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Fraud and Deceit—Rescission of Contract—Scienter as Element

The defendant, a real estate broker, induced the plaintiff to buy a stone veneer house by falsely representing it to be a genuine stone house, perfectly constructed. The plaintiff sued for damages and to rescind the contract. The jury found that the defendant had no knowledge of the falsity of his representations. *Held*, that defendant's want of scienter precludes a recovery on either count.¹

The English View

The law of England is settled that an action of deceit cannot be maintained unless the defendant had knowledge of the falsity of his representation, *i.e.*, unless the defendant was a conscious liar.² A particular mental attitude is the main essential of liability.³ But it is well established that for purposes of rescission this question is wholly immaterial.⁴ The rationale of this distinction is subject to exception. Both remedies are designed to put the parties back *in statu quo*,—generally and so far as money can do it, in the one case; specifically and exactly in the other. It is difficult to see why the victim of an innocent untruth should not be entitled to compensation, since he can get no greater damages than he would be entitled to if the action were for breach of warranty or contract. Furthermore, from the point of view of the representee, the injury to him is the same, whatever the motive of the representor was.⁵

The American Views

A majority of American jurisdictions follow the English law in both particulars,⁶ and the distinction has been defended by many legal writers.⁷ The equity rule, requiring no scienter for the purpose of rescission, is almost universally established,⁸ but there has been much

¹ *Ebbs v. Trust Co.*, 199 N. C. 242, 153 S. E. 858 (1930).

² *Derry v. Peek*, 14 App. Cas. 337 (1889).

³ *Jenks, On Negligence and Deceit in the Law of Torts* (1910) 26 L. Q. REV. 159, 166.

⁴ *Derry v. Peek*, *supra* note 2, 359; *Re Metropolitan Coal Consumers' Assn., Wainwright's Case*, 63 L. T. Rep. (N. S.) 427 (1890); BOWER, ACTIONABLE MISREPRESENTATION (1911) §250.

⁵ *Ibid.*, §§471, 472.

⁶ *Halsey v. Minn.-S. C. Land and Timber Co.*, 28 F. (2d) 720 (C. C. A. 4th, 1928).

⁷ 2 BLACK, RECISSION AND CANCELLATION (1916) §102. Distinct and separate theories. 2 LAWRENCE, EQUITY JURISPRUDENCE (1928) §842. In equity the emphasis shifts from wrongful act of defendant to injury to plaintiff. 2 POMEROY, EQUITY JURISPRUDENCE (4th ed., 1918) §885. Actual fraud in equity not necessarily immoral; also constructive fraud basis.

⁸ BLACK, *op. cit. supra* note 7, §102.

divergence and modification of the rule requiring scienter in an action of deceit.

A minority of the American courts have completely rejected the rule requiring conscious dishonesty as a basis for an action of deceit and permit a recovery against a defendant who had no knowledge of the falsity of his representation.⁹ These courts have applied the rule in equity to actions of deceit, thus making the legal and equitable conception of fraud identical.¹⁰ This is a rational and desirable result, and gives a logical consistency to the law governing misrepresentation.¹¹

Other jurisdictions have purported to follow the rule requiring scienter, but have imposed liability for misrepresentations made without knowledge of their falsity by such fictions as the imputation or conclusive presumption of knowledge.¹² While the result is desirable, the use of fictions as a legal technique is not.¹³

Negligence as a Test of Liability

The most recent development in the law of misrepresentation is tort liability for the negligent use of words. Words are a form of voluntary behavior, and there is no good reason why, by analogy, negligent words, as well as negligent deeds, should not be actionable if injury proximately results from them.¹⁴ In cases of misrepresentations, made without knowledge of their falsity, liability has quite properly been based upon general principles of negligence, including contributory negligence as a defense.¹⁵ This extension of the law of

⁹ Gulf Elect. Co. v. Fried, 218 Ala. 684, 119 So. 685 (1929); Becker v. McKinnie, 106 Kan. 426, 186 Pac. 496 (1920); Rosenberg v. Cyrowski, 227 Mich. 508, 198 N. W. 905 (1924), privity of contract between the parties required; Lundy v. Hazlett, 146 Miss. 499, 112 So. 591 (1927); Donelson v. Michelson, 104 Neb. 666, 178 S. W. 219 (1920); Bradley v. Fagula (Tex. Civ. App.) 25 S. W. (2d) 255 (1930); Hastings v. Bain, 151 Va. 976, 145 S. E. 735 (1928); Trust Co. v. Fletcher, 152 Va. 868, 148 S. E. 785 (1929), unjustly criticised in (1929) 16 VA. L. REV. 90, as applying the rule in equity to an action of deceit; McDaniel v. Crabtree, 143 Wash. 168, 254 Pac. 1091 (1927); Ohrmundt v. Spigelhoff, 175 Wis. 214, 184 N. W. 693 (1921).

¹⁰ (1929) 16 VA. L. REV. 90.

¹¹ Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415, 434: "Consideration should be given chiefly to two things: (1) logical consistency with itself in all parts of the law governing misrepresentation; (2) the inherent justice of the rule proposed."

¹² Fairfield Finance and Mfg. Co. v. Griffin, 144 Atl. 43 (Conn. 1928); Watson v. Jones, 41 Fla. 241, 25 So. 678 (1899); Williams v. Hume, 83 Ind. App. 608, 149 N. E. 355 (1925); Horton v. Tyree, 104 W. Va. 238, 139 S. E. 737 (1927).

¹³ GRAY, *NATURE AND SOURCES OF LAW* (2nd ed., 1927) 30, 35.

¹⁴ Smith, *Liability for Negligent Language* (1900) 14 HARV. L. REV. 187.

