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Robert W. Miller

*University of Wyoming School of Law*

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# SCIENTER IN DECEIT AND ESTOPPEL

ROBERT W. MILLER\*

Scienter may be defined as the knowledge on the part of a person making a representation, at the time made, that it is false. Thus the law in regard to false representations is invoked and an immediate distinction must be made between tort actions for deceit as contrasted with contract actions for breach of warranty, and equitable actions for rescission. In the latter two cases it is generally accepted that if a material statement is found to be false, an action may be predicated thereon, without inquiry into the knowledge of the maker as to truth or falsity. In the deceit cases, however, considerable conflict seemingly exists in regard to the requirement of scienter. It is possible for the courts to strictly construe the requirement of scienter making actual knowledge an essential element, or, on the other hand, the courts may permit something less than actual knowledge of the falsity of the statement satisfy his requirement. Should a strict or liberal construction be had? In order to better answer this, let us examine the development of the requirement of scienter in the law of deceit and likewise the necessity of knowledge in the working of an estoppel in pais.

## A. *English Law of Deceit.*

The law of deceit in England prior to *Derry v. Peek*<sup>1</sup> was far from settled. It was generally supposed as settled in Equity that liability was incurred by a person who carelessly, though honestly, made a false representation to another about to deal in a matter of business upon the faith of such representation.<sup>2</sup>

In *Peek v. Derry*, it appeared that Derry and others, the directors of a certain tramway company, issued a prospectus with the purpose of inducing the public to subscribe for stock. Statute permitted the use of steam as a motive power only in case the company first obtained the consent of the Board of Trade and of two municipal boards. The prospectus read: "—the company

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\* See page 178 for biographical note.

<sup>1</sup> (1889) 14 Appeal Cases 337.

<sup>2</sup> *Burrows v. Lock*, (1805), 10 Vesey 470. *Slim v. Croucher*, 1 D. F. & J. 518.

has the right to use steam or mechanical power instead of horses." The company as a matter of fact had no such right, proper consent never being obtained. This meant that the stock was worth less than if the consent had, in fact, been obtained. Peek, who became a stockholder in reliance upon the prospectus, sued the directors for deceit. The court of the first instance held for the directors stating that the directors believed their statement true. The Court of Appeals unanimously held the directors liable. The House of Lords overruled the Court of Appeal and restored the decision of the first court.

It was here held that a person is not liable for a false representation upon the faith of which another acts, even though carelessly made, provided he made it in the honest belief that it was true. Thus scienter became an essential element in a cause of action for deceit. As stated by Lindley, L. J., some two years later: "Speaking broadly of *Peek v. Derry*, I take it, that it has settled, once and for all, the controversy which was well known to have given rise to very considerable difference of opinion, as to whether an action for negligent representation, as distinguished from fraudulent representation could be maintained. There was considerable authority that it could, and there was considerable authority that it could not."<sup>3</sup>

Lord Bramwell, in a case decided five years before *Peek v. Derry*, stated that "an untrue statement as to the truth or falsity of which the man who makes it has no belief is fraudulent, for in making it, he affirms he believes it, which is false."<sup>4</sup> This paved the way for the later decision, the belief of the party making the statement being laid down as the true test. Lord Herschell followed this intention test in his opinion in *Peek v. Derry* by stating that in order to sustain an action of deceit that proof of fraud was essential, such being proved by showing "that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." He then added that "to prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth."

Two cases decided a few years after *Peek v. Derry* state very concisely the English view as to liability for negligent but not fraudulent representations. In the first of these the defendant,

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<sup>3</sup> *Angus v. Clifford* (1891), 2 Ch. 449.

