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CAVEAT EMPTOR OR JUSTIFIABLE RELIANCE?

SERGE S. GORNY

In the recent case of *Haugen v. Neiswonger*¹ the respondent, whose sawmill was encumbered and who was in danger of having to cease operations, induced the appellant to enter into a partnership for the operation of the mill. During the preliminary negotiations he told the appellant that he would get back, in a short time, everything that he put into the venture. The partnership agreement, which was signed on May 9, 1947, contained a covenant of the respondent, that he had good title to the sawmill free of all encumbrances. At the time, there was an outstanding chattel mortgage of record against the property, which was not satisfied until September 30, 1947, more than four months after the date of the partnership agreement.

The trial court denied the plaintiff's plea for rescission and found: (1) that the parties entered into negotiations for the purpose of forming a partnership for the operation of the sawmill, (2) that the negotiations were carried on fully and fairly by the parties, at arm's length, and (3) that no misrepresentation or false statement of fact was made by the defendant to the plaintiff in connection therewith. The Supreme Court affirmed the decision and classified the representation relating to the returns from the business as "sales talk" on which the appellant had no right to rely because the parties were dealing at arm's length. The court agreed that the "appellant was misled by respondent's failure to disclose the existence of the chattel mortgage on the sawmill,"² but held. (1) that where the parties deal at arm's length there is no duty to disclose a material fact, where the complainant had the means of acquiring the information, or because of his experience or his prior dealings should have acquired further information before he acted, and (2) that as a *prudent businessman it was incumbent upon the appellant to at least search the public records*,³ which would have appraised him of the precarious financial condition of his future partner.

In denying the appellant relief the court is applying the rule of *caveat emptor*. This comment reviews the Washington application of that rule. The scope of this annotation is limited to arm's length transactions in which there has been a verbal misrepresentation by the vendor.

¹ 134 Wash. Dec. 386, 209 P.(2d) 267 (1949).

² *Id.* at 391, 209 P.(2d) at 269.

³ Author's italics.

STATEMENTS OF FACT

Caveat emptor is a rule embodying the *laissez faire* theories of the nineteenth century and was extensively applied at that time. It required the exercise of caution on the part of the vendee, and if he was overreached by his adversary it was merely a bad bargain in which he was the loser, with only himself to blame. The business ethics of the day presumed that a party to a business transaction would do his utmost to turn it to his advantage, whether by fair means or foul. The law of sales denied the vendee the benefit of any implied warranties; the law of fraud did not permit the vendee to rely on the veracity of his adversary, requiring him to investigate the facts surrounding the transaction. In a world of expanding trade, emphasis was placed on advantage to the dealer.⁴

Modernly "encouragement for dealers is needed less than encouragement for customers and *caveat emptor* declines as warranty and liability for innocent misrepresentation increases."⁵ The buyer finds it more convenient to rely on the statements of the seller, he having the greater detailed information, rather than incur the expense and trouble incident to an investigation on each transfer; *caveat emptor* has given way to *caveat venditor*,⁶ and the merchant's motto has become "the customer is always right." The last half century has seen the evolution of a new standard of business ethics, extending the duties of the vendor and giving the vendee the benefit of implied warranties. Within the law of fraud there has been a revaluation of the principle of justifiable reliance;⁷ the rule precluding the vendee from relying on his vendor's statements and requiring him to make an independent investigation, merely because he is negotiating an arm's length transaction, has been so confined that it is now the exception rather than the rule.

The Washington court, in harmony with the majority, has repudiated the broad application of *caveat emptor* as it applies to the law of fraud. As early as 1909 it said that the tendency was to restrict rather than extend the rule and, quoting from *Strand v. Griffith*,⁸ said, "there is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which

⁴ Harper and McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939 (1938).

⁵ *Id.* at 962.

⁶ VOLD, SALES 444, 445 (1931).

⁷ PROSSER, HANDBOOK OF THE LAW OF TORTS 749 (1941).

