nevertheless made with reference only to the information which both have, or which the representor reasonably believes both have. In the illustration last given, B may not know that the land is flooded nearly every year in the spring, but A may reasonably assume B's knowledge of this, and therefore, may intend only a statement of his belief. Moreover, the interpretation put upon the statement by the representee is a material inquiry. Even though the representation would usually carry a cer-

[52]Williston, Contracts, sec. 1491.

[53]Situations where statements of value by the representor were properly regarded as expressions of opinion only are found in the following Minnesota cases: Follingstad v. Syverson, (1926) 166 Minn. 457, 208 N. W. 200; Hoeft v. Raddatz, (1927) 170 Minn. 466, 212 N. W. 939.

tain meaning i.e., a conclusion of fact as well as an expression of opinion, if that is not the meaning placed upon it by the representee, then there is no reliance, and consequently, no recovery because of it.

Restatement of Contracts. The position taken here seems to have been adopted, in part at least, by the Restatement of Contracts. According to this restatement, it would seem that an assertion of an opinion or belief cannot be fraudulent unless the knowledge of the speaker is such that no reasonable man would entertain the opinion so stated.[54] This was not developed to the extent of discarding the well-settled distinction between fact and opinion, but only as a means of ascertaining what kinds of opinion statements are actionable. Apparently, it was meant to refer only to the situation where the information of the parties at the time of the statement was not regarded as being equal. If so, such a representation under the terminology as used in this paper, would be a shorthand rendition of that information as well as the expression of the speaker's opinion. The chief criticism, therefore, of the Restatement of Contracts on this subject, is that it retains the so-called distinctions between "fact" and "opinion."

There is another criticism to be made of the Restatement position in that the knowledge of the speaker must be such that *no reasonable man would entertain the opinion so stated.* Bearing in mind that every statement other than a representation of intention involves an expression of the speaker's opinion, and assuming further, that a misrepresentation of opinion only is not ordinarily an actionable misrepresentation, (a matter to be discussed later), the question as to whether there was an actionable misrepresentation would be a question of law for the court, and never one for the jury, since there could be no actionable misrepresentation where reasonable men might differ as to whether the opinion was justified. But wherever the representor is professing to convey his information in a shorthand manner, then the question as to whether his expression gives a proper picture of that information, is one of construction of the language used. If the statement is open to

[54]Restatement, Contracts, sec. 474: "A manifestation that the person making has reason to expect to be understood as more than an expression of his opinion, though made also with the intent or expectation stated in sec. 471, is not fraud or a material misrepresentation unless made by,

(a) one who has, or purports to have expert knowledge of the matter, or,

(b) one who manifests an intentional misrepresentation and varies so far from the truth that no reasonable man in his position could have such opinion."

two reasonable constructions—i.e., if the statement might be treated by some as a misstatement of the information that he possessed, two other inquiries would be pertinent. Did the representor believe that it gave a proper picture of his information? If the representee had known the information possessed by the representor, would he have regarded the statement as a true picture of that information? In other words, was the representee misled as to the information? In *Smith v. Chadwick*,[65] the statement is made that if with intent to lead the plaintiff to act upon it, the defendant puts forth a statement which he knows may bear two meanings, one of which is false to his knowledge, and thereby the plaintiff, putting that meaning on it, is misled, the defendant cannot escape by saying the plaintiff should have put the other construction. This statement was made in a case where the question concerned the construction of words themselves, but the problem here is only one of construction.

Assume a statement by a representor who has, and professes to have, more knowledge concerning a matter than the representee, under circumstances where the information which he has is such that no reasonable person would entertain a belief other than the one expressed, but where the representor himself has a contrary belief on the basis of the information which he has. Should this be treated as an actionable misrepresentation? It would seem that it should be treated as a misrepresentation of opinion only, and not actionable unless a misstatement of opinion would be actionable under circumstances where the information was the same.