<sup>4</sup> *Smith v. Chadwick* (1884), 9 A. C. 187.

a surveyor, was held not liable in an action by the plaintiffs who were advancing money on the strength of his certificates as to the progress of certain buildings under construction, defendant not having been appointed by the plaintiffs. Court here stated: "Negligence, however great, does not of itself constitute fraud. . . . Here all he (defendant) has done was to give untrue certificates negligently. Such negligence, in the absence of contract with the plaintiffs, can give no right of action at law or in Equity."<sup>5</sup> In the second case, Lindley, L. J., said: "If the representation has been fraudulent an action might lie; but it is now settled that an action cannot be brought for a misrepresentation which was only negligent and not fraudulent."<sup>6</sup>

Thus we find the English rule is that of *Peek v. Derry* and that the further development of extending liability in tort for negligent misrepresentation has not been had. With the "honest belief" of the declarant as the rule for all liability in tort, negligent misrepresentation presents a case in which a remedy is not provided for by the English courts.

### B. *English Law of Estoppel.*

Another doctrine which must be considered in this connection is that of estoppel *in pais* i. e. preclusion of one to deny the truth or existence of a particular fact which, by his conduct, he may have caused another to believe, rely upon, and act on to his injury. Estoppel, it must be remembered, was not recognized in the early common law and is of equitable creation. It does not give a cause of action but is analogous to a conclusive presumption i. e. a substantive rule of law. With *Peek v. Derry* stating scienter as an essential element in a cause of action for deceit, many courts seem to think scienter is likewise essential in order to have an estoppel *in pais*. Hence, let us direct our attention to the query whether or not "honest belief" will prevent estoppel from being resorted to. Does all liability for misrepresentation depend upon the knowledge of the declarant? With the exception of fraudulent misrepresentations (fraud having been defined by Lord Herschell in *Peek v. Derry* set out above) and cases in which estoppel may be used, the above query may seemingly be answered in the affirmative.

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<sup>5</sup> *Le Lievre & Dennes v. Gould*, (1893), 1 K. B. 491.

<sup>6</sup> *Onward Bldg. Society v. Smithson* (1893), 1 Ch. 1.

One of the earliest cases on this subject was the case of *Burrows v. Lock*,<sup>7</sup> decided some thirty years before the landmark case on *Pickard v. Spears*.<sup>8</sup> In this latter case representation as a distinct branch of estoppel was first enunciated. Lord Denman, C. J., there stated: "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The natural meaning of the word "wilfully" as used above was not permitted to stand, Parke, B, in a later case stating: "By the term 'wilful,' we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."<sup>9</sup>

In an 1887 case<sup>10</sup> the secretary of the Defendant Company answered certain questions asked of him as secretary regarding the validity of certain stock in Defendant Company. His answers were untrue and fraudulently made for his own benefit. The Court, in holding the Defendant Company not liable, stated: "No action of contract lies for false representation unless the maker of it or his principal has either contracted that the repre-

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<sup>7</sup> *Supra* note 2. This was a suit by the assignee of one of several residuary legatees for his share of the residue of the testator's estate. The amount of the residue was not in controversy and a general administration decree was not sought. Defendants to the suit were the plaintiff's assignor and the trustees of his share of the residue. The trustee had informed the plaintiff that this share was unincumbered, whereas, in fact, it was not. The decree was, in effect, that the trustee should pay the full amount of the share to the plaintiff without deducting the incumbrance. The trustee, even if he acted honestly, was estopped from denying that the share was unincumbered.

<sup>8</sup> 6 A. & E 469.

<sup>9</sup> *Freeman v. Cooke*, 2 Ex. 654.

<sup>10</sup> *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 714.

sentation is true, or is estopped from denying that he has done so." Here, due to Lord Cairn's "no capacity" doctrine as regards ultra vires acts of a corporation, the corporation could not be bound to do something by estoppel which was beyond its corporate powers. The case, however, suggests that liability for misrepresentation may be had in two types of situations, even though the Defendant is ignorant as to the falsity of his statements, these being, (1) where we have a warranty, and (2) where we can work an estoppel.