⁸ 97 Fed. 854 (1899).

declares them guilty of negligence, and refuses them redress, whenever they fail to act upon that presumption. The fraudulent vendor cannot escape liability by asking the law to applaud his fraud and condemn his victim for credulity 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.'"⁹ A person can reasonably expect honesty in connection with the sale of land or goods, and there is no duty on the part of the vendee to investigate the truth of the vendor's statements.¹⁰

The Restatement of Torts¹¹ takes the position that "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Prosser states that the reliance must be reasonable under the circumstances, depending on the knowledge the representee has or the knowledge which may fairly be charged against him from facts within his observation,¹² and in regard to the duty to investigate, "It is only where under the circumstances the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which would serve as a warning that he is being deceived that he is required to make an investigation of his own."¹³ The fraudulent statement of fact has been classified as a situation in which the representee is entitled to rely on the "existence of the fact as represented," there being no duty to investigate unless there has been some warning given which points to the falsity of the representation.¹⁴

Our court is in accord with these principles and has held that assertions of fact may be justifiably relied upon without investigation, not only where investigation would be burdensome or difficult¹⁵ but also where the falsity of the representation might be discovered by an investigation requiring little effort by means easily at hand.¹⁶ *Caveat emptor* is applicable only where the parties have equal present means and opportunity to ascertain the truth at the time of the transaction and does not apply merely because it is *possible* to ascertain the facts.¹⁷

⁹ Wooddy v. Benton Water Co., 54 Wash. 124, 102 Pac. 1054 (1909).

¹⁰ Champney v. Irwin, 106 Wash. 438, 180 Pac. 405 (1919).

¹¹ RESTATEMENT, TORTS § 540 (1938).

¹² PROSSER, *op. cit. supra* note 7, at 747-749.

¹³ *Id.* at 751.

¹⁴ Harper and McNeely, *op. cit. supra* note 4.

¹⁵ Borde v. Kingsley, 76 Wash. 613, 136 Pac. 1172 (1913), Daniel v. Glidden, 38 Wash. 556, 80 Pac. 811 (1905).

¹⁶ Champney v. Irwin, 106 Wash. 438, 180 Pac. 405 (1919).

¹⁷ Dixon v. MacGillvray, 29 Wn. (2d) 30, 185 P. (2d) 109 (1947), Miller v. Frederick, 171 Wash. 452, 18 P. (2d) 40 (1933).

The established test of justifiable reliance is whether or not the representee has used the care of an "ordinary prudent person,"¹⁸ and "ordinary prudence does not require a person to test the truthfulness of representations made to him by another as of his own knowledge with intent that they shall be relied upon even though the party to whom such representations are made may have an opportunity to ascertain the truth for himself."¹⁹

The court has recognized and classified certain situations in which the buyer has met the test of the exercise of ordinary prudence. These situations, rejecting any requirement of investigation, fall into three categories: (1) where the vendor knows that the vendee does not intend to make a personal investigation but is relying on the truth of the facts communicated to him;²⁰ (2) where the vendor uses artifice or other active means to prevent the hearer from ascertaining the truth;²¹ (3) where the parties lack equal facilities to ascertain the truth.

The court has further subdivided category (3) into two parts:²² situations where the facts are peculiarly within the knowledge of the speaker,²³ and situations where the means of knowledge are not readily ascertainable.²⁴ In some instances the court relies on both of these

¹⁸ Tacoma v. Tacoma Light & Water Co., 17 Wash. 458, 50 Pac. 55 (1897).

¹⁹ Christenson v. Koch, 85 Wash. 472, 148 Pac. 585 (1915). See Stewart v. Larkin, 74 Wash. 681, 134 Pac. 186 (1913). This rule, first quoted with approval in Wooddy v. Benton Water Co., *supra* note 9, is taken from the following section of 14 AM. & ENG. ENCYC. LAW (2d ed.) 120, 121 "By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself. By the weight of authority, and in reason the rule that a person who is voluntarily blind as to facts concerning which false representations are made cannot complain of the same, applies only where the parties have equal present opportunity and means to ascertain the facts. Indeed, it has been held that a person is justified in relying on a representation made to him, in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." Piecemeal quotations of this section appear throughout the Washington cases.

²⁰ See Stewart v. Larkin, *supra* note 19.

²¹ *Artifice*: Sherrin v. Gevurtz, 142 Wash. 128, 252 Pac. 683 (1927), cf. Stanton v. Zechner, 101 Wash. 383, 172 Pac. 559 (1918) (padded books), Beeker v. Wilson, 63 Wash. 149, 114 Pac. 899 (1911) (packing of defective boiler). *Suspicious allayed*: Wheeler v. Yoakum, 136 Wash. 216, 239 Pac. 557 (1925), Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490 (1914), Blum v. Smith, 66 Wash. 192, 119 Pac. 183 (1911).

²² Stewart v. Larkin, 74 Wash. 681, 134 Pac. 186 (1913).

²³ Blum v. Smith, 66 Wash. 192, 119 Pac. 183 (1911) (statement that tenants were of desirable class), Westcott v. Wood, 122 Wash. 596, 212 Pac. 144 (1922), Kelly v. Merritt, 111 Wash. 426, 191 Pac. 404 (1920) (representations as to ownership of property), Mulholland v. Washington Match Co., 35 Wash. 315, 77 Pac. 497 (1904) (representations based on skilled knowledge of vendor).

