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QUASI-CONTRACTS-RECISSION-LIABILITY AND REMEDIES FOR INNOCENT MISREPRESENTATION

Bruce L. Moore S.Ed.
University of Michigan Law School

QUASI-CONTRACTS—RECISSION—LIABILITY AND REMEDIES FOR INNOCENT MISREPRESENTATION*—A number of courts and most writers recognize the existence of three types of misrepresentation. One type is described as intentional, a second type as negligent, and a third

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type as innocent.[1] An innocent misrepresentation may be defined as one believed to be true and made without negligence, but false in fact.

Any number of cases might be chosen to initiate a discussion of innocent misrepresentation. *E. & F. Construction Co. v. Town of Stamford*[2] indicates one of the problems frequently encountered and discloses one solution thereto. Plaintiff contracted with defendant to erect a school building and make the necessary excavations therefor. In submitting its bid, plaintiff relied upon plans and specifications furnished by defendant showing the nature of subsurface conditions and the amount of rock which would be encountered. In excavating for the building plaintiff encountered more rock than was represented. Plaintiff completed the work, however, and after its demand for additional compensation was refused, brought an action to recover damages for the extra expense involved in the excavation of the rock. Plaintiff did not label its action as either contract or tort, nor did it allege that the representations upon which reliance was placed were intentionally or knowingly false. Defendant contended, *inter alia*, that the action was essentially for deceit, and that the law was well settled that recovery of damages in deceit was dependent upon proof of an intentional misrepresentation.[3] To this contention, the court answered that plaintiff need not label its action as tort, and that it was entitled to redress in an action for damages for its loss due to defendant's misrepresentation, equally with its right, if it had elected, to rescind the contract. It would be unjust for a party to a contract who had made misrepresentations, even innocently, which concerned the subject matter of the contract and induced the other party to enter into it, to retain the fruits of a bargain induced by such misrepresentations. To avoid the obstacle of the requirements of the deceit action, the court held that the statement as to the nature of the subsoil was in the nature of a warranty, and that the plaintiff can recover under the contract as for a breach of warranty.

The *Stamford* case points up the difficulty encountered in most jurisdictions in seeking damages for an innocent misrepresentation. Historically, the action in which damages might be obtained for misrepresentation was the action of deceit.[4] The requirements for this action, as they are customarily stated, preclude its use in most cases of innocent misrepresentation. Thus, in the *Stamford* case, the court felt compelled to predicate the relief granted on another theory.

[1] Many courts make no distinction between negligent and innocent misrepresentation. The distinction is that a negligent misrepresentation may be honestly believed to be true, but is made without due care in ascertaining the truth.

[2] 114 Conn. 250, 158 A. 551 (1932).

[3] Connecticut courts had held in deceit actions substantially as contended.

[4] PROSSER, TORTS, § 85 (1941).

The importance of the form of action and the remedy sought is illustrated in the New York case of *Seneca Wire and Manufacturing Co. v. A. B. Leach and Co.*[5] Plaintiff bought securities relying upon a false representation of defendant. On discovery of the misrepresentation, plaintiff sought to rescind and brought an action at law to get its money back. In granting relief, the court held that an innocent misrepresentation was sufficient for rescission and restitution at law, and that plaintiff need not prove a willfully false misrepresentation. The court stated, however, that had the plaintiff brought an action for damages for deceit, proof of willful and fraudulent misrepresentation, knowingly made, would have been required.

These cases indicate that an inquiry into liability for innocent misrepresentation in terms of substantive elements of liability will encounter difficulty. It is generally inaccurate to say that on a given state of facts a plaintiff who has relied upon an innocent misrepresentation and suffered damage thereby can obtain relief without regard to the form of action and remedy sought. If the plaintiff pursues one type of remedy he may succeed, whereas if he seeks another remedy he may be denied relief. The confusion resulting from this apparent emphasis upon the form of action rather than the substantive question of liability has been criticized by a number of legal writers.[6] Even within the same jurisdiction there is often confusion and contradiction in the cases.[7]

In terms of policy, should there be liability for innocent misrepresentation? If liability is imposed, it is necessarily a form of strict liability, for an innocent misrepresentation is by hypothesis one made without fault. On the other hand, the injury suffered by the party relying upon the misrepresentation is just as great whether the misrepresentation be innocent or intentional. Neither tort nor contract law is particularly helpful in the search for a basis of liability. Innocent misrepresentation is somewhere between, and liability cannot be predicated either upon fault or upon agreement.