In *Lowe v. Bowerie*, we find Lindley, L. J., stating: "I do not, however, understand *Derry v. Peek* to apply where there is a legal duty on the part of the Defendant toward the Plaintiff to give him correct information. If such an obligation exists, an action for damages will, I apprehend, lie for its non-performance, even in the absence of fraud." The court cites as examples instances where the law of warranties or of estoppel is applicable. As stated at the outset, in an action on a warranty it is sufficient to show that a material warranty has failed, and such being the case scienter need not be alleged or proved.<sup>12</sup>

From the above cited cases and others it is questionable whether in England scienter is a fundamental requisite in setting up an estoppel. Seemingly, the mere fact that the statement was false, relied on, etc., is sufficient without more. Thus, while "honest" belief may protect a defendant in an action of deceit, still, estoppel may be invoked in some cases regardless of such "honesty."<sup>13</sup>

### C. American Law of Deceit.

As stated by one author: "It is often said that, in order to render false representations fraudulent in law, it must be made to appear that the party making them knew at the time they were made that they were untrue. But this rule has so many exceptions that it is difficult to affirm, with any confidence, that it is a general rule at all."<sup>14</sup> While *Peek v. Derry* still represents the

<sup>11</sup> (1891), 3 Ch. 82.

<sup>12</sup> *Collen v. Wright*, 8 E. & B. 647. Expressly limited by *Oliver v. Governor & Co., etc.* (1902), 1 Ch. 610.

<sup>13</sup> Cf. *Jordan v. Money*, 5 H. L. Cas. 185, 210. *Balkis Concol. Co. v. Tompkinson* (1893), A. C. 396. *Conventry, Shepard & Co. v. Gt. Eastern Ry. Co.* (1883), 11 Q. B. D. 776. Negligence satisfied any requirement of scienter. Estoppel *in pais* based on negligence was had.

<sup>14</sup> *Cooley on Torts* (2nd Ed.), p. 582.

English view, it is quite doubtful whether American jurisdictions have all followed the rule there stated. Lord Herschell himself said: "I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong." Thus he suggests scienter be imputed where the Defendant's words reasonably permit the inference that he knows the truth though, in fact, he has no actual knowledge at all. This view has seemingly been adopted by statute in a few of our states.<sup>15</sup> Decisions under such statutes are clearly inconsistent with the English "honest belief" rule which permits unreasonableness to be shown as going to decide the honesty of the belief, but not as a clear and distinct heading of fraud.

Again, in some jurisdictions, a Plaintiff has been allowed an action for deceit, wherever the misrepresentation has been such as to entitle him to a rescission in equity of the transaction.<sup>16</sup> One Massachusetts Court declared that "if a statement of fact which is susceptible of actual knowledge is made as of one's own knowledge, and is false, it may be a foundation of an action of deceit, without proof of further intent to deceive."<sup>17</sup> Still other courts have said that where the representation was material, made with the purpose of being acted upon, and relating to matters which the Defendant was bound to know or presumed to know, actual knowledge was not essential.<sup>18</sup> Hence, the rule of *Peek v. Derry* cannot be said to apply in the United States.

Under the English decisions it appears that no general duty to use care, great or small, is placed upon a declarant making statements of fact which other persons are likely to rely and act upon to their detriment. Seemingly, in the absence of breach of warranty, fraud and estoppel alone constitute the sole instances where a remedy is available. While perhaps there is no general duty to speak the truth, still, a liability for the negligent use of

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<sup>15</sup> S. D. Code (1919), Sec. 796; Deceit—"the assertion, as a fact, of that which is not true, by one who has no reasonable grounds for believing it to be true." N. D. Civil Code, Sec. 5, 388. Montana Civil Code, Sec. 5073.

<sup>16</sup> *Hoffman v. Dixon* (1900), 105 Wis. 315; *Gerner v. Mosher* (1899), 58 Neb. 135; *Becker v. McKinnie* (1920), 106 Kan. 426.