²⁴ Community State Bank v. Day, 126 Wash. 687, 219 Pac. 43 (1923) (books showing profits of corporation could only be interpreted by expert), Christenson v. Koch, 85 Wash. 472, 148 Pac. 585 (1915), Black v. Thompson, 110 Wash. 379, 188 Pac.

grounds in the same case to deny any duty to investigate;²⁵ in others the court will state only one of them in concluding that reliance was justifiable. Actually, the two are but an expression of the lack of equal facility to determine the truth²⁶ and should be recognized as such.

In accordance with these principles ordinary prudence does not require one to search public records to test the veracity of a representation. The realistic position taken by the Restatement²⁷ is that the purpose of recordation statutes is to protect the purchaser from third parties who have unrecorded claims against the property and "The purpose of such statutes can be perfectly accomplished without giving them a collateral result which protects fraud feorsors from liability" Previous to the decision in *Haugen v. Neiswonger* our court, in accord with the majority,²⁸ has held that a vendee, dealing at arm's length, can rely on a representation the truth or falsity of which is subject to verification by examination of public records and is under no duty to search the records.²⁹ The only qualification to the rule is that where the vendee has been given reason to doubt the truth of the representation, he is under a duty to investigate the records.³⁰ Whether the holding in the *Haugen* case overrules or modifies the rule of these cases is questionable,³¹ but it certainly is contrary to the spirit of them and puts the rule of these cases in doubt.

393 (1920), *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883 (1905) (property at a distance), *Wilson v. Clark*, 63 Wash. 136, 114 Pac. 916 (1911) (public records in distant state), *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643 (1904) (only person who could furnish information was at a distance).

²⁵ *Miller v. Frederick*, 171 Wash. 452, 18 P.(2d) 40 (1933), *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853 (1912), *Gilluly v. Hosford*, 45 Wash. 594, 88 Pac. 1027 (1907) (financial status of corporation), *Champneys v. Irwin*, 106 Wash. 438, 180 Pac. 405 (1919), *Cooper v. Kincaid*, 151 Wash. 535, 276 Pac. 557 (1929), *Hahn v. Brickell*, 135 Wash. 189, 237 Pac. 305 (1925) (past profits and rents from property).

²⁶ Lack of equal facilities may be due to the disparity of business knowledge of the parties, *Boehme v. Broadway Theatre Co.*, 91 Wash. 104, 157 Pac. 218 (1916), *Duffy v. Blake*, 80 Wash. 643, 141 Pac. 1149 (1914), or to the inferior mental status or capacity of the vendee, *Hoptowit v. Brown*, 115 Wash. 661, 198 Pac. 30 (1921), *Cf. Sova v. First Nat. Bank of Ferndale*, 18 Wn.(2d) 88, 138 P.(2d) 181 (1943).

²⁷ RESTATEMENT, TORTS § 540 (1938).

²⁸ 33 A.L.R. 917-942.

²⁹ *Curtley v. Security Savings Society*, 46 Wash. 50, 89 Pac. 180 (1907) (title), *Stanton v. St. Michell*, 130 Wash. 449, 227 Pac. 737 (1924) (outstanding tax assessment), *Crawford v. Armacost*, 85 Wash. 622, 149 Pac. 31 (1915) (outstanding street assessment), *Pitman v. Erskine*, 49 Wash. 166, 94 Pac. 921 (1908) (outstanding conditional sale vendor's interest), *Peterson v. Graham*, 7 Wn.(2d) 464, 110 P.(2d) 149 (1941) (probate court order).

³⁰ *Lake v. Churchill*, 39 Wash. 318, 81 Pac. 849 (1905) (representation that abstract was up to date obviously false because it was dated one year previously), *See Kalmans v. Powles*, 121 Wash. 203, 209 Pac. 5, 29 A.L.R. 618 (1922) (statement of opinion, see *Stanton v. St. Michell*, *supra* note 29, distinguishing *Kalmans v. Powles* on that ground at page 452).

³¹ See Conclusion this comment.

Although ordinary prudence does not require a person to make a separate investigation to determine the truth or falsity of a representation, it does require him to take cognizance of that which he does investigate. The Restatement³² takes the position that "The recipient in a business transaction of a fraudulent misrepresentation is not justified in relying upon its truth if its falsity is obvious." In the comment on the section it is stated that the recipient is required to use his senses and cannot recover if he blindly relies upon a statement, the falsity of which would be apparent to him if he had taken advantage of his opportunity to make a *cursorry* inspection. As early as 1895 our court said "If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representation if their ventures do not prove successful."³³ Although the rule of this case has been restricted,³⁴ the restriction appears to be based on the application of the rule to the facts of the case³⁵ rather than of the rule itself.