Professor Williston states that the real issue in these cases is essentially this: When a defendant has induced another to act by representa-

[5] 247 N.Y. 1, 159 N.E. 700 (1928).

[6] Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 (1911): "It is common enough in our law to find that several parts of it which have grown up with little regard to each other have nevertheless logical and intimate connection, and that the doctrines laid down in one set of cases are hardly reconcilable with those established in others. . . . The law governing misrepresentation furnishes a striking instance of the truth of what has been said." See also, Bohlen, "Misrepresentation as Deceit, Negligence, or Warranty," 42 HARV. L. REV. 733 (1929); PROSSER, TORTS, § 85 (1941).

[7] As an example of this confusion, see the review of Texas cases in Miller, "Innocent Misrepresentation as the Basis of an Action for Deceit," 6 TEX. L. REV. 151 (1928).

tions false in fact though not dishonestly made, and damage has directly resulted from the action taken, who should bear the loss? [8] This question is fundamental but certainly not easy to answer. No one has argued that there should be liability for innocent misrepresentation in all cases, for there are instances in which policy considerations would make such a rule undesirable. Thus, credit agencies which furnish information relative to the character, credit, and pecuniary responsibility of a business man would be unduly restricted in the furnishing of information if held strictly liable for the truth of the information furnished. On the other hand, there may be instances in which strict liability should be imposed. For example, when a vendor of land makes representations concerning his own land there seems to be agreement that the vendor should be strictly liable for his representations.[9] The *Stamford* case indicates that there should be liability for false statements upon which contractors base their bids.[10]

A number of writers have attempted to analyze the question in terms of substance and policy and to state a basis of liability for innocent misrepresentation. Williston, after criticizing the tendency of courts to state liability in terms of the various forms of action, suggests a uniform rule of liability thus:

> "If a man makes a statement in regard to a matter upon which his hearer may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as part of a business transaction, or to induce action from which the speaker expects to gain an advantage, he should be held liable for his misstatement." [11]

In more general terms, Harper and McNeely[12] suggest that liability for innocent misrepresentation should be confined to instances in which business ethics justify complete reliance upon the accuracy of representations, and to situations where the representor has peculiar

[8] Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 at 434 (1911). Williston's views are largely republished in 5 WILLISTON, CONTRACTS, rev. ed., § 1500 et seq. (1937).

[9] See Gunther v. Ullrich, 82 Wis. 222, 52 N.W. 88 (1892); Moulton v. Norton, 184 Minn. 343, 238 N.W. 686 (1931); Davis v. Central Land Co., 162 Iowa 269, 143 N.W. 1073 (1913).

[10] Supra, note 2. Allowing damages on very similar fact situations without regard to whether the misrepresentation is intentional or innocent: United States v. Atlantic Dredging Co., 253 U.S. 1, 40 S.Ct. 423 (1920); United States v. Smith, 256 U.S. 11, 41 S.Ct. 413 (1921).

[11] Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 at 437 (1911). Cited with approval in the Stamford case, 114 Conn. 250, 158 A. 551 (1932).

[12] Harper and McNeely, "A Synthesis of the Law of Misrepresentation," 22 MINN. L. REV. 939 (1938).

and almost exclusive means of knowledge of the facts, or where the manner of giving the information constitutes such an assumption of complete knowledge that the psychological effect upon the other is calculated to divert that self-protective investigation which would normally be made. Professor Bohlen[13] argues that liability should be treated as an extension of the law of warranty, and, inferentially, that strict liability should be imposed where the representation is similar to a warranty.

It would be helpful if the case law stated a rule of liability in some such terms as these writers have. It is true that in some instances the foregoing considerations have influenced the decisions, but taken as a whole, the cases disclose no substantive rules of liability cutting across the different remedies.[14] In the *Seneca Wire* case,[15] for example, it was decided that defendant should be liable for an innocent misrepresentation if the plaintiff asked for rescission and restitution, but not if his action was for damages based on deceit. It might be suggested that an award of damages is too severe a penalty, whereas some other form of relief is not, but the cases do not indicate that this is the reason for reluctance to allow the action of deceit. Surely, in a case involving securities of fluctuating value the award of restitution may be as severe a remedy as an award of damages. A more plausible explanation is that the law of misrepresentation has been shaped by the form of action and the remedy, with different rules determining liability for each remedy. For this reason, analysis of the present state of the law governing liability for innocent misrepresentation would seem more accurate if made in terms of the various remedies which may be available.

