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NOTES

MAY AN INFANT DISAFFIRM A CONTRACT WHICH
HE HAS INDUCED THE OTHER PARTY TO
ENTER BY MISREPRESENTING HIS AGE?

Although it is well settled in Missouri¹ that an infant is not estopped from relying on his infancy where he has misrepresented his age, the rule has not always been stated with

1. 188 Mo. App. 402.

such precision in other jurisdictions. As this question has never been fully considered in Missouri, it will be necessary for us to concern ourselves with cases cited elsewhere, both pro and con, in order to investigate the matter in a few of its most important aspects.

In the first place, it seems almost self-evident that if the contract or transaction is considered absolutely void, no estoppel can arise by reason of the infant's misrepresentation as to his age. But it is when we turn to the merely voidable civil transaction that we find the conflict of authority. In some jurisdictions it has been held that such false representation by an infant of his age does not give any validity to the transaction or estop the infant from disaffirming it or setting up the defense of infancy against the enforcement of any rights thereunder. This rule has been applied to deeds, mortgages, and other instruments affecting an infant's realty.²

These decisions are based on the idea that a conveyance by an infant is in itself an assertion of his right to convey, and that a contemporaneous declaration of his right or of his age adds nothing to what is already implied in the deed or contract. In other words, an assertion of an estoppel against him is but a claim that he has assented or contracted, a thing which he can no more do effectively than he can make the contract alleged to be confirmed. The underlying reasoning is that the fraud of misrepresentation of age does not restore validity to the promise, or, in any way enhance its obligation; but that it is the contract which forms the sole basis of liability; and that if an infant were to be estopped from disaffirming on the ground that he represented himself to be of age,

2. 102 U. S. 300. 150 Mo. 606.

then the result would be that a plaintiff, in an action of assumpsit on a contract which the law holds void, would recover damages for an injury caused by the fraudulent misrepresentations of the defendant, it being manifest that no such confusion of rights and remedies can exist in the law.³ Let it be understood here that those cases which hold that an infant cannot disaffirm under such conditions, either directly or indirectly, ground their decisions on the tort of fraud. The way in which this is done we shall consider later in our discussion.

It has been objected further, as a reason for allowing the infant to disaffirm, that to estop him might allow people to impose on him, as they might take advantage of his very infancy to get him to misrepresent his age.⁴ But this does not seem a valid reason, when standing alone, for such a decision; for it is generally held, in the cases which estop the infant from disaffirming, that if the misrepresentation was induced by the other party to the transaction, or by the agent of such party, no estoppel arises.⁵ As will be seen by a reference to these cases, to make the infant liable as for a tort does not allow designing adults to take advantage of infants, for it holds one who contracts with an infant to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, for it allows him only compensation for the actual loss sustained. It does not permit him to make any profit out of an executory contract, but it simply makes good his actual loss.

Again, it has been urged that to enforce an estoppel would encourage infants to lie in order to make contracts that would

3. 11 Cush. (65 Mass.) 40.

4. 1 Johns. Cas. (N. Y.) 127.

5. 80 Conn. 307.

bind them, so that they would be enabled to waste their money and property.⁶ However, it would seem that the same result would be reached to serve the purpose of the infant to obtain goods, property, or services for which he could not ordinarily contract, regardless of whether or not the infant be estopped and made liable. Indeed, it would appear that the inducement to the infant would be greater in the case where he is given the opportunity to induce another party to contract with him, and is then allowed to escape from all liability upon such contract. That is, if rules of law are to be framed to protect and conserve the morals of infancy, that purpose may best be served by making the infants of the land liable for their transgressions. Nevertheless, it is perfectly true that the application of such a rule would enable infants to waste their money and property; and it remains a question of whether the greater hardship will be worked by placing the entire burden on one who acted reasonably, in good faith, and in reliance on the infant's own representation, or by making that infant liable to the extent that the other party has been actually injured, and thus encouraging the infant to do the thing that the law of contracts has been framed to protect him against.

At the same time, where an infant in personal appearance, family surroundings, and business activities appears to be of age, represents himself to be so, and the other party would be greatly injured by allowing the disaffirmance, the contract having been fairly made, and advantageous to both parties, it is undoubtedly a hardship to strictly enforce the rule and permit a disaffirmance.⁷ In at least one case where the infant was estopped from disaffirming the contract, he was, at the time

6. 119 N. C. 323.