When the means of knowledge are equally open to both parties and actually at hand and accessible,³⁶ or, the subject matter not being at hand, the facts are equally available to both parties and neither has superior knowledge,³⁷ the representee cannot be heard to say that he relied on the misrepresentation. He is either charged with knowledge of what he reasonably should have seen and therefore could not *justifiably* rely, or is found not to have *relied* on the statement. The investigation which precludes reliance must be one which would reasonably apprise the recipient of the falsity of the representation. If the investigation did not disclose the falsity of the statement and could not have disclosed it without entailing further investigation the court then applies the same rules and the same test for justifiable reliance as it uses

³² RESTATEMENT, TORTS § 541 (1938).

³³ Washington Central Improvement Co. v. Newlands, 11 Wash. 212, 214, 39 Pac. 366, 367, (1895).

³⁴ The "broad doctrine laid down in that case has been much restricted by all of the more recent decisions in this state and by the trend of modern authority everywhere." O'Damel v. Streetby, 77 Wash. 414, 420, 137 Pac. 1025, 1027 (1914).

³⁵ The vendee of a parcel of land relied on the vendor's representation as to improvements which were in process of being erected on the land without making an inspection of the land.

³⁶ See Davis v. Boyne, 171 Wash. 1, 17 P.(2d) 618 (1932), Blomquist v. Runkel, 162 Wash. 362, 298 Pac. 458 (1931), Narup v. Benson, 154 Wash. 646, 283 Pac. 179 (1929), McKay v. Peterson, 122 Wash. 550, 211 Pac. 716 (1922), Hurley v. Lindsay, 105 Wash. 559, 178 Pac. 626 (1919), Conta v. Corgiat, 74 Wash. 28, 132 Pac. 746 (1913), Griffith v. Strand, 19 Wash. 686, 54 Pac. 613 (1898).

³⁷ Parker v. Brainard, 91 Wash. 428, 157 Pac. 1078 (1916).

in cases where there has been no investigation. did the representee use the care of the "ordinarily prudent man?"³⁸

The reasoning behind the rule denying justifiable reliance where the representee has made an investigation is that a reasonable investigation would inform him of the falsity of the representation. In like manner, even though the subject matter of the misrepresentation is not at hand or not equally available, reliance is not justifiable if there has been some warning given, either by the vendor or a third party, which would lead a reasonably prudent man to investigate the facts before he consummated the transaction.³⁹ A clue to a fact, which if followed diligently would lead to the discovery of the falsity of the representation is equivalent to knowledge of its falsity⁴⁰

STATEMENTS OF OPINION

In the *Haugen case* the court did not allow the appellant to rely on statements regarding future returns because they were "sales talk." Such representations are nothing more than expressions of opinion and the court has categorically stated that a person cannot rely on a representation of *mere* opinion. It is nothing more than an expression of judgment, or estimate, of the representor and in an arm's length transaction the law requires a person to form his own judgments on the basis of facts before both parties. Where there is no reason why the judgment of one party should be superior to that of the other, if the representee knows⁴¹ or should know⁴² that the representation is but an expression

³⁸ *Facts in peculiar knowledge of vendor*: *Smith v. Fletcher*, 102 Wash. 218, 173 Pac. 636 (1918). *Facts not readily ascertainable*: *Dixon v. MacGillivray*, 29 Wn.(2d) 30, 185 P.(2d) 109 (1947), *Rackham v. Koch*, 125 Wash. 451, 216 Pac. 835 (1923), *George v. Kurdy*, 92 Wash. 277, 158 Pac. 965 (1916), *Best v. Offield*, 59 Wash. 466, 110 Pac. 17 (1910) (irregular boundaries of inspected land). *Lack of equal facilities*: *Norman v. Raddue*, 145 Wash. 485, 260 Pac. 988 (1927), *Eyers v. Burbank Co.*, 97 Wash. 220, 166 Pac. 656 (1917) (vendee inexperienced). *Vendor knows vendee is inexperienced and relying on vendor*: *Miraldi v. Wick*, 117 Wash. 207, 200 Pac. 1094 (1921), *Becker v. Sunnyside Land and Investment Co.*, 76 Wash. 685, 136 Pac. 1147 (1913). *Artifice used to make investigation ineffective*: *Stanton v. Zechner*, 101 Wash. 383, 172 Pac. 559 (1918), *Beeker v. Wilson*, 63 Wash. 149, 114 Pac. 899 (1911).