1. *Legal Remedies*

a. *Action for damages—deceit.* Modern statements of the elements of deceit are traceable in large measure to the English case *Derry v. Peek*,[16] in which the House of Lords identified the deceit action with intentional misrepresentation. For deceit, it was said, there must be proof "that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be

[13] Bohlen, "Misrepresentation as Deceit, Negligence, or Warranty," 42 HARV. L. REV. 733 (1929).

[14] The most thorough attempt to explain liability in terms of substantive rules and policy considerations is that made by Harper and McNeely, note 12, supra, whose views are substantially as set forth in the text. But see Carpenter, "Responsibility for Intentional, Negligent and Innocent Misrepresentation," 9 ORE. L. REV. 413 (1930), who would explain most cases of innocent misrepresentation as really cases of warranty with this as the basis of liability. See also, note, 81 UNIV. PA. L. REV. 435 (1933), suggesting that most of the cases speaking of liability for innocent misrepresentation rest, factually, upon negligence.

[15] Note 5, supra.

[16] 14 A.C. 337 (1889).

true or false."[17] This decision excluded from the action of deceit a misrepresentation that is innocent or negligent. The element of intent which characterizes an intentional misrepresentation has been labelled "scienter." It is often stated as a general rule that scienter must be established to maintain an action of deceit for damages, and, undoubtedly, the majority of American courts purport to accept this rule.[18] The interpretations which have been given to the meaning of "scienter" and the variations of the rule of *Derry v. Peek* are, however, of significance. Scienter, in a strict sense, connotes actual knowledge of the falsity of a representation. Very few recent cases are found however, which restrict the action of deceit and the remedy of damages to situations disclosing actual knowledge of falsity. In following the rule of *Derry v. Peek*, most American courts regard the absence of honest belief in the truth of a representation as the equivalent of actual knowledge,[19] and most allow an action of deceit for damages for statements made recklessly.[20] The latter formula has been liberalized in many jurisdictions so as to allow an action of deceit for misrepresentations which may be described as negligent but not reckless.[21] The opening of the deceit action to cases of negligent misrepresentation has provoked considerable controversy[22] and two states, New York[23] and New Hampshire,[24] have recognized liability in

[17] Lord Herschell, in Derry v. Peek, 14 A.C. 337 at 374 (1889).

[18] Tews v. Marg, 246 Wis. 245, 16 N.W. (2d) 795 (1944); Nash v. Normandy State Bank, (Mo. 1947) 201 S.W. (2d) 299; Cosby v. Asher, (Ga. App. 1947) 41 S.E. (2d) 793; 23 Am. Jur., Fraud and Deceit, §§ 116, 122; and see 3 TORTS RESTATEMENT, § 525 (1938).

[19] Griswold v. Gebbie, 126 Pa. 353, 17 A. 673 (1889); Shackett v. Bickford, 74 N.H. 57, 65 A. 252 (1906); PROSSER, TORTS, § 87 (1941); and see 3 TORTS RESTATEMENT, § 526 (b) (1938).

[20] Cooper v. Schlesinger, 111 U.S. 148, 4 S.Ct. 360 (1884); Automatic Truck Loader Corp. v. New York, (N.Y. Co. S.Ct. 1945) 57 N.Y.S. (2d) 295; Otis & Co. v. Grimes, 97 Colo. 219, 48 P. (2d) 788 (1935); 23 AM. JUR., Fraud and Deceit, § 128.

[21] Cf. Linscott v. Orient Ins. Co., 88 Me. 497, 34 A. 405 (1896); Trimble v. Reid, 97 Ky. 713, 31 S.W. 861 (1895). See Bohlen, "Misrepresentation as Deceit, Negligence, or Warranty," 42 HARV. L. REV. 733 (1929).

[22] For discussion of this problem, reference may be made to Smith, "Liability for Negligent Language," 14 HARV. L. REV. 184 (1900); Bohlen, "Misrepresentation as Deceit, Negligence or Warranty," 42 HARV. L. REV. 733 (1929); Bohlen, "Should Negligent Misrepresentations Be Treated as Negligence or Fraud?" 18 VA. L. REV. 703 (1932); Carpenter, "Responsibility for Intentional, Negligent and Innocent Misrepresentation," 24 ILL. L. REV. 749 (1930), reprinted in 9 ORE. L. REV. 413 (1930).

[23] Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922); International Products Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662 (1927). The New York cases are discussed in 31 COL. L. REV. 858 (1931).