7. 147 Ky. 441.

of the execution of the deed, at most, not more than a month under twenty-one years of age, was a married man with two children, and the wearer of a full beard, and both he and his mother represented him to be of age.⁸ With regard to this point it might prove interesting to quote from the opinion of Daly, F. J., in *Eckstein vs. Frank*,⁹ where he said: "When an infant obtains property by falsely representing himself to be of age, an action of tort may be maintained against him, either to recover it back or to recover damages, upon the ground that he obtained possession of it wrongfully. It has long been the rule in courts of equity, that an infant will be held liable where he obtains property by a false representation respecting his age. 'If an infant is old and cunning enough,' says Lord Chancellor Cowper, 'to contrive and carry out a fraud, he ought to make satisfaction for it.' (2 Eq. Ca. Ab., 515). And the good sense and justice of requiring him to do so has been held in the numerous cases cited to be as applicable in a court of law as in a court of equity." Of course, if the situation and appearance of the infant are not such as to be reasonably conducive to the belief that he is of full age, it is apparent that one of the elements of estoppel is lacking. But where they are all present, in some jurisdictions, both at law and in equity,¹⁰ the infant is estopped; but it is essential that these elements of estoppel coexist: The conduct of the infant must have been fraudulent, believed in, relied on, and acted upon by the other party. Even then, estoppel is confined to cases where the infant is in fact developed to the condition of actual discretion, to cases of actual fraud, and where the contract or transaction is beneficial to the minor,

8. 26 Ky. L. 48.

9. 1 Daly (N. Y.) 334, 336.

10. 92 N. J. L. 375. 131 Va. 316.

according to the rule in some jurisdictions.¹¹ Something more than a mere failure to disclose infancy must be present in order to charge the infant as for fraud, for there must be a direct misrepresentation by the infant as to his age, and the execution of the instrument is not in itself a sufficient representation.¹² However, it has been held that if an infant has arrived at the age of discretion, and, under the circumstances of the case, it was his duty to disclose his minority, he may be estopped by his failure to do so.¹³

In order that what we have said with regard to estoppel both at law and in equity may not be misinterpreted, it may be well to state that there have been some distinctions made, as is shown by the case of *Hayes vs. Parker*,¹⁴ decided in 1886, where the court said, "At law it is conclusively presumed that a person within the age of twenty-one is unfitted for business, and that every contract into which he enters is to his disadvantage, and that he is incapable of fraudulent acts which will estop him from interposing the shield of infancy against its enforcement. In equity, however, this rigid rule has its exceptions. Equity will regard the circumstances surrounding the transaction—the appearance of the minor, his intelligence, the character of his representations, the advantage he has gained by the fraudulent representations, and the disadvantage to which the person deceived has been put by them in determining whether he should be permitted to invoke successfully the plea of infancy."

By force of statute, in some jurisdictions, no contract or transaction can be disaffirmed where, on account of the in-

11. 142 Wis. 556.

12. 23 Ont. A. 497.

13. 3 Bart. (Tenn.) 69.

14. 41 N. J. Eq. 630, 631 and 632.

fant's misrepresentation as to his majority, the other party had good reason to believe him capable of contracting.¹⁵ As an example of such a statute, Section 3190 of the Iowa Statutes might be cited, which reads as follows: "No contract can be thus disaffirmed where, on account of minor's own misrepresentations as to his majority * * * the other party had good reason to believe him capable of contracting." This has been interpreted to mean some affirmative or definite statement, not made by a person other than the infant himself, intended to mislead and to create a belief in the mind of the other party that he is capable of contracting.¹⁶ Naturally, it is a question of fact for the jury whether the infant's acts and statements naturally and reasonably induced a belief in the mind of the other party that he was of full age, and led the other party to deal with him on that assumption.¹⁷

It has been objected that it is anomalous that an infant should be made liable for his fraud in making a thing which he is not capable of making; and this has been met by the statement that the only satisfactory test is supplied by the answer to the question, "Can the infant be held liable without directly or indirectly enforcing his promise?"¹⁸ The courts which estop the infant from disaffirming say that there is no enforcement of a promise where an infant who has been guilty of a positive fraud is made to answer for the actual loss, as distinguished from the prospective loss on an executory contract, his wrong caused to one who dealt with him in good faith, and who exercised due diligence.

15. 43 Kan. 77. 187 Mo. App. 510. (Decided under the Kansas Statutes).

16. 192 Ia. 427.

17. 245 S. W. 478. (Ct. of Civ. App. of Tex.)

18. 108 Ind. 472.

This leads us directly, then, to the question of enforcing tort liability against the infant, even though he is not, strictly speaking, liable on the contract according to the recognized rules. Some courts will not attempt to establish the liability by any such circuitous method, and will neither hold the infant liable in tort for deceit, nor for damages to property while in his possession and in his use by reason of the contract.¹⁹ Other courts take the view that the result must be the same, whether it is in tort that the infant is made liable, or on the contract; and therefore, rather than further involve he litigation, they make the infant immediately liable on the contract, with the idea that the same results must follow in either case.²⁰ They say that minority is given for the protection of a person under age, but it cannot be used as a weapon with which to commit fraud; thus harking back to a figure that these judges seem exceedingly fond of, and one which is frequently to be found in their opinions—namely, that infancy is a shield to be used for the protection of the minor, and is not a sword which he may wield to perpetrate a fraud. However, the doctrine of estoppel is not generally applied to executory contracts, for to do so would be to base the action on the promise, a situation which would be somewhat difficult to reconcile with the theory of tort liability where the infant has misrepresented his age.