³⁹ *Sather v. Home Security Savings Bank*, 49 Wash. 672, 96 Pac. 229 (1908) (stock represented to be worth par value of \$2,000 sold for \$500), *Romane v. Excelsior Etc. Gas Machine Co.*, 54 Wash. 41, 103 Pac. 32 (1909) (promise of vendor made six months beforehand still not fulfilled at time of consummation of transaction), *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14. L.R.A. (n.s.) 1176 (1908) (parties were competitors).

⁴⁰ *Christiansen v. Parker*, 152 Wash. 149, 277 Pac. 445 (1929).

⁴¹ *Kirkland v. Dressel*, 104 Wash. 668, 177 Pac. 643 (1919), *Jarvis v. Ireland* 89 Wash. 286, 154 Pac. 455 (1916), *English v. Grinstead*, 12 Wash. 670, 42 Pac. 121 (1895).

⁴² See *Lent v. McIntosh*, 29 Wn.(2d) 216, 186 P.(2d) 626 (1947), *West Seattle Land and Improvement Co. v. Herren*, 16 Wash. 665, 48 Pac. 341 (1897).

of opinion, he is required to investigate the facts for himself. Generally promissory statements⁴³ and representations as to future events⁴⁴ or the law,⁴⁵ and representations regarding value⁴⁶ or quality,⁴⁷ often classified as "dealer's talk"⁴⁸ or "sales talk," are held to be expressions of opinion.

The rationale of the rule is that representations of opinion are immaterial and do not justify reliance, each party being required to form his own judgments. In some situations, however, "opinion" statements are material, which fact the court has recognized and in doing so has added to the confusion. If the court would merely state that under certain circumstances representations of opinion are material and therefore justify reliance and then define the circumstances it would greatly clarify the law. Instead it has chosen to interpret the rule literally and fit in the exceptions by classifying "opinion" statements which are material under the circumstances to be statements of "fact." Thus, although the rule is well settled, it is very difficult of application; when is a representation one of *mere opinion* and when is it one of *fact*?

One well-defined area in which a representation of opinion is held to be one of fact is the "state of mind" exception. A statement of opinion which the representor does not actually entertain is a misrepresentation of a state of mind which is a fact and the other elements of fraud being present is actionable.⁴⁹ In such cases it is the *existence of the opinion* which is being relied on.

In the area where it is the *existence of the subject matter as represented* that is being relied on the exception becomes confusing. The court does not follow any clear-cut rules delineating statements of fact from statements of opinion whenever the parties are on relatively the same mental and moral footing (there being no artifice or disparity in

⁴³ *Sweeney v. Sweeney*, 199 Wash. 135, 90 P.(2d) 716, 139 A.L.R. 847 (1939), *Rankin v. Burnham*, 150 Wash. 615, 274 Pac. 98 (1929).

⁴⁴ *Penney v. Pederson*, 146 Wash. 31, 261 Pac. 636 (1927), *Williamson v. United Brotherhood of Carpenters and Joiners of America*, 12 Wn.(2d) 171, 120 P.(2d) 833 (1942), *Andrews v. Standard Lumber Co.*, 2 Wn.(2d) 294, 97 P.(2d) 1062 (1940), *Jewell v. Shell Oil Co.*, 172 Wash. 603, 21 P.(2d) 243 (1933).

⁴⁵ *Prest v. Adams*, 142 Wash. 111, 252 Pac. 686 (1927).

⁴⁶ *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613 (1898), *but see Horowitz v. Kuehl*, 117 Wash. 16, 18, 200 Pac. 570, 571 (1921) where the court said "False representations as to value of a thing sold, when made with intent to deceive and do deceive, the purchaser to his injury, are actionable."

⁴⁷ *Jones v. Reynolds*, 45 Wash. 371, 88 Pac. 577 (1907).

⁴⁸ *Biel v. Tolsma*, 94 Wash. 104, 161 Pac. 1047 (1917), *Getty v. Jett Ross Mines Inc.*, 23 Wn.(2d) 45, 159 P.(2d) 379 (1945) (second-hand dragline shovel represented to be "in good shape" and a "pretty fair old machine"), *Smith v. Bolster*, 70 Wash. 1, 125 Pac. 1022 (1912) (second-hand auto represented to be "in first class condition").