[24] Cunningham v. Pease, 74 N.H. 435, 69 A. 120 (1908); Weston v. Brown, 82 N.H. 157, 131 A. 141 (1925).

damages for a negligent misrepresentation in an action for negligence as distinct from an action of deceit.

Another modification of the rule of *Derry v. Peek* is of particular interest because of its relation to innocent misrepresentations. In a considerable number of jurisdictions it is held that a defendant is liable in deceit for a positive assertion of fact as of his own knowledge.[25] A qualification is often added that the matter be susceptible of actual knowledge.[26] The theory behind this rule is that such positive statements are a misrepresentation of the extent of the speaker's knowledge.[27] Under this formula, liability in deceit has been extended to representations which are innocent insofar as intent and knowledge of falsity are involved. An honest belief in the truth of the statement is no defense,[28] and the courts usually purport to find scienter or its equivalent in these positive assertions. If the case can be brought within this formula, the likelihood is that liability in damages will be imposed.

Other variations of the rule of *Derry v. Peek* have also been employed to make inroads on the strict requirements of the action of deceit. In some instances the courts have imposed liability because the circumstances imposed a duty upon the representor to know the truth of his statements,[29] and it is sometimes held that one is liable if the facts were peculiarly within his knowledge.[30] In order to find scienter, some courts have resorted to presumptions of knowledge of falsity

[25] Braley v. Powers, 92 Me. 203, 42 A. 362 (1898); National Bank of Pawnee v. Hamilton, 202 Ill. App. 516 (1916); Osborn v. Holt, 92 W. Va. 410, 114 S.E. 801 (1922); Litchfield v. Hutchinson, 117 Mass. 195 (1875). Under this formula a statement is regarded as being as of defendant's own knowledge whenever it is a positive unqualified assertion of fact. See First Natl. Bank v. Hackett, 159 Wis. 113, 149 N.W. 703 (1914); Metropolitan Life Ins. Co. v. Becraft, 213 Ind. 378, 12 N.E. (2d) 952 (1938).

[26] Tucker v. White, 125 Mass. 344 (1878); National Bank of Pawnee v. Hamilton, 202 Ill. App. 516 (1916); Schlechter v. Felton, 134 Minn. 143, 158 N.W. 813 (1916).

[27] In Chatham Furnace Co. v. Moffatt, 147 Mass. 403 at 404, 18 N.E. 168 (1888), the court said: "The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not."

[28] Litchfield v. Hutchinson, 117 Mass. 195 (1875); Huntress v. Blodgett, 206 Mass. 318, 92 N.E. 427 (1910), in which the court said, at p. 324: "Due diligence to ascertain the truth in regard to statements made as matters of fact within one's own knowledge is not enough to relieve the maker of them of liability. . . ."

[29] In Diamond Cattle Co. v. Clark, 52 Wyo. 265, 74 P. (2d) 857 (1937), the court said that where there is a duty to speak the truth because of contract or the relation of the parties, knowledge of falsity, or scienter, is unnecessary. Disparity in access to the facts will often impose such a duty upon the representor. See Tott v. Duggan, 199 Iowa 238, 200 N.W. 411 (1925); Becker v. McKinnie, 106 Kan. 426, 186 P. 496 (1920); Palmer v. Goldberg, 128 Wis. 103, 107 N.W. 478 (1906).

[30] This is particularly true in cases of misrepresentation by a vendor of land, note 11, supra. In Davis v. Nuzum, 72 Wis. 439, 40 N.W. 497 (1888), the court

from the fact of falsity, and, as a practical matter, such presumptions are difficult to rebut.[31] In all these cases liability is imposed for an essentially innocent misrepresentation in an action of deceit. But these formulae are not consistently or uniformly employed, and it would seem questionable practice to rely thereon in seeking damages. It may be suggested, however, that these cases indicate a tendency to open the action of deceit, and if any trend is evident it is in this direction.

A minority of American courts have frankly held that an action for damages will lie for an admittedly innocent misrepresentation.[32] These courts have rejected the rule of *Derry v. Peek.* The limit of this rule of strict liability is not always precisely stated, but in Michigan[33] and Washington[34] liability is limited to those cases in which the representor directly benefits as a result of the reliance placed upon his false statements. These cases indicate that the benefit the speaker derives from his misrepresentation is regarded as unjust enrichment, and emphasis is sometimes given to the point that the injury to the other party is equally great whether the misrepresentation be intentional or innocent.[35] In a small number of states liability is imposed by statute, but a number of the statutes require that there be a contract between the

held that good faith of the vendor was not in issue when he misrepresented facts concerning his own land. Harper and McNeely, "A Synthesis of the Law of Misrepresentation," 22 MINN. L. REV. 939 (1938), emphasizes the importance of peculiar or unusual means of knowledge available to the misrepresentor as an important consideration in determining liability.