The early idea was that the infant was liable only for torts which are *vi et armis*, and that misrepresentations are a part of the contract, for which an infant cannot be made liable.²¹ But while the early English cases assumed this position,

19. 230. Mass. 54.

20. 88 Miss. 668.

21. Sid. pt. 1. 258; 1 Keble 913; 1 Lev. 169. (Cited by all three of these reporters).

the modern view, as we have seen, has changed somewhat; but even yet there is such a division of authority that it cannot be said with any degree of certainty that either view carries with it the weight of present day opinion. The argument, then, assumes something of this aspect: Why not apply tort principles, as misrepresentation is essentially a tort? But why hold the infant liable for misrepresentation, when this destroys the very reason of the rule, which is that an infant shall be protected against any liability on his contracts, because he is incapable of protecting his own interests? If a satisfactory distinction is to be found, a solution which will at once satisfy common justice and careful legal reasoning, it may be in the fact that, strictly speaking, no contract is made as to the infant's age, but that it is the fraud that induces the contract, and is therefore antecedent to the contract. On such a basis, the action may be *ex delicto* rather than *ex contractu*.

This would apparently indicate that all that is necessary in order to hold the infant liable is to bring a tort rather than a contract action. However, this is not the case, for the action must rest solely on the wrong committed by the infant.²² This point was raised in a case decided in 1923, that of Greensboro Morris Plan Co. et al. v. Palmer et al.,²³ where the majority of the court held that where the original complaint against an infant alleged the execution of a note and mortgage by the infant, his default in payment, the seizure and sale of the mortgaged truck, and sought to recover the balance due on the note after such sale, an amended complaint, alleging deceit by the infant in misrepresenting his age, which claimed

22. 206 N. Y. 288.

23. 185 N. C. 109.

the exact amount of the indebtedness as damages caused by the fraud, showed a manifest purpose to collect the unpaid balance due on the note by transforming an action on contract into an action in tort, which is not permitted. A dissenting opinion by Stacy, J., in that case, illustrates the quandary into which the courts have been thrown on this matter, and at the same time serves to show a tendency to break away from the old rules:

“The suit is not to enforce the contract; it is alleged that there is none. The action is based upon the tort of deceit. The measure of damages is different from what it would be in an action founded on contract. The plaintiff is not entitled to recover the purchase price of the machine, or the balance due under the contract, for the infant may have agreed to pay too much. The plaintiff is limited in its recovery to what it has actually lost * * *

“An infant who obtains my property by deceit injures me no less than the infant who negligently destroys that which is mine. If he is liable in the latter case, where the heart is free from guilt, why should he not be required to answer in the former, where forsooth his moral turpitude makes the injury more reprehensible on his part, if not more grievous to me.”

Williston²⁴ quotes with approval the summary of the present English law upon the subject of contracts, that the law “has scrupulously stopped short of enforcing against the infant a contractual obligation, entered into while he was an infant even by means of a fraud.” He says, “Whether the infant is liable in tort for deceit in misrepresenting his age

24. Williston, *Law of Contracts*, Section 245.

is not so clear. There is considerable authority that he is not. The soundest view, however, is that the infant is liable.”

The entire matter may well be summed up by a brief quotation from the case of *Creer v. Active Automobile Exch., Inc.*,²⁵ decided in 1923, where, in an exceedingly well reasoned opinion, Keeler, J., said: “The underlying reason running through the cases supporting the action of tort against the infant seems to be that, if an infant is held estopped from setting up his infancy because of fraudulent representation at the time of making the contract, and for that reason is held to the terms of the contract as if of full age, thereby his right of rescission may in many cases be seriously impaired, in that he is held to the full damages of a breach of contract which in many cases may be seriously unfair, owing to his inexperience in making an improvident agreement, while, if the remedy of the other party is confined to an action of tort, the latter will recover the actual damages suffered from the fact of deceit, which is all to which he is in fairness entitled. Since then the tort of the infant is held not to be involved in the formation of the contract and hence defensive against his attempt to rescind, it follows that the remedy of the other party, if any, is an action for a tort, either brought independently or properly set up by a counterclaim or cross-complaint.”

JAMES T. BRITT, '26.

25. 99 Conn. 266, 273.