<sup>17</sup> *Weeks v. Currier* (1898), 172 Mass. 53. Cf. *Mabordy v. McHugh* (1909), 202 Mass. 148.

<sup>18</sup> *Iron Co. v. Bamford* (1893), 150 U. S. 665; *Simon v. Goodyear Co.* (1900), 105 Fed. 573, 581.

words is seemingly beginning to appear in the U. S. Lord Herschell's view as stated above suggests that a liability for the negligent use of words should be imposed. In a Tennessee case it is stated, "Culpable negligence in making false statements, to induce action by others, is in law equivalent to fraud." Is there then a liability in tort for negligent misrepresentation? If there is, it must be remembered that such a liability exists independently of the tort action for deceit. There are numerous articles dealing with this question a reference to which will be made by way of answer.<sup>19</sup> Let it suffice to say that tort liability is seemingly being extended by the innovation of such a doctrine, such not to be considered as a part of the law of deceit but rather in spite of it.<sup>20</sup>

In an equitable case for rescission of a contract there is dictum to the effect "that there are so many exceptions to the rule requiring knowledge to be shown that it may be worthy to inquire whether it is exactly accurate to say that it is a general rule."<sup>21</sup> Seemingly, the inquiry is now being made as to why the difference in the importance of scienter in an action of law as compared with rescission or redress in equity. Is there any real necessity for not extending the equitable rule to actions at law?<sup>22</sup>

At all events, the above cases suggest that American jurisdictions have taken a broader view than that laid down in *Peek v. Derry* and require considerably less to satisfy the scienter doctrine where scienter is stated as essential to a tort action for deceit. Tort liability in general has probably been extended in this field of misrepresentation to include cases of negligent misrepresentation, which, however, are not to be considered as an extension of the doctrine of deceit but as entirely independent thereof. It is extremely difficult to formulate any rule as to the requirement of and the consequent satisfaction of scienter in an action for deceit, the above cases showing that there is no uniformity on the question.

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<sup>19</sup> Jenks—26 *L. Quart. Rev.* 159; Terry—25 *Yale L. J.* 87; Smith—14 *Harv. L. Rev.* 184; Williston—24 *Harv. L. Rev.* 415.

<sup>20</sup> *Glanzer v. Shepard* (1922); 233 N. Y. 236. Cf. *Peoples ex rel Daily Credit Service Corp. v. May*, 147 N. Y. S. 487; *Munro v. Bradstreet Co.* (1915), 155 N. Y. S. 487.

<sup>21</sup> *Woodruff v. Garner*, 27 Ind. 4.

<sup>22</sup> See *Aldrich v. Scribner*, 154 Mich. 23, for what is stated to be the "peculiar Michigan Rule." Cf. *Gerner v. Mosher*, 58 Nebr. 135.

D. *American Law of Estoppel.*

In a recent Oklahoma case<sup>23</sup> the Court states the essential elements of an equitable estoppel in the following language: "The elemental elements of an 'equitable estoppel' are: First, there must be a false representation or concealment of facts. Second, it must have been made with knowledge, actual or constructive, of the real facts. Third, the party to whom it was made must have been without knowledge, or the means of knowledge of the real facts. Fourth, it must have been made with the intention that it would be acted upon. Fifth, the party to whom it was made must have relied on or acted upon it to his prejudice. The representation or concealment mentioned, may arise from silence of a party under imperative duty to speak; and the intention that the representation or concealment be acted upon may be inferred from the circumstances."

It has often been stated that there can be no estoppel *in pais* against the party who does not know the full truth of facts to which his conduct, declarations or representations constituted the basis of the alleged estoppel relate.<sup>24</sup> Hence, it seems that knowledge of the truth as to the material facts represented or concealed is generally indispensable to the application of the doctrine of Equitable estoppel.<sup>25</sup>

Assuming the general rule to be that scienter is essential to estoppel i. e. that estoppel will not arise where the representation or conduct of the Defendant against whom the estoppel is being sought is due to ignorance founded upon an innocent mistake, are there any exceptions to be found? An Iowa court stated that in certain cases "the intent of the person making the statement may be immaterial, and he may be estopped, although he has spoken in forgetfulness or ignorance of the facts."<sup>26</sup> What, then, are these situations?