[31] In Watson v. Jones, 41 Fla. 241 at 254 (1899), the court said, "When it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know. For this reason the law conclusively presumes from the existence of these facts that defendant had actual knowledge of the falsity of his statement. . . ." See also, Lehigh Zinc & Iron Co. v. Bamford, 150 U.S. 665, 14 S.Ct. 219 (1893); Edwards v. Sergi, 137 Cal. App. 369, 30 P. (2d) 541 (1934); and 1 BLACK, RESCISSION AND CANCELLATION, 2d ed., § 104 (1929), and cases cited, note 58, therein.

[32] Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 148 S.E. 785 (1929); Holcomb v. Noble, 69 Mich. 396, 37 N.W. 497 (1888); Schlechter v. Felton, 134 Minn. 143, 158 N.W. 813 (1916); Jacquot v. Farmers' Straw Gas Producer Co., 140 Wash. 482, 249 P. 984 (1926). Nebraska law is questionable. In Paul v. Cameron, 127 Neb. 510, 256 N.W. 11 (1934), the court stated: "In this state we are committed to the view that in tort actions based on false representations, it is not necessary to prove scienter." Contra, Falkner v. Sacks Bros., (Neb. 1948) 30 N.W. (2d) 572. 33 A.L.R. 853 at 875 (1924).

[33] Rosenberg v. Cyrowski, 227 Mich. 508, 198 N.W. 905 (1924).

[34] First Natl. Bank of Enumclaw v. City of Pasco, 131 Wash. 28, 228 P. 838 (1924), holding that a third person not benefiting by the misrepresentation is not liable unless there is conscious knowledge of the misrepresentation or something equivalent.

[35] See Goodrich v. Waller, 314 Mich. 456, 22 N.W. (2d) 862 (1946); and Michigan cases cited in notes 32 and 33.

parties, and that the representation be made without reasonable grounds for believing the truth thereof.[36] In the latter type of statute, liability appears to be imposed for negligent rather than innocent misrepresentations.

b. *Action for breach of warranty.* In many instances a representation may be brought within the definition of a warranty. The law of warranty, as it has developed, is in contrast with the action of deceit since it involves strict liability. No inquiry is made as to whether the misrepresentation was intentional, negligent, or innocent. One reason for this is the fact that warranty has traditionally been associated with the existence of a contract between the parties, and is considered an ex contractu action rather than tort.[37] Most cases of warranty involve the sale of goods, but the term is also used to describe representations made in a limited number of other types of transactions, perhaps the most common being insurance contracts. The Uniform Sales Act defines an express warranty as "any affirmation of fact or any promise made by the seller relating to the goods . . . if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."[38] Obviously, the definition of warranty does not cover all misrepresentations made in the course of commercial transactions. As a matter of policy, however, it would seem that there are strong reasons for dispensing with the requirement of scienter in many commercial transactions which are very close to warranty. The *Stamford* case indicates a useful application of the concept of warranty to avoid the requirements of the deceit action. The case law, however, indicates very little tendency to expand the warranty action beyond the type of case with which it is traditionally associated.

An action for damages is, of course, not the only remedy for breach of warranty. Among other things, the buyer may set up the breach of warranty in diminution of the purchase price, or he may rescind the sale and secure restitution of whatever he has paid.[39]

c. *Estoppel.* The courts have never recognized estoppel as a cause of action in itself, nor is it often spoken of in terms of a remedy for misrepresentation. It is not a remedy in itself, but rather, the basis upon

[36] Ga. Code Ann. (1936) §§ 37-703 and 105-302; Ala. Code (1940) tit. 7, §§ 108-110. In Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 7575 (2) "Deceit" is defined as "2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true. . . ." See also, Cal. Civ. Code (Deering, 1941) § 1572; N.D. Rev. Code (1943) § 9-0308; S.D. Code (1939) § 10.0307.

[37] But see 5 WILLISTON, CONTRACTS, rev. ed., §§ 1503-1506 (1937), pointing out that warranty is not always based upon contract, and often is based upon tort.

[38] Uniform Sales Act, § 12, 1 U.L.A. 85 (1931).

