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Rights of Adult Where Minor Misrepresents Age

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The fact that minors are continuously making many purchases and even engaging in business has resulted in much litigation, sometimes with disastrous results to adults. Because of this, some business men go so far as to refuse to deal with minors entirely and most good business men now make it a practice to inquire as to the age of persons appearing close to their majority.

The general rule is that a minor may rescind his contract by returning the consideration which he has received, or so much of it as remains.[1] Some states add an additional qualification which, while allowing the minor to rescind upon the return of the article purchased, holds the minor liable for deterioration and depreciation.[2] One state, Minnesota, has adopted an anomalous rule under which the rights of the parties are dependent upon the question of whether the contract was provident from the minor's viewpoint.[3] But the rule concerning the return of the consideration applies only to tangible property and in all jurisdictions it is held that if the infant obtains money, no right to recover is given the adult in the absence of fraud.

Of course many transactions take place with persons admittedly or,

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[1]Arkansas Reo Motor Co. v. Goodlett, 163 Ark. 35, 258 S. W. 975 (1924); Creer v. Active Auto Exchange, 99 Conn. 266, 121 Atl. 888 (1923); Hauser v. Marmon Chicago Co., 208 Ill. App. 171 (1917); Story & C. Piano Co. v. Davy, 68 Ind. App. 150, 119 N. E. 177 (1918); Utterstrom v. Myron D. Kidder, 124 Me. 10, 124 Atl. 725 (1924); McCarthy v. Henderson, 138 Mass. 310 (1885); Gillis v. Goodwin, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265 (1901); Reynolds v. Garber-Buick Co., 183 Mich. 157, 149 N. W. 985, L. R. A. 1915C 362 (1914); Collins v. Norfleet-Baggs Co., 197 N. C. 659, 150 S. E. 177 (1929); Standard Motor Co. v. Stillians, 1 S. W. (2d) 332 (Tex. Civ. App. 1928); Blake v. Harding, 54 Utah 158, 180 Pac. 172 (1919); Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194 (1855); Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678 (1878); McNaughton v. Granite City Auto Sales, 108 Vt. 130, 183 Atl. 340 (1936); Snodderly v. Bratherton, 173 Wash. 86, 21 P. (2d) 1036 (1933).

[2]Adams v. Beall, 67 Md. 53, 8 Atl. 664 (1887); Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 303 (1899); Pettit v. Liston, 97 Ore. 464, 191 Pac. 660, 11 A. L. R. 487 (1920); Sturgeon v. Starr, 17 West. L. R. (Can.) 402 (1911); Valentini v. Canali, L. R. 24 Q. B. Div. (Eng.) 166, 59 L. J. Q. B. N. S. 74, 61 L. T. N. S. 731, 38 Week. Rep. 331, 54 J. P. 295 (1889).

[3]Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191 (1916).

from their appearance, obviously minors, and in other cases where the minor is near his majority, no questions are asked and no representations concerning age are made. With those cases we are not now concerned as the present discussion will be limited to the rights of the parties where the minor has falsely represented that he was of age, and his appearance was such that the adult might reasonably rely upon that representation.

ACTIONS FOR FRAUD OR DECEIT

Where the minor falsely represents himself as being of age at the time the contract is made and then, taking advantage of his minority, rescinds the contract, the usual action brought by the adult has been one for fraud or deceit.[4] And there would seem to be no good reason why such an action should not be sustained. For every other tort, the infant is held liable, and surely when he deliberately and fraudulently induces an adult to deal with him because of the adult's reliance on his statement that he is of full age, he is not less culpable than when he injures another by the negligent use of an automobile. He has been held criminally liable for obtaining money under false pretenses because of a misrepresentation of his age,[5] and certainly it would be a poor rule which would hold him guilty of a crime and subject to imprisonment for it and at the same time relieve him from all civil liability for the same wrongful and unlawful act. But the cases are not in accord on the question of whether such an action can be maintained.

(a) Action in fraud or deceit permitted.

By the weight of American authority, the minor is held liable for his fraudulent deceit. The leading case is *Fitts v. Hall.*[6] There the plaintiff sold hats to the defendant, who represented that he was of age.