⁴⁹ *Kritzer v. Moffat*, 136 Wash. 410, 240 Pac. 355, 44 A.L.R. 681 (1925), *Lovell v. Dotson*, 128 Wash. 669, 223 Pac. 1061 (1924), *Hewett v. Dole*, 69 Wash. 163, 124 Pac. 374 (1912).

capacity involved). Instead it tends to base its decisions on the "circumstances of the case" in holding particular "opinion" representations to be statements of fact.⁵⁰ The court does, however, follow definite principles; it finds statements to be *fact* whenever any of the elements denying *caveat emptor* in the clear-cut misrepresentation of fact cases are present. It finds reliance justifiable when there is no knowledge on the part of the representee of the factual basis of the representation and the vendor has special *knowledge*⁵¹ of such which would appraise him of the fact that his representation is false. The ultimate rule appears to be that unless a statement is patently one of opinion a person can justifiably rely on the existence of the subject matter as represented where he has no knowledge of the factual basis of the opinion.

SYNTHESIS

Caveat emptor is the exception rather than the rule. The vendee is not required to make an investigation of his own in order to justify reliance unless he has received warning, actual or constructive, that there is some reason for him to investigate before relying on the existence of matters as represented by the vendor. If the vendee knows or has received a clue that would lead him to believe that a statement of fact is false, or if he knows that a statement is merely an expression of judgment, the rule is clear; he must investigate unless artifice is used to preclude him from investigating. It is in the cases where the warning and knowledge are implied by the court that the difficulty arises.

Whether or not the court will charge the vendee with knowledge of the falsity of the statements depends upon whether or not he has used the care of the "ordinarily prudent man." The representee satisfies the test of ordinary prudence in whatever investigation he makes, or fails to

⁵⁰ *Value* - Horowitz v. Kuehl, 117 Wash. 16, 200 Pac. 570 (1921). *Quality* - Smith v. Fletcher, 102 Wash. 218, 173 Pac. 636 (1918), Dixon v. MacGillivray, 29 Wn.(2d) 30, 185 P.(2d) 109 (1947), Freeman v. Gloyd, 43 Wash. 607, 86 Pac. 1051 (1906), Algee v. Hillman, 12 Wn.(2d) 672, 123 P.(2d) 332 (1942) (quantity of land). *Law* - Hoptowit v. Brown, 115 Wash. 661, 198 Pac. 30 (1921), Hobson v. Union Oil Co., 187 Wash. 1, 59 P.(2d) 929 (1936), Westcott v. Wood, 122 Wash. 596, 212 Pac. 144 (1922), and Kelly v. Merritt, 111 Wash. 426, 191 Pac. 404 (1920) (ownership). *Future events* - Holcomb & Hoxe Mfg. Co. v. Auto Inter. Co., 140 Wash. 581, 250 Pac. 34, 51 A.L.R. 39 (1926) (future profits), Horowitz v. Kuehl, 117 Wash. 16, 200 Pac. 570 (1921). *Promissory statements* - Cases cited note 49 *supra*. *Dealer's talk* - Weller v. Advance-Rumely Thresher Co., 160 Wash. 510, 295 Pac. 482 (1931), *cf.* Sova v. First National Bank of Ferndale, 18 Wn.(2d) 88, 138 P.(2d) 181 (1943).

⁵¹ See Jacquot v. Farmer's Straw Gas Producer Co., 140 Wash. 482, 249 Pac. 984 (1926), Weller v. Advance-Rumely Thresher Co., *supra* note 50, and compare with Webster v. Romano Eng. Corp. 178 Wash. 118, 122, 34 P.(2d) 428 where the court held similar representations to be "dealer's talk" when based on a hypothetical, distinguishing the *Weller* case.

make, if he does not have equal facility to determine the truth or falsity of the facts constituting the basis of the representation, whether it be one of "fact" or "opinion." Equal facility means present equal opportunity to discover the fault and does not entail any separate investigation. The fundamental basis of all the variations of the requirements satisfying justifiable reliance is that a person can rely on the veracity of his representor unless he knows, or should know, that he is a liar.

The above rules are all subject to the condition that the representation is not so fantastic that the court will consider the statement, as such, to be the warning signal. It must be remembered, however, that the "ordinarily prudent man" is measured by the capacities of the particular vendee involved; was this vendee, with his mental and physical powers and his knowledge or lack of knowledge of the subject matter, as prudent as could be expected of others of his same capacity?⁵² What may be fantastic to one person may seem perfectly reasonable to another.