[39] So provided in § 69, Uniform Sales Act, 1 U.L.A. 395 (1931).

which a number of different remedies may be predicated, and it is often the sole or main basis of an affirmative action. Equitable estoppel or estoppel in pais (as distinguished from estoppel by deed) is based upon equitable principles, but there is no longer any doubt that it may be enforced in a court of law as well as in equity. The doctrine of estoppel enables one who has relied on a misrepresentation to recover damages without resorting to an action for deceit by proceeding on the theory that the representation was true, and thus leave the misrepresentor without a defense to plaintiff's action. The theory of estoppel is that fraud or inequity would result if the misrepresentor were permitted to deny the truth of his representations upon which the other party has relied. For this reason, there are many cases in which the courts will enforce estoppel without inquiry as to whether the misrepresentation was intentional or innocent.[40] This is not to say that estoppel may always be relied upon as a basis for recovery of damages without a showing of fault in the representor, for because of the equitable character of estoppel, there may be instances, depending upon the interests involved or the relationship of the parties, where innocent misrepresentation will not alone suffice.[41]

The principal difficulty encountered in utilizing the estoppel doctrine as a basis for recovery of damages is that the facts do not come within a remedy to which estoppel is applicable. If the facts are such that estoppel may be relied upon, plaintiff may well recover for an innocent misrepresentation; if not, recovery may be precluded by the requirements of the deceit action. An often-cited example of a situation in which estoppel is useful is the case of a warehouseman who may be held liable in damages for his failure to deliver goods to one who has purchased goods relying upon the warehouseman's representation that he held goods belonging to the seller.[42] In such a case there is usually no inquiry as to whether the misrepresentation was intentional or innocent.

Seemingly, logical difficulties are encountered in allowing an affirmative action for innocent misrepresentation based on estoppel while denying relief if the action is in the form of deceit. Ewart's comment on this point is interesting:

[40] McLearn v. Hill, 276 Mass. 519, 177 N.E. 617 (1931); Goodwin Tile & Brick Co. v. DeVries, 234 Iowa 566, 13 N.W. (2d) 310 (1944); 5 WILLISTON, CONTRACTS, rev. ed., § 1508 (1937), and cases cited; EWART, PRINCIPLES OF ESTOPPEL 83-88 (1900). Some jurisdictions hold, however, that scienter or negligence is necessary when estoppel is invoked. See Eaton v. Wilkins, 163 Cal. 742, 127 P. 71 (1912); Bishop v. Minton, 112 N.C. 524, 17 S.E. 436 (1893).

[41] See discussion on this point by Carpenter, "Responsibility for Intentional, Negligent and Innocent Misrepresentation," 24 ILL. L. REV. 749 at 764-766 (1930).

[42] See 2 WILLISTON, SALES, 2d ed., § 418 et seq. (1924), and cases cited.

> "There seems to be no escape from the conclusion (while *Derry v. Peek* stands) that if the facts are stated naturally and in support of the real ground of complaint the plaintiff will be beaten; whereas he will succeed if he state the case artificially—asserting as his grievance that of which he cannot complain."[43]

Williston has argued that the law of misrepresentation as stated in the deceit cases is inconsistent with the law of warranty and estoppel, and that it will be difficult to keep them in separate compartments when law and equity are fused and pleading reduced to mere statement of the facts of the case.[44]

d. *Recission and restitution at law.* Where the relief sought by one who has relied to his detriment on an innocent misrepresentation is the return of his money or property, as distinguished from damages, it is clear that his action proceeds on a theory of rescission of the transaction. Rescission and restitution were adopted by courts of law from equity, and for that reason equitable principles govern the remedy. The theory behind this remedy is that it is unjust to allow one to retain benefits derived through his own misrepresentation. As a general rule, when this remedy is available in a legal action there is no requirement that scienter be established. A number of courts have emphasized the consideration that the injury to the relying party is just as great whether the misrepresentation be innocent or intentional.[45] It is not entirely clear how many jurisdictions allow rescission and restitution in a legal action, but many cases can be found in which this remedy is allowed when asserted affirmatively and by way of defense.[46] When the type of relief required for restitution is not complicated, and where rescission is asserted merely to avoid further performance of a contract, this remedy should be available in a legal action. The *Seneca Wire* case decided, for example, that where all plaintiff wanted was return of his

[43] EWART, PRINCIPLES OF ESTOPPEL 236 (1900).

[44] Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 (1911). But see Green, "Deceit," 16 VA. L. REV. 749 (1930). Green, while not opposing greater clarification of the law of misrepresentation, points out that the various formulae and remedies do make the law flexible and give a court a wide choice of theories in deciding each case.