Probably the first of these situations where the Defendant is estopped even though not actually knowing the facts is where the circumstances of the parties is such as to imply knowledge

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<sup>23</sup> *Gypsey Oil Co. v. Marsh* (1926), 248 Pac. 329.

<sup>24</sup> *Bisconer v. Billing* (1925), 71 Cal. App. 779; *Rice v. McCarthy* (1925), 73 Cal. App. 655; *Hempstead v. Broad* (1916), 275 Ill. 358; *Smith v. Yost* (1919), 72 Ind. App. 628.

<sup>25</sup> Cases collected 21 C. J. 1123.

<sup>26</sup> *Kirchman v. Standard Coal Co.*, 112 Ia. 668. Cf. *Criley v. Cassel*, 144 Ia. 685 in 123 N. W. 348 on 349. Also *Pearson v. Hardin*, 95 Mich. 360 on 387. *Prickett v. Siebert*, 75 Ala. 315 on 319.

on the part of the person sought to be estopped. A Minnesota Court<sup>27</sup> states: "It is not necessary that the facts be actually known to the party estopped. It is enough if the circumstances are such that a knowledge of the truth is necessarily imputed to him." In a Supreme Court case where a bank depositor sent his book to the bank to be written up and failed to check up on the book and returned vouchers within a reasonable time, the lower court submitted the question of estoppel to the jury, the agent of the depositor having committed certain forgeries. The court stated: "Where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct."<sup>28</sup>

A second possible exception exists in cases where the Defendant is innocently mistaken as to his legal rights. Thus in a Maine case the Court held that the ignorance of the Defendant of his legal rights would not prevent his conduct from working an estoppel if he had full knowledge of the facts.<sup>29</sup> Likewise, in a Pennsylvania case estoppel was sought to be set up in defense to an ejectment suit, the Court stating: "Now, if the acts and declarations of Tyler were such as to induce Putnam to make the purchase, and as matters of fact upon the faith thereof the purchase was made, Tyler would be estopped from afterwards setting up the true title against Putnam, although he may have been ignorant of his own rights at the time."<sup>30</sup>

A third possible exception is had in cases where acquiescence for a considerable period of time has been had. Thus long term acquiescence is often accepted in lieu of knowledge of the facts at the outset and upon such acquiescence estoppel may be predicated. As an example is a New York case where the Defendants had held land for over two hundred years on the strength of a disclaimer by the town, the Court, in holding the

<sup>27</sup> *Macomber v. Kinney* (1910), 114 Minn. 146, Cf. 43 Iowa 301.

<sup>28</sup> *Leather Min'g Nat. Bk. v. Morgan* (1885), 117 U. S. 96. Cf. *Somers v. Germania Nat. Bk.* (1912), 152 Wis. 210.

<sup>29</sup> *Rogers v. Portland & B. St. Ry.* (1905), 100 Me. 86. In accord is *King v. Stroup*, 160 Pac. 367, which affirms the Rogers case, citing note at p. 773 to the case of *Knauf v. Elkhart Lake Sand & G. Co.*, 48 L. R. A. (N. S.) 744. Cf. *Tilton v. Nelson*, 27 Barb. (N. Y.) 595.

<sup>30</sup> *Putnam v. Tyler* (1888), 117 Pa. St. 570.

town estopped, saying: "If the Defendant's act was voluntary, and calculated to mislead, and actually has misled another acting in good faith, that is enough." A lesser period of time than two hundred years has been held to work an estoppel.<sup>31</sup> Since scienter is deemed immaterial in such cases, another exception may thus be said to exist.