CONCLUSION

The holding in the *Haugen* case may be distinguishable from the body of decisions declaring that there is no duty to investigate a matter of public record⁵³ on the ground that those cases dealt with verbal misrepresentations, whereas the holding in the instant case is restricted to cases of nondisclosure of a material fact. Even so it is still in conflict with previously declared rules. At page 391 of the opinion the court quotes and adopts the following rule: "It will thus be seen that the duty to speak does sometimes arise when the parties are dealing at arm's length. That duty arises where the *facts are peculiarly within the knowledge of one person and could not be readily obtained by the other*,⁵⁴ or where, by the lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent. However, a party cannot be permitted to say that he was taken advantage of, if he had means of acquiring the information, or if, because of his business experience or his prior dealings with the other, he should have acquired further information before he acted."

This quotation is from *Oates v. Taylor*,⁵⁵ a case which is in accord with all previously announced rules, both on its facts and on its law⁵⁶

⁵² See note 26 *supra*.

⁵³ See notes 27-29 *supra*.

⁵⁴ Author's italics.

⁵⁵ 31 Wn.(2d) 898, 199 P.(2d) 924 (1948).

⁵⁶ Appellant was a contractor employed by a corporation building respondent's

The rule is an extension of the principles the court uses to find reliance justifiable where there has been a verbal misrepresentation to cases of misrepresentation by nondisclosure. It is a further limitation, not recognized by most jurisdictions, on *caveat emptor*⁵⁷ The only qualification on the rule is the well recognized one that reliance is not justifiable where one has received warning that a material fact, not mentioned by his adversary, did exist. Applied to *Haugen v. Neiswonger* the rule should lead to the decision that the vendor had a duty to disclose the existence of any matter affecting title because such matter was a fact within his peculiar knowledge and not readily ascertainable.

The contrary result is reached in the *Haugen* case where the court entirely overlooks the statement of the general rule which appears in the first sentence of the quotation. The holding that it is incumbent upon a "prudent business man" to search the public records to discover any nondisclosure of a material fact is thus at least a modification of the *Oates* rule; however, other factors in the case could lead to the conclusion that the rule embraces more than cases of nondisclosure.

The court's treatment of the case as one of nondisclosure is in itself a paradox. The encumbrance involved was the subject matter of an express covenant in the partnership agreement, yet the court says that the appellant was misled by the respondent's failure to disclose the existence of the chattel mortgage. The Washington court has never ruled on the proposition of whether a misrepresentation in the form of a warranty can be the subject matter of an action in rescission for fraud or in deceit for damages, but there would be no reason to deny the injured party the right to treat it as he would any other misrepresentation. In

house and had requested and received an advance on the contract price from the respondent on behalf of the corporation. The corporation failed and the respondent was forced to pay more for his house than he had contracted for. He sued for damages on the ground that the appellant's failure to disclose the imminent insolvency of the corporation when he applied for the advance constituted actionable fraud. The facts showed that at a previous date the respondent had discovered other members of the corporation making false statements in an attempt to get \$2,500 from him before it was due under the contract. Furthermore, at the time of the transaction in issue the appellant had told the respondent that the corporation could not continue work on his house unless he advanced it the money in order to meet a materials bill. The court held that there had been no reliance on the part of the respondent on the solvency of the corporation and found that he had merely been taking a chance that his house would be finished at an early date and reversed the decision of the trial court.

⁵⁷ PROSSER, *op. cit. supra* note 7, at 724 states that "there is a rather uncertain tendency on the part of some courts to find a duty of disclosure in cases where the defendant has special knowledge, or special means of knowledge, not open to the plaintiff, and it is understood that the plaintiff is expecting to be given full information. Thus far such cases for the most part have involved defects in title with respect to land or chattels sold by the defendant, where the plaintiff has acted upon the reasonable assumption that such conditions do not exist."

jurisdictions where the problem has arisen it has been held that, the other elements of fraud being present, such a representation can be made the basis of an action for misrepresentation,⁵⁸ and the vendee can join such with an action for breach of warranty, the remedies being concurrent.⁵⁹ On its facts the case would seem to hold that even in cases of verbal misrepresentation a "prudent businessman" cannot rely on any representation the subject matter of which can be found in the public records regardless of the fact that he has received no warning that the statement is false.

Furthermore, the language of the opinion applies to verbal misrepresentations as well as to those of nondisclosure. The court states that "Under the circumstances, he had no right to rely upon the *representations*⁶⁰ or lack of representations of respondent."⁶¹ The reasoning of the court leads one to believe that the important element in the case is the "circumstances" rather than the "lack of representation" and that under the same circumstances the rule would apply to an actual representation. The opinion speaks of "hard bargains" and lays stress on the business acumen of the vendee and on the fact that this was an arm's length transaction. The court quotes a passage from *Hurley v. Lindsay*⁶² in support of the proposition that where parties deal at arm's length there must be a strong case to justify reliance. If the rule of the principal case is restricted to misrepresentation by *nondisclosure*, the quotation is not in point because that case deals with a *verbal* misrepresentation.⁶³

The only clear rule which emerges is the unfortunate one that parties negotiating a partnership agreement are dealing at arm's length.⁶⁴ Be-

⁵⁸ *Potter v. Crawford*, 106 Vt. 517, 175 A. 229 (1934), *Oelwein Chemical Co. v. Baker*, 204 Iowa 66, 214 N. W. 595 (1927).