[45] See, for example, Jacobson v. Chicago, M. & St. P. R. Co., 132 Minn. 181, 156 N.W. 251 (1916).

[46] Montgomery Door & Sash Co. v. Atlantic Lumber Co., 206 Mass. 144, 92 N.E. 71 (1910); Haebler v. Crawford, 258 N.Y. 130, 179 N.E. 319 (1932); Henry v. Kopf, 104 Conn. 73, 131 A. 412 (1925); cases cited 5 WILLISTON, CONTRACTS, rev. ed., § 1509, note 1 (1937). Accord, CONTRACTS RESTATEMENT, § 476, comment b (1932); RESTITUTION RESTATEMENT, §§ 9, 28, 55, comment (c) and illustrations 4, 5, 6 (1937). Rescission is allowed freely in cases involving release of a cause of action for personal injuries. See 48 A.L.R. 1462 at 1502 (1927), 50 L.R.A. (N.S.) 1091 (1914).

money, legal remedies were entirely appropriate. A few cases can be found which hold that where rescission is available at law, equity will not assume jurisdiction.[47] The converse also seems true, so that where rescission is not available at law, the legal remedy is inadequate and there is a basis for equity jurisdiction.[48]

e. *Innocent misrepresentation as a defense.* A defense to an action brought by the misrepresentor may take various forms. In some situations, estoppel may be relied upon. The same principles are here involved as when estoppel is used to obtain affirmative relief, and an innocent misrepresentation is usually an adequate basis for the use of estoppel defensively.[49] In an action for breach of contract, rescission may be asserted as a defense.[50] A number of courts, however, seemingly have not considered the different theories upon which innocent misrepresentation may be asserted as a defense, and whenever it has appeared have required proof of scienter.[51] Under modern codes of procedure which permit equitable defenses in actions at law rescission should be allowed as a defense, particularly when innocent misrepresentation is a ground for an affirmative action for restitution based upon rescission. Some courts, while allowing this defense, have required the defendant to act promptly and restore what he has received,[52] and have held that the defense is lost by any act affirming the transaction.[53] These, of course, are the customary requirements for an affirmative action for rescission and restitution. When innocent misrepresentation is asserted as the basis for a counterclaim, a different rule is often encountered. Many courts have required proof of scienter, regarding a counterclaim as nearly the equivalent of an affirmative action for damages, to be governed by the same rules.[54] Of course, where innocent misrepresentation will suffice for an affirmative action for damages,

[47] Schank v. Schuchman, 212 N.Y. 352, 106 N.E. 127 (1914).

[48] So held in Pickford v. Smith, 215 Iowa 1080, 247 N.W. 256 (1933).

[49] Note 41, supra.

[50] Standard Mfg. Co. v. Slot, 121 Wis. 14, 98 N.W. 923 (1904); Frenzel v. Miller, 37 Ind. 1 (1871). Often, the defense is allowed but the theory not clearly spelled out. See Bates v. Cashman, 230 Mass. 167, 119 N.E. 663 (1918); cf. Taylor v. Burr Printing Co., (C.C.A. 2d, 1928) 26 F. (2d) 331.

[51] Mitchell v. Deeds, 49 Ill. 416 (1867); Fivey v. Pa. R. Co., 67 N.J.L. 627, 52 A. 472 (1902). See the discussion and cases cited in BLACK, RESCISSION AND CANCELLATION, 2d ed., § 102 (1929); and 23 AM. JUR., Fraud and Deceit, § 135.

[52] Heaton v. Knowlton, 53 Ind. 357 (1876).

[53] Marks v. Stein, 61 Okla. 59, 160 P. 318 (1916); Bell v. Baker, 43 Minn. 86, 44 N.W. 676 (1890). See 1 BIGELOW, FRAUD 79 (1888); and PROSSER, TORTS, § 85, p. 714 (1941).

[54] See Gillespie v. Torrance, 25 N.Y. 306 (1862). Allowing counterclaim for innocent misrepresentation, see In re Construction Materials Corp., (D.C. Del. 1936) 18 F. Supp. 509. Cf. Mutual Savings L. Ins. Co. v. Brown, 245 Ala. 423, 17 S. (2d) 164 (1944).

there is no reason to deny the same relief when asserted in the form of a counterclaim.