Expert Opinions. In the light of the proposed method explained in the preceding pages, perhaps something should be said concerning the so-called representations of opinions by experts, and representations of value in terms of money. Assume a statement by a jeweler that a diamond ring is worth five hundred dollars; it should be noticed that in practically all instances the statement is made more for the purpose of conveying information than it is for expressing the personal belief of the speaker. Thus the jeweler in estimating the value of a diamond ring to one who has no information on the subject, in addition to expressing his opinion as to the worth of the ring, is giving a shorthand rendition of the information which he has concerning both qualities and characteristics of diamonds which affect their value, and the qualities of this particular ring. The operation of estimating its value consists in comparing the qualities of this ring with those qualities which affect

[65] (1884) L. R. 9 App. Cas. 187.

the value of diamonds in general. The statement of the jeweler, therefore, in addition to being an expression of his opinion is a conclusion of fact, the conclusion being that he has information of a kind which would justify a reasonable expert in believing that the ring was worth as much as he states that it is. Frequently, the information of the expert as to the qualities of the subject-matter of the opinion is the same as that of the representee, but his technical information is conveyed in a shorthand way by his statement; for example, a client who takes a case to a lawyer knows as much perhaps about the operative facts of the case as the lawyer, but he has no knowledge concerning the authoritative materials and the judicial technique, and it is this information which the lawyer is conveying in a shorthand way when he expresses to the client his belief that the judgment of a court would be in his favor. This brief treatment of experts' opinions serves to show that it is not the opinion itself which is actionable, but it is the difference in the information possessed by the respective parties that makes it actionable.

The same treatment might be made of statements of actual and market value. A statement of actual value is frequently more than a mere opinion. To be able reasonably to appraise the value of an article, something must be known about the article itself, and something must also be known concerning values generally. So a representation of value may be a shorthand rendition of knowledge of two kinds; it may be a shorthand rendition of knowledge of one kind only, depending on the representee's assumed information; or finally, of course, it may be solely a representation of opinion. For example, a knowledge of the value of horses involves primarily a knowledge of the value of different grades of horses, but it also involves a knowledge of the appearance and quality of the particular horse; and the operation of estimating its value consists in comparing it with the several possible classes or grades and then placing it in one of them. If the information of the parties with respect to both kinds of knowledge is assumed to be the same, then the expression is only an opinion. If not, it is more than an opinion.[56]

Statements of Opinion Not Involving Conclusions of Fact. On occasions, it has been urged by commentators that a person who intentionally deceives another to his damage should be held re-

[56]This mode of treatment would not necessitate a distinction between representations of market value and representations of intrinsic value, as has sometimes been made. Annotations in 66 A. L. R. 188 and 71 A. L. R. 622.

sponsible regardless of how the deceit is accomplished, and such a generalization can sometimes be found in decided cases. However, the fact situations always involved in such cases would permit a recovery on the ground that the statement involved a conclusion of fact as well as an opinion. Even assuming such a rule is the law, it would still be necessary to make the distinction already made between statements involving expressions of opinion only, and those involving a conclusion of fact as well, since equity will rescind a transaction where the conclusion of fact represented does not express correctly the information of the representor; moreover, in the law of warranties, distinctions between expressions of opinion and conclusions of fact would still be necessary. But what about the liability of the representor for a bare representation of belief unaccompanied by any shorthand rendition of his information when the representor did not entertain such belief at the time the statement is made? It is certainly a misrepresentation; namely, a misrepresentation of the representor's state of mind, but is that such a misrepresentation as will always be actionable where the representee is actually deceived, and relies on it to his damage?

Reasonable Probability of Reliance Necessary. It has been said that if a person intentionally deceives another and damage results, in justice the deceived person should be permitted the usual remedies resulting from fraud in the same manner as where a person is deceived by a so-called misrepresentation of fact.[57] The cases have generally denied a recovery on one of two grounds: first, the misrepresentation is not material, and it is only a material misrepresentation that can be made the foundation for fraud; and second, the representee had no right to rely thereon. Close scrutiny will disclose that they are substantially the same, and the problems in connection with the cases have already been discussed. Bower states the general rule that a misrepresentation should be material, and thereafter defines a material misrepresentation as one whose natural and probable effect, either in the ordinary course of events or in the special circumstances of the case known to the representor, is to induce the representee to alter his position in the manner alleged.[58] He then indicates that inducement and materiality are separate and distinct problems, materiality being always a question of law.

[57]See Berger, Torts: Deceit: Representation of Value: When Actionable as Fact, (1928) 13 Corn. L. Q. 140, where the author concludes that the better view is to recognize liability on the basis of a knowingly false statement of opinion. See also the comment on misrepresentations of law in (1932) 32 Col. L. Rev. 1018.

[58]Bower, Actionable Misrepresentation, art. 18, P. 7.