¹⁵ Weston v. Brown, 131 Atl. 141 (N. H. 1925); International Products Co. v. Erie R. R., 244 N. Y. 331, 155 N. E. 662 (1927); Note (1928) 28 COL. L.

negligence is inherently sound.¹⁶ In at least three states, this result may be reached under statutes providing that an action of deceit will lie for "the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true."¹⁷

There is an authoritative basis for such a holding in North Carolina. In an action for damages, recovery was allowed for negligent assurances that a message had been delivered, when in fact it had not been delivered. It was expressly conceded that there was no liability for failure to deliver the message in the particular case.¹⁸ It seems that this direct holding has never been followed.

The North Carolina Cases

North Carolina has never drawn the well established distinction, discussed above, between actions at law for deceit and suits in equity for rescission, as to the requirement of scienter. In both, the rule requiring that the misrepresentations be made with knowledge of their falsity has been followed.¹⁹ Although there are general statements that scienter and intent to deceive are essential elements of fraud,²⁰ it is well recognized that it is not always necessary for the establishment of actionable fraud that a false representation should be knowingly made. These cases fall in the following classes: (1) Where reckless or positive assertions are made by one in a position to know, and expected to know, to one who is not in an equal position with reference to the misrepresentation, the one having a duty to investigate and the other having reasonable grounds for reliance.²¹

REV. 216; *Courteen Seed Co. v. Hong Kong and Shanghai Banking Corp.*, 245 N. Y. 377, 157 N. E. 272 (1927); (1927) 41 HARV. L. REV. 105.

¹⁶ Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty* (1929) 42 HARV. L. REV. 733.

¹⁷ MONT. REV. CODE: (Choate, 1921) §7575; N. D. COMP. LAWS ANN. (1913) §5944; S. D. REV. CODE (1919) §1293; *Roper v. Noel*, 32 S. D. 405, 143 N. W. 130 (1913), construing statute. Question is whether defendant had reasonable ground for making representation.

¹⁸ *Laudie v. Tele. Co.*, 126 N. C. 431, 35 S. E. 810 (1900).

¹⁹ *Tarault v. Seip*, 158 N. C. 363, 74 S. E. 3 (1912) (Allen, J., in dissenting opinion makes plea for the distinction); *Bell v. Harrison*, 179 N. C. 190, 102 S. E. 200 (1920); *Ebbs v. Trust Co.*, *supra* note 1; *Hinsdale v. Phillips*, 199 N. C. 563 (1930) (No rescission for promissory misrepresentations honestly made).

²⁰ *Ebbs v. Trust Co.*, *supra* note 1.

²¹ *Whitehurst v. Insurance Co.*, 149 N. C. 273, 62 S. E. 1067 (1908) (insurance agent's statements regarding policy to an illiterate person); *Case Threshing Mach. Co. v. Feezer*, 152 N. C. 516, 67 S. E. 1004 (1910) (statements made by agent of manufacturer); *Briggs v. Insurance Co.*, 155 N. C. 73, 70 S. E. 1068 (1911) (unequal position); *Unitype Co. v. Ashcraft*, 155 N. C. 230, 71 S. E. 61 (1911) (statements by inventor); *Pate v. Blades*, 163 N. C. 267, 79 S. E. 608 (1913) (unequal position); *Bell v. Harrison*, *supra* note 19 (con-

(2) Where false statements are published by the directors as to the condition of their bank, a duty to speak the truth is imposed.²²

Conclusion

In the principal case, the defendant volunteered positive assertions of material facts, susceptible of knowledge, with the intention that the plaintiff act upon them. He knew neither the falsity nor the truth of his statements. Modern artificial constructions defy detection by the inexpert examiner. The defendant was a real estate broker, an expert, while the plaintiff was a mere purchaser of a home. The defendant was in position to know, and the plaintiff had reasonable grounds to rely upon the statements of the defendant as importing verity. It is submitted that under the North Carolina decisions, liability should have been imposed.²³ If the North Carolina decisions are to be so restricted, then the requirement of scienter should be abolished completely; or, alternatively, liability should be determined according to the general principles of negligence, for which, our court has a precedent in its own decisions.

J. GLENN EDWARDS.

Husband and Wife—Torts—Right of Wife to Sue Husband for Negligent Injury

Under married women statutes¹ permitting married women to hold all their property of every description for their separate use as though they were unmarried and permitting them to sue and be sued as though unmarried, it was held, in an action for personal injury from the negligent driving of an automobile, that a wife could not recover from her husband though the action had been started before the marriage.²

This would be the result at common law,³ since on marriage the woman's choses in action may be reduced to possession by the husband (fiducial relationship); *Evans v. Davis*, 186 N. C. 41, 118 S. E. 845 (1923); *Corley Co. v. Griggs*, 192 N. C. 171, 134 S. E. 406 (1926) (scienter not necessary in all cases). But *cf.* *Peyton v. Griffin*, 195 N. C. 685, 143 S. E. 525 (1925) (no positive assertion of knowledge); (1928) 7 N. C. L. REV. 90, as to what constitutes reasonable reliance.

²² *Tate v. Bates*, 118 N. C. 287, 24 S. E. 482 (1896) (knowledge presumed by fiction); *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (1896); *Houston v. Thornton*, 122 N. C. 265, 29 S. E. 827 (1898) (duty to speak truth imposed).

²³ *Supra* note 21.

¹ D. C. CODE (1924) §§1154, 1155.

² *Spector v. Weisman*, 40 F. (2d) 792 (Ct. or App. D. C. 1930).

³ *Peters v. Peters*, 42 Iowa 182 (1875); *Phillips v. Barnet*, 1 Q. B. D. 436 (1876); *Abbott v. Abbott*, 67 Me. 309 (1877).