A fourth possible exception may be said to exist in cases where the person sought to be estopped has been guilty of culpable negligence. Thus a Federal court states:<sup>32</sup> "the rule has sometimes been stated as though it were universal, that an actual knowledge of the truth is always indispensable. It is, however, subject to many restrictions and limitations as to lose its character of universality. It applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence. It does not apply where the party, although ignorant or mistaken as to the real facts, was in such a position that he ought to have known them, so that knowledge would be imputed to him. In such case ignorance or that knowledge would be imputed to him. In such case ignorance or mistake will not prevent an estoppel. Nor does the rule apply to a party who has not simply acquiesced, but who has actually interfered, by acts or words, and whose affirmative conduct has thus misled another. Finally, the rule does not apply, even in cases of mere acquiescence, when the ignorance of the real facts was occasioned by culpable negligence." Another Federal Court spoke as follows: "To cause an estoppel, the representation relied on must have been made with full knowledge of the facts by the party to be estopped, unless his ignorance was the result of gross negligence or otherwise involved gross culpability."<sup>33</sup> And thus another exception to our general rule is had.

A fifth exception is concisely stated by a Missouri Court as follows: "If a man makes a representation as to what he ought to have known, and what he did at one time know, although he alleges that at the particular moment he had forgotten it, and injury ensues, the maker of the misrepresentation is equally as

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<sup>31</sup> *Brookhaven v. Smith* (1900), 118 N. Y. 634. Cf. *Chicago Ry. Co. v. People*, 91 Ill. 251; *Strosser v. Ft. Wayne*, 100 Ind. 443 on 447; *State v. Wertzell*, 62 Wis. 184.

<sup>32</sup> *Sullivan v. Colby* (1896), 71 Fed. 460, the Court citing and affirming *2 Pom. Eq. Jur.*, sec. 809.

<sup>33</sup> *U. S. v. Wilson & Co.* (1914), 214 Fed. 630. Cf. *Wright v. Stice* (1898), 173 Ill. 571; *Sweezey v. Collins*, 40 Iowa 540.

answerable, equally bound to make such representation good, equally estopped from asserting the contrary of his misrepresentation, as if he knew when uttering it, it was false.”<sup>34</sup> Again in an Iowa case<sup>35</sup> the Plaintiff was held estopped on the basis of forgotten knowledge, the court saying that forgetfulness “would exonerate the plaintiff from any moral fraud in the premises, but not from the legal consequences of his conduct.”

The above cases certainly show that in spite of the general rule calling for actual knowledge at the time of the representation, that something less than actual knowledge is required by the courts in working an estoppel. Whether or not we say these five exceptions are merely instances of constructive as distinguished from actual knowledge i. e. they impute knowledge to the declarant, it nevertheless remains questionable whether scienter is necessary in working an estoppel. The rule stating actual knowledge as essential has lost its universality. Has it not also lost its status as a rule?

### *Conclusion.*

In spite of the statements found in recent decisions to the effect that scienter or culpable negligence is essential to estoppel, it is submitted that the great weight of modern authority supports the view that positive statements of fact may give rise to an estoppel if given on a matter upon which the declarant has been or may reasonably be supposed to be informed. While scienter is generally stated as a requisite where estoppel is invoked, still, is more than lip service being given to such requirement? If so, should the courts not restrict themselves to mere lip service?

In the case of a contract action for breach of warranty, if a material warranty is found to be false, scienter or the knowledge of the declarant is immaterial. The question first is, was there a warranty? Secondly, was there a breach of a material warranty? If so, a cause of action may be had in contract without more.

One author on the law of insurance states: “A representation of a fact may be false or untrue through mistake, ignorance, accident, or negligence, in which case if it induces the risk which

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<sup>34</sup> *Raley v. Williams* (1880), 73 Mo. 310.

