method of calling the right to money payments a "profit," an approach which does not support its conclusion, and which by-passes the more troublesome problems raised by the unilateral severance of the benefit of a covenant to pay money from the ownership of the land.

---

Sales—Seller's Liability for False Statements of Comparison to Other Products—[North Carolina].—The plaintiff, a manufacturer of laundry machines, sold to the defendant laundry operator new laundry equipment. The defendant had been using an earlier model manufactured by the plaintiff. The contract of sale contained a disclaimer of warranties. As a defense to an action to recover the balance due on the purchase price the defendant asserted that the plaintiff's agent fraudulently induced him to purchase the machinery by representing that it was of superior and advanced design and could and would do the work in a better and more economical manner than the old machinery. The jury found that the agent's statements were false and that the contract was induced by fraud. Judgment was entered for the defendant. On appeal to the Supreme Court of North Carolina, held, that actionable fraud consisted of "misrepresentations of a subsisting fact," and that the agent's statements were of opinion only or, at best, mere comparison of the products. Judgment reversed, three judges dissenting. American Laundry Machinery Co. v. Skinner.¹

In an action on a sales contract the defense of fraud in the inducement of the contract cannot be avoided by reason of a disclaimer clause.² But the defense of fraud traditionally rests upon proof of misrepresentation of a material fact, and it is said that mere statements of opinion on the part of the seller are not a defense.³ The obvious difficulty of applying this yardstick to a given set of facts has been recognized by the courts,⁴ and it has been suggested that the liability of a seller for misrepresentations is more properly expressed in terms of justified reliance on the part of the buyer.⁵ It is especially difficult to draw the line between fact and opinion in those cases where the allegedly fraudulent representa-

¹ 34 S.E. 2d 190 (N.C., 1945).
² Vold, Sales § 151 (1931). In the principal case the defense of false warranty was denied by the court because the disclaimer clause in the contract excluded all "representations, agreements, promises or warranties relating to the subject matter of this contract other than those expressed herein." 34 S.E. 2d 190, 192 (N.C., 1945).
⁴ The majority in the principal case observed that, "Judicial precedents, hastily examined, appear to drag the subject back and forth across the line ... without much regard for the [fact-opinion] syllogism." 34 S.E. 2d 190, 193 (N.C., 1945); see Eastern States Petroleum Co., v. Universal Oil Products Co., 3 A. 2d 768, 775 (Del. Ch., 1939); Williams v. Fouche, 164 Ga. 311, 138 S.E. 580, 581 (1927).
⁵ See 2 Williston, Sales § 628b (2d ed., 1924); Vold, Sales § 119 at 376 (1931); note 17, infra, and accompanying text.
tion was a statement as to the comparative merits of two products. In the principal case the majority dismissed the seller's remarks as "mere comparisons" and as "merely promissory statements which cannot be held for factual misrepresentations." In other jurisdictions statements as to the comparative worth of goods have been held fraudulent when proved false. Assertions that one engine "would develop more power than" another; that one victrola "was better than" another; that certain stock was "as good as could be found"; or that a kerosene engine would "do just as good work" as the electric engine already in use, have been held to be statements of fact, and fraudulent when false. Similarly, statements that one piano was "as high or higher class," and that the "workmanship and tone quality were as good or better," than another, or that one farm was "more productive" than another, were held to be more than opinions. If the statements were intended to induce a purchase there is a growing unwillingness to allow them to be made without liability. A similar tendency to impose liability upon the seller appears in those cases where the false comparison is alleged to have been a warranty.

It is generally said that misrepresentations of value are not fraudulent. Vulcan Metals Co. v. Simmons Mfg. Co., 248 Fed. 853, 856 (C.C.A. 2d, 1918). For a similar rule in respect to warranties see Uniform Sales Act § 12. In part this is because the accuracy of a statement of value is not subject to exact measurement. The truth of representations that one product or machine is "better than" or "more economical than" another machine might be said to be so difficult to ascertain as to be similar in that respect to statements of value. On the other hand, the accuracy of assertions that a machine will meet certain specified standards may be more definitely ascertained, as, for example, where the statement is made that a heating plant would give heat of 70 degrees at a cost not exceeding $350. Bareham & McFarland v. Kane, 228 App. Div. 396, 240 N.Y. Supp. 123 (1930).


Conroy Piano Co. v. Pesch, 279 S.W. 226 (Mo. App., 1925).


Not all statements of comparison have been held fraudulent when false. Slide Mines v. Denver Equipment Co., 112 Colo. 285, 148 P. 2d 1009 (1944); Boston Consolidated Gas Co. v. Folsom, 237 Mass. 555, 130 N.E. 197 (1921); Mayo v. Latham, 159 Mich. 136, 123 N.W. 561 (1909); see note 23, infra.

In the principal case the agent testified that he meant the defendant to rely on his statements and that he made them for the purpose of inducing him to buy the machines. 34 S.E. 2d 190, 195 (N.C., 1945).

Swift & Co. v. Meekins, 179 N.C. 173, 102 S.E. 133 (1920) (statement that fertilizer was "as good as any on the market"); Winkler v. Patten, 57 Wis. 405, 15 N.W. 380 (1883) (statement that goods offered as "good bagging and gunnies" were "far superior to any Chicago and Milwaukee packing"); see Summers v. Provo Foundry Co., 18 Utah 126, 178 Pac. 916 (1919) (statement that a car would do "whatever any other super-six would do"); 2 Williston, Sales § 628 (2d ed., 1924). Contra: Michelin Tire Co. v. Schulz, 295 Pa. 140, 145 Atl. 67 (1929); Smith v. Bolster, 70 Wash. 1, 125 Pac. 1022 (1915).
Although the courts in the preceding cases continue to speak in terms of “fact” and “opinion,” it is apparent that the decisions rest upon the belief that the buyer was justified in relying upon statements made by a person who was in a position to know the relative qualities of the goods compared. The application of this “superior knowledge” test is, however, extremely uncertain.