⁵⁹ *L. C. James Motor Co. v. Wetmore*, 36 Ariz. 382, 286 Pac. 180 (1930), *Tallant v. Fox*, 24 Tenn. App. 96, 141 S. W. (2d) 485 (1940).

⁶⁰ Author's italics.

⁶¹ Page 390 of the opinion.

⁶² 105 Wash. 559, 178 Pac. 626 (1919).

⁶³ The citation is also not in point if it is meant to stress the duty to investigate, in the *Hurley* case the court held that the vendees had made their own thorough inspection and did not rely on the representations but on their own judgment.

⁶⁴ "There is no stronger fiduciary relation known to the law than that of a copartnership," *Salhunger v. Salhunger*, 56 Wash. 134, 137, 105 Pac. 236, 237 (1909). The weight of authority in both the United States and in England also accepts the rule that the absolute good faith required of actual partners applies equally to those negotiating for a partnership, but between whom the relation does not as yet exist. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP § 232 (7th ed. 1881), ROWLEY, THE MODERN LAW OF PARTNERSHIP 450 (1916) and the cases collected in 47 C.J. § 51 n. 4, 660 and the cases collected in LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP 379, 392 n. 99 (10th ed. 1935) (England). Previous to the decision in the *Haugen* case only two jurisdictions, Minnesota, *Walker v. Patterson*, 166 Minn. 215, 208 N. W.

yond this it is impossible to presently determine how far we have retrogressed into *caveat emptor*. What are the limitations on the holding that an experienced businessman is required to investigate the public records in order to meet the test of ordinary prudence even though he has been given no reason to doubt the truth of any statements made by his vendor? Does it apply to (1) all misrepresentations, or to (2) misrepresentations by nondisclosure only, or (3) will it be limited to the facts of the particular case?⁶⁵ The answer can only be found in a future decision of the court, and until the court does define the extent of the holding the case will make the position of a vendee a difficult one. That it will be limited to either number (2) or (3) of the above-listed possibilities is an almost inescapable conclusion, modern business could not function if the *prudent businessman* were required to investigate chattel mortgage and conditional sales records, mechanics' lien records, judgment records, and all the other various and sundry records in order to be able to rely on the *veracity* of his vendor.

3, 7 (1926), and New Jersey, *Uhler v. Semple*, 20 N. J. Eq. 288 (1869) followed the rule that *caveat emptor* is applicable where the parties contemplate forming a partnership, and that the duty of utmost good faith does not arise till the partnership is actually formed, Washington is now the third.

This decision seems inconsistent with former decisions of the court imposing a confidential relationship, in cases dealing with misrepresentation, upon parties contemplating alliances which, when consummated, would fall far short of the fiduciary relationship of a consummated partnership. The decisive factor in allowing the vendee to rely on a misrepresentation of value in *Kohl v. Taylor*, 62 Wash. 678, 114 Pac. 874 (1911) was that the parties contemplated future business relations to grow out of the sale. Reliance upon a representation as to value was justifiable in *Kennah v. Huston*, 15 Wash. 275, 46 Pac. 236 (1896) because a confidential relationship exists between prospective co-purchasers. In *Gorrien v. Jamson*, 132 Wash. Dec. 13, 200 P.(2d) 488 (1948) the court stated that potential co-owners owed the duty to be frank and honest in their dealings. The principle underlying these decisions is that the parties are not negotiating a sale which when consummated will find them going their separate ways but are contemplating a sale which will lead them into mutual engagements in the future. This principle would be much more appropriate applied to a contemplated partnership than in the cases outlined, it seems inconsistent to apply *caveat emptor* and then ten minutes later when the partnership is consummated require the utmost good faith between the parties.

⁶⁵ The case can be distinguished on the ground that the trial court found that there was no misrepresentation. An examination of the briefs discloses that the trial court found that although the chattel mortgage was not satisfied of record until after the partnership agreement was concluded it had been satisfied in fact before the negotiations started. In such case the trial court's decision was perfectly proper; however, the Supreme Court does not mention this point and bases its decision entirely on grounds which assume that there was a misrepresentation.