This tends to show that the underlying reason why some courts require a fraudulent misrepresentation to be material, so far as the action of deceit is concerned, is to make certain that there has been a reasonable probability of reliance.[59] The misstatement may be material, and yet uncertainty and improbability of reliance may exist to an equal and even greater degree than where an immaterial misrepresentation is made. In truth, regardless of whether the misrepresentation which the plaintiff asserts he has relied on is a misrepresentation of the speaker's opinion or of his information, if it is not of a character which would justify a reasonable reliance, the courts should require a showing of objective facts sufficient to raise a reasonable probability that this particular plaintiff relied on it, but the requirement that the misrepresentation be material is an arbitrary way of attempting to achieve the same result. Reliance on an opinion is improbable, not because such a statement is in itself immaterial, since opinions of a disinterested third person regarding the subject-matter of the sale are held actionable, but it is more often because the vendor, the speaker, is not to be trusted. Even assuming, therefore, that in justice, opinion statements should be actionable to the same extent as any other statement, it must be admitted that they 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. Reasonable probability of reliance on an immaterial misrepresentation might be shown by the existence of a relation of friendship, or by any circumstances showing that the plaintiff put confidence in the representor to a greater degree than ordinary. The conclusion then is this: even assuming that theoretically the socially desirable result would be to make actionable all opinion misstatements which damage another, as a practical matter, some guarantee of a likelihood of reliance, other than the representee's profession of reliance, should be required. But the rule sometimes asserted that opinion statements are not actionable because they are immaterial, or because reliance cannot be reasonable, is unsound.

Some Misstatements of Opinion Not Unfair Conduct. There remains the consideration of the question of whether misrepresentations of opinion by an adversary should in justice be actionable, even assuming that the practical difficulties centering around the requirement of reliance are satisfied or disregarded. Everyone

[59]See the recent case, Goetke v. The Ebarr Co., (1935) 195 Minn. 393, 263 N. W. 448.

would agree that the end of law is to achieve justice, and justice as used here would seem to mean the socially desirable result. As previously pointed out, some have argued that a rule of non-liability is sound social policy in that it induces people to rely on their own opinions rather than on the opinions of others, especially in that type of case where reasonable men might differ. It is, however, doubtful if the law in this respect would have any effect on the actions of the members of society. It is an argument based on a philosophy of individualism and may therefore be rejected. It does not, however, follow that in justice all opinion misstatements should be actionable. It does not seem to have been emphasized sufficiently by commentators and courts that the fundamental reason why non-liability for intentional misstatements of opinion has prevailed in large measure, even today, is because society has not advanced to the stage where all such conduct is regarded as unfair. The point emphasized is that this is a question of fair conduct, just as non-disclosure is a question of fair conduct. The assumption is often made that whenever one person intends to benefit himself at the expense of another, such conduct is unfair; generally speaking, it is, but community sentiment does not condemn all conduct which the moral philosopher would condemn, and present day jurists point out that the law cannot hope to apply a standard too far in advance of the spirit of the time and place.

Note, however, the difference in the approach adopted here, and the approach which has generally been followed in the authoritative materials. It has been stated that the plaintiff who has relied on a statement of opinion cannot recover because reliance is reasonable wherever a confidential or fiduciary relationship exists between the parties, or wherever the statement is by a disinterested third person, but otherwise such reliance on such a statement would be unreasonable. The exception based on the confidential or fiduciary relationship is then extended to cover instances where reliance was not actually reasonable, but where all would agree that the defendant was guilty of unfair conduct; for example, where because of friendship, ignorance, or previous negotiations the defendant has obtained the plaintiff's confidence, and that friendship, ignorance, or previous negotiation was a contributing factor in causing the plaintiff to be deceived. In truth, community sentiment does not condemn a vendor for using what has been called "trade talk" or "puffing" to deceive a vendee who is a stranger, but it does condemn the same action if the vendee was a close friend of the vendor. The test, in all cases, is what the ordinary ethical

man would have done under the same circumstances, this fictitious person being endowed with the crystallized sentiment of the community.

Distinctions have properly been drawn between the opinions of disinterested third persons and those of a party to the contract, but the "disinterested third person" perhaps should not be defined as referring solely to that person who is not interested financially in the transaction. Even though a person is not financially interested in the transaction, if he is a close relative by blood or marriage to one of the parties to the contract, his conduct in attempting to deceive the other party by using exaggerations and by using misrepresentations of his opinions as to the value of the subject-matter of the contract, is certainly not as reprehensible as it might otherwise be. However, it is extremely doubtful whether the privilege of exaggeration should be permitted to any but the party to the contract. In doubtful cases, is not the question one of fact for the jury? Where reasonable men could not differ, as for example, where the statement is made by a person who is a stranger to both the vendee and the vendor, then the question is one of law for the court.