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Torts - Misrepresentation - Knowledge of Falsity Unnecessary

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TORTS—MISREPRESENTATION—KNOWLEDGE OF FALSITY UNNECESSARY—Defendant, a real estate broker, while showing plaintiffs a house which they subsequently purchased told them that the walls of the house were of tile

construction with imitation stone on the outside. Defendant reasonably believed this to be true,[1] although the walls actually had been cleverly constructed of earth, clay, and straw with a plaster covering on the inside and a tarlike preparation on the outside covered with a thin veneer of imitation stone, completely concealing their true nature. Purchasers brought an action, on the theory of deceit, against the broker to recover damages. A jury verdict for plaintiffs was set aside by the trial court, and defendant's motion for a judgment *non obstante veredicto* was granted. The county court of appeals reversed and remanded the case for a new trial. On appeal to the Ohio Supreme Court, *held,* affirmed and remanded to the trial court, one justice dissenting. It was not necessary to allege or prove that defendant made the representation knowing it was false. *Pumphery v. Quillen,* 165 Ohio St. 343, 135 N.E. (2d) 328 (1956).

It was held in the leading case of *Derry v. Peek*[2] that the speaker must be conscious of his misrepresentation to be liable for deceit. Most American jurisdictions at least pay lip-service to this formula,[3] and require that the misrepresentation be made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, i.e., carelessly as to whether it be true or false. Many courts, however, have enlarged the concept of scienter by torturing the *Derry v. Peek* requirements.[4] For example, some courts have dispensed with the requirement of some species of scienter in cases in which the speaker was an interested party in a contractual relationship.[5] Also, a speaker with no knowledge on a subject may speak erroneously in such a positive manner that he will be liable in deceit for misrepresenting his own state of mind.[6] Occasionally the interest of the court in protecting the injured party has resulted in completely dispensing with scienter as an essential ingredient.[7] In the principal case the court held that lack of knowledge by the speaker of the falsity was no defense if "made under circumstances which implied knowledge on his part."[8] Difficulty is encountered in identifying the precise grounds relied upon by the court in its attempt to

1 The speaker's belief was in accord with that of three others familiar with the situation—the vendor, an appraiser, and a builder. Plaintiff's building expert admitted that he, too, would have been deceived. See dissent in the principal case at 349.

2 Derry v. Peek, 14 A.C. 337 (1889).

3 Ohio purports to follow this rule. See 19 O. JUR., Fraud and Deceit, §67 (1931).

4 See generally 34 BOST. UNIV. L. REV. 351 (1954). To the effect that Derry v. Peek is not the law today in the United States, see Pendelton, "Liability for Innocent Misrepresentation: State of the Law in the District of Columbia," 23 J. BAR ASSN. OF DISTRICT OF COLUMBIA 274 (1956).

5 Aldrich v. Scribner, 154 Mich. 23, 117 N.W. 581 (1908).

6 Bullitt v. Farrar, 42 Minn. 8, 43 N.W. 566 (1889). For the meaning of this doctrine, see 31 MICH. L. REV. 138 (1932); 37 YALE L.J. 1148-1149 (1928). Williston suggests that "as-of-one's-own-knowledge" doctrines have at times been confused with the theory which holds that if no reasonable grounds for belief exist, there is evidence of fraud. Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 at 430 (1911).

7 See 26 MICH. L. REV. 698 (1928). The convincing accusation there asserted is that reliance on equity cases is sometimes made to justify a decision that no guilty knowledge by the speaker is necessary in deceit.

8 Principal case at 343.

clarify the Ohio law as to the requirement of scienter. It seems most likely that the court based its decision on principles of contract rescission,[9] or the "as-of-one's-own-knowledge" basis for a deceit action.[10] In view of the court's attempt to follow the principles of stare decisis, it would seem that contract rescission theory[11] is the more plausible, if not entirely valid, explanation of the holding that knowledge of the falsity is not necessary in deceit, for the "as-of-one's-own-knowledge" doctrine is of questionable application here.[12] If the rescission theory has been adopted it seems that the benefits received by the speaker should define the limits of his liability,[13] for if not, the lack of scienter coupled with liability exceeding the benefit received strongly suggests a form of verbal warranty.[14] The tortured application of scienter in situations like that involved in the principal case has given rise to doctrines of synthetic scienter which have served only to confuse, and there have been numerous appeals for clarification.[15] The law provides remedies for the consequences of misrepresentations made without fault, but the action of deceit was not originally designed to be one of them. The holding in the principal case seems to complete the amalgamation, unless the decision can be grouped with those cases that hold one liable who, having no knowledge of the truth or falsity of certain statements, nevertheless affirms them to be true as of his own knowledge. In some future case the Ohio court will inevitably be forced to admit that strict liability exists for inaccurate representations or make some retrogression from its most recent scienter formula.

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9 Among rescission cases used as authority were Parmlee, Admr. v. Adolph, 28 Ohio St. 10 (1875); Aetna Ins. Co. v. Reed, 33 Ohio St. 283 (1877).

10 "A positive statement implies knowledge, and if the party . . . has no knowledge . . . he has told scienter what is untrue; he has affirmed his knowledge. . . ." Quoted in principal case at 347.

11 Parmlee, Admr. v. Adolph, note 9 supra; Aetna Ins. Co. v. Reed, note 9 supra. See 5 WILLISTON, CONTRACTS, rev. ed., §1509 (1937). *Contra,* 44 KY. L.J. 112 (1955).

12 According to the record the defendant had made an examination of the house before the "showing." If on that information he genuinely believed that the facts and his conviction of their existence were precisely the same as his utterance asserted them to be, then it is difficult to find the delict demanded by this rule.

13 See Aldrich v. Scribner, 154 Mich. 23, 117 N.W. 581 (1908); Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 at 433 (1911); Carpenter, "Responsibility for Intentional, Negligent, and Innocent Misrepresentation," 24 ILL. L. REV. 749 at 761 (1930).

14 For the desirability of such a doctrine see Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 at 435 (1911). But see also Green, "Deceit," 16 VA. L. REV. 749 (1930).

15 Bohlen, "Misrepresentation as Deceit, Negligence, or Warranty," 42 HARV. L. REV. 733 at 747 (1929); Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 (1911); 8 KAN. STATE BAR ASSN. J. 395 (1940).