<sup>35</sup> *Bullis v. Noble* (1873), 36 Iowa 618. Cf. *Spencer v. Carr*, 45 N. Y. 406,—in which an infant’s statement did not work an estoppel, such having been forgotten.

the assurer would not otherwise have taken, it is material. . . . Actual fraud is not, in such case, a material factor . . . . It is now well settled that in cases of the character above specified, the misrepresentation of a material fact preceding or contemporaneous with the contract avoids the policy, even though the assured be innocent of fraud or an intent to deceive, or to wrongfully induce the assurer to act, or whether the statement was made in ignorance or good faith, or unintentionally. A mere inadvertent omission of material facts which the assured should have known to be material will avoid the contract if false and relied on by the assurer."<sup>36</sup>

Likewise, in a tort action based on breach of warranty, scienter has not been regarded as essential. In the case of *Shippen v. Bowen*,<sup>37</sup> an action to recover damages for the sale of municipal bonds to the plaintiff was had, the bonds being alleged as being forgeries. The Supreme Court in its opinion stated: "But as to the scienter that is not necessary to be laid, when there is a warranty, though the action be in tort; or, if the scienter be laid, in such a case, then there is no necessity for proving it."

Turning to the field of equity, according to the weight of authority, misrepresentation of material facts, although innocently made, if acted upon by the other party to his detriment will constitute a sufficient ground for rescission and cancellation in Equity.<sup>38</sup>

In the light of the foregoing discussion, can it then be supported as a general rule that scienter is essential in order for estoppel to be had? Do not the above mentioned exceptions really indicate that liability is tending to be imposed in cases of misrepresentation where the defendant is injured thereby? In the present day stage of civilization does not social justice demand a liability be imposed in all cases where one speaks with intent to induce others to act, regardless of his subjective knowledge of the facts?<sup>39</sup> In other words, are we not now approaching

<sup>36</sup> Joyce—*Law of Insurance* (2nd ed—1917), sec. 1902.

<sup>37</sup> 122 U. S. 575. Accord: 4 *Blackf.* (Ind.) 293 on 295. Cf. *Farrel v. Manhattan*, 198 Mass. 271; *Tyler v. Moody*, 11 Ky. 191. *Medina v. Stoughton* (1700), 1 *Ld. Raym.* 593.

<sup>38</sup> *Trenzel v. Miller*, 37 Ind. 1. *Peters v. Lohman*, 171 Mo. App. 465. *Southern Development Co. v. Silva*, 125 U. S. 247, 250.

<sup>39</sup> Mr. Hope in an excellent article in 32 *Harvard Law Review* 679 entitled "Ignorance of Impossibility as Affecting Consideration," assumes the following A B case: "A, a married man, intending to deceive B, an unmarried girl ignorant of A's existing marriage, promises to marry B

a doctrine which imposes a duty to speak the truth when one volunteers a statement? Estoppel is but a means of penalizing a man by procluding him from setting up the truth in derogation of his statements. Should not there be a corresponding liability in tort for honest misrepresentations and thus a fusing of the equitable and warranty rule with that of tort? With the recognition in the United States of liability in tort for the negligent use of words, should not this doctrine of scienter be abolished for all situations and a doctrine of speaking at one's peril be substituted? Certainly the various courts in the United States have liberally construed the requirement of scienter and less than actual knowledge has oftentime rightfully been held to satisfy this element either in a tort action for deceit or where estoppel has sought to have been invoked.

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presently, and in return for his promise requests and obtain's B's promise to marry him presently." The author suggests that the true ground of recovery in such a case is estoppel, or if there has been fraud, that a tort action for deceit would be appropriate. At all events, he concludes, "no present theory seems able to account for our case as a 'contract'."

As our A B case, let us assume that A, a married man, honestly believing himself divorced but due to some technicality of the divorce law in fact not divorced, promises to marry B presently, and in return for his promise requests and obtains B's promise to marry him presently, without informing B of his first marriage. Subsequently finding himself still married, A breaks the engagement with B. Is B without a remedy?