Thus, a large and experienced construction firm may be as justified in relying upon a statement as to the merits of two Diesel engines, as is the widow who purchases stock because it is represented as being as good as any on the market. And it may be as reasonable to rely upon a comparison when made by a retailer as it would be if made by the manufacturer. The cases do indicate, nevertheless, that what might be regarded as the most common sort of “puffing” or “sellers’ talk”—boosting of one product over another—may be accepted under certain circumstances at its face value.

If sellers may be accountable for comparisons, the circumstances in the principal case should present the clearest illustration of justified reliance on the part of the buyer. The goods contrasted were manufactured by the seller.

The rigidity of this fact-and-opinion dichotomy has resulted in a continuous qualification of the rule. Thus it is a common practice to assert that, because of the seller’s superior knowledge, what might otherwise be a mere opinion becomes a statement of fact. See cases cited in notes 8–13, supra. It has been maintained that an opinion is a fact. See opinion of Judge L. Hand in Vulcan Metals Co. v. Simmons Mfg. Co., 248 Fed. 253, 256 (C.C.A. 2d, 1918). A decision that a particular assertion is an “opinion” merely indicates that the court does not believe the buyer was justified in relying upon the assertion. See 2 Williston, Sales § 628b (2d ed., 1924).

Since the basis of the seller’s liability in these cases is said to be his superior knowledge and the justifiable reliance of the buyer upon this knowledge, it might be expected that there would be evidence which would distinguish the circumstances from the customary assertions by a seller that his goods were superior to others. But the cases do not show that there were prior dealings between the parties or that an unusually close business relationship existed between the buyer and seller. In only one case was there evidence that the seller took great care to secure the buyer’s trust and confidence. Stonemets v. Head, 248 Mo. 243, 154 S.W. 108 (1913). The evidence justifying the buyer’s reliance in the cases where liability was imposed (notes 8–13, supra) was as meager as, if not more so than, the testimony offered by the purchaser in the present case.


But a buyer can easily check an assertion that the price of goods is lower than elsewhere, and should not rely upon such a statement, Mayo v. Latham, 159 Mich. 136, 125 N.W. 561 (1905); nor should a buyer rely upon a statement that certain machines are more efficient than others, if he is given an opportunity to test the machines himself, Slide Mines v. Denver Equipment Co., 112 Colo. 285, 148 P. 2d 1009 (1944).

Where the seller asserts that his goods are better than those produced or sold by another manufacturer or dealer, it seems doubtful whether his “superior knowledge” should be as significant as his rather patent aim to boost his own goods. The validity of the reasoning behind the superior knowledge test is more apparent where the seller is comparing goods, both
might reasonably expect that the assertions were based upon expert knowledge derived from the manufacturer's experience and research. Furthermore, the buyer could not readily discount the statements by inquiry of other sellers as he might do, were the goods which were depreciated manufactured by another seller. The parties had satisfactory business relations previous to this transaction, a fact which would tend to make the buyer less suspicious than if the parties were strangers. Currently a common inducement to purchase is the statement that post-war products are superior to pre-war models. It is believed that a stricter responsibility should be imposed upon sellers than is established by the principal case.2

Specific Performance—Option To Buy Land—Mistake of Ownership as a Defense—[Illinois].—By the terms of an option to buy land, the defendant bank agreed to convey by warranty deed a fee simple title to the plaintiff. In compliance with the requirements of the United States Farm Security Administration from whom the plaintiff wished to borrow part of the purchase price of the land the defendant also agreed to deliver to the plaintiff a title-insurance policy issued in favor of the government by an approved company in the amount of the purchase price of the property. The option agreement was recorded and the plaintiff occupied the land with the consent of the defendant. After the plaintiff had exercised the option, the defendant, upon application to a title-insurance company, was informed that a policy would not be issued unless half of the purchase price were put in escrow because the defendant held only a life estate and a contingent remainder in the property. The bank had relied upon its counsel's erroneous construction of a will under which its grantor had taken the land. When the plaintiff refused the bank's offer to convey the land by warranty deed but without a title-insurance policy, the bank conveyed the land by warranty deed to a third party. The plaintiff sued for specific performance, $1,500 damages, and vacation of the deed to the third party. The lower court refused to grant specific performance, but awarded the plaintiff $500 damages for breach of the contract. On appeal, held, the decree of the lower court is reversed and specific performance is ordered. Hardship does not excuse the vendor from performing. Smith v. Farmers' State Bank of Alto Pass.2

of which he manufactures. There would likewise be less reason to assume that the statements were sales talk when the seller is a dealer handling both products and able to profit by the sale of either product. Conroy Piano Co. v. Pesch, 279 S.W. 226 (Mo. App., 1925). 2

A stricter rule would be in line with a policy designed to discourage unnecessary buying during boom times. It is arguable that purchasers would be less justified in relying upon sellers' statements during periods of depression when economic pressures would prompt sellers to make exhorbitant claims as to the quality of goods.

1 The appellate court did not pass upon the plaintiff's request for damages.

2 390 Ill. 374, 61 N.E.2d 557 (1945).