2. Equitable Remedies

Relief in equity for misrepresentation is seldom made contingent upon proof of an intentional misrepresentation. Equity's approach has been to look more to the injury of the party who has relied to his detriment, and to the injustice of allowing the defendant to benefit by his own false statements, than to the degree of fault in the misrepresentor. This is not to suggest that an actual fraudulent intent is always immaterial, for it is often considered by the courts with other factors in determining whether equitable relief should be given.[55] Equity will, however, seldom deny relief solely because the misrepresentation was unintentional.

The basis of equitable jurisdiction in these cases is usually fraud or constructive fraud, terms sufficiently broad and ambiguous to cover innocent misrepresentation. It is frequently unimportant, however, whether this is to be considered fraud, because relief is often given on the theory of mutual mistake in which both parties believed the facts to be otherwise than they actually were. The distinction between mistake and misrepresentation as the basis for equitable relief is often not made clear by the courts.[56] Relief in these cases is given in accordance with equitable principles, and while innocent misrepresentation will not assure relief, the many cases in which equitable relief has been given clearly indicate that it will not be denied solely because plaintiff was unable to prove scienter.[57]

Equitable relief generally takes whatever form the situation calls for. A common remedy is rescission with a decree of cancellation or restitution, and it seems quite firmly established that these remedies are available for innocent misrepresentation.[58] This relief is subject to the customary requirements that plaintiff must do equity by restoring what he has received, unless excused by special circumstances, and must not pursue a course of conduct inconsistent with the relief de-

[55] McCLINTOCK, EQUITY, § 76, p. 136 (1936).

[56] As examples, see Winkelman v. Erwin, 333 Ill. 636, 165 N.E. 205 (1929); Pacific Mutual L. Ins. Co. v. Glaser, 245 Mo. 377, 150 S.W. 549 (1912); Knapp v. Fowler, 30 Hun. (37 N.Y. Supr. Ct.) 512 (1883).

[57] Bloomquist v. Farson, 222 N.Y. 375, 118 N.E. 855 (1918); Newton v. Tolles, 66 N.H. 136, 19 A. 1092 (1890). McCLINTOCK, EQUITY, § 76, cases cited note 7 (1936); 2 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 887 (1918); BLACK, RESCISSION AND CANCELLATION, 2d ed., § 102 (1929).

[58] Greenbaum v. Baywood Homes, (Queens Co. S.Ct. 1946) 62 N.Y.S. (2d) 545 (1946); Algee v. Hillman Inv. Co., 12 Wash. (2d) 672, 123 P. (2d) 332 (1942); Metropolitan L. Ins. Co. v. Babb, 128 N.J. Eq. 391, 16 A. (2d) 548 (1940); BLACK, RESCISSION AND CANCELLATION, 2d ed., § 106 (1929).

manded.[59] A problem of jurisdiction is sometimes presented where the availability of rescission at law affords an entirely adequate remedy,[60] and where innocent misrepresentation is a good defense to a suit on an instrument, conceivably cancellation in equity may be denied. Innocent misrepresentation is generally a good defense in equity, and in a suit for specific performance of a contract brought by the misrepresentor, it will bar relief.[61] There seems to be no reason why other equitable relief may not in appropriate cases take the form of reformation, imposition of a constructive trust, or subrogation to the claim of another.

This analysis of the various remedies which may be available to one who has sustained injury through reliance upon an innocent misrepresentation would indicate that difficulty will be encountered most often in an action at law for damages, and least often when equitable relief is sought. Care must be exercised in most jurisdictions in selecting the form of action and remedy. In many instances, however, the variety of formulae available to the judge within the confines of the deceit action will permit relief in the form of damages for innocent misrepresentation. It is difficult to discover any substantive rules of liability running through the remedies, but a sufficient variety of remedies does exist to make relief in one form or another usually available.

Bruce L. Moore, S.Ed.

[59] De Montague v. Bacharach, 181 Mass. 256, 63 N.E. 435 (1902); but many cases hold that tender of restitution prior to suit is unnecessary, see O'Neill v. Kunkle, 244 Mich. 653, 222 N.W. 110 (1928); Masters v. Van Wart, 125 Me. 402, 134 A. 539 (1926). *Re* inconsistent conduct, see In re Warner's Estate, 168 Cal. 771, 145 P. 504 (1914); Parsons v. McKinley, 56 Minn. 464, 57 N.W. 1134 (1894).

[60] Mackintosh v. Tracy, 4 Brewst. (Pa.) 59 (1868); note 47, supra.

[61] Wisherd v. Bollinger, 293 Ill. 357, 127 N.E. 657 (1920); McCLINTOCK, EQUITY, § 72 (1936); and see CONTRACTS RESTATEMENT, § 471 (1932).