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[4]The theory of estoppel has been applied in a few cases but the cases applying the doctrine have produced a hopeless confusion. As a general proposition, however, it may be said that a majority of the courts will not estop an infant from setting up his correct age in an action at law but will in a suit in equity. But in La Rosa v. Nichols, 92 N. J. L. 375, 105 Atl. 201, 6 A. L. R. 412 (1918), the court was of the opinion that the distinction between law and equity ought not to govern the substantial rights of the parties and that an estoppel should arise in both law and equity actions. On the other hand no estoppel is permitted under the rule of the federal courts either in law or in equity. Sims v. Everhardt, 102 U. S. 300, 26 L. ed. 87 (1880).

It must be noted that a full application of the doctrine of estoppel would have the effect of enforcing the contract. If the infant were estopped to rely upon his correct age, then his liability would be measured, not by what he had taken from the adult, but by what he had promised to do plus damages for failure to keep that promise. That being so, the doctrine would go further than merely protect the adult against loss. Moreover, it would take away most, if not all, of the protection which the law has provided for the infant.

The cases on this subject are collected in three annotations in 6 A. L. R. 416, 18 A. L. R. 520 and 90 A. L. R. 144.

[5]Commonwealth v. Ferguson, 135 Ky. 32, 121 S. W. 967, 24 L. R. A. (N. S.) 1101 (1909); 22 Am. Jur. 468, §44.

[6]9 N. H. 441 (1838).

When the plaintiff sued on the note given for the hats, the defendant pleaded infancy. Thereafter the plaintiff brought an action for deceit, and the court held:

> "But the representation in *Johnson v. Pie* (1665), 1 Lev. 169, 1 Keble 905, 913, 83 Eng. Reprint 353, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract. It has been said that 'all the infants in England might be ruined,' if infants were bound by acts that sound in deceit. But this cannot be a reason why the action should not be maintained for fradulent wrongs done, for the same reason would seem to apply equally well in cases of slander, trover, and trespass. The latter are as much the results of indiscretion as the former, and quite as likely to be committed."[7]

This case has been followed again and again by the courts of the United States, and undoubtedly represents the majority rule.

A more recent case is *Wisconsin Loan and Finance Corporation v. Goodnough*.[8] In this case an infant signed a promissory note upon which judgment was confessed. The infant thereupon came into court and filed an answer setting up his infancy. The plaintiff, in reply, alleged that the defendant fraudulently represented that he was of age. The court recognized the two lines of authority but followed the rule set out in *Fitts v. Hall*.[9] The Wisconsin court then set forth the conditions precedent to an action of fraud and deceit against a minor for misrepresentation:

> "The cases quite uniformly hold that the fraud must be actual, not constructive; that mere failure of the infant to disclose his age is not sufficient. This quite apparently for the reason that the in-

[7] *Ibid.* at 449.
[8] 201 Wis. 101, 228 N. W. 484, 67 A. L. R. 1259 (1930).
[9] *Supra* note 6.

fant himself may be unaware of the legal consequences of his acts, and that it is his affirmative wrongdoing which leads to liability. Some of the cases emphasize the fact that the infant must have had actual discretion as opposed to legal discretion. That is a matter it seems to use more properly disposed of in ascertaining whether or not the person seeking to hold the infant reasonably relied upon the representation made by him. Quite obviously a child 10 years of age could not represent himself to be 21 years so as to warrant any one dealing with him upon that representation."[10]

The rule set out by the New Hampshire and Wisconsin courts appears reasonable and just and a proper solution to the problem. It has been followed in a number of other jurisdictions.[11]

The Colorado Supreme Court has not ruled directly on this point. However, *Mosko v. Forsythe*[12] presents a somewhat analogous situation. There the action was brought by the adult to replevin an automobile under a chattel mortgage given for the purchase price of the car. To this the defendant put in a plea of infancy and counterclaimed for the amount paid by him on the purchase price. The court held that the infant could not counterclaim in an action of replevin since the only issue involved was the right to possession. The court further held that before an infant may disaffirm he must return the goods, but the court did not state whether he must make restitution if the goods had been depreciated or depleted. On page 118 we find this statement:

> "Plaintiff, either with or without knowledge of defendant's age, *in the absence of any representations thereof made by defendant*, dealt with the latter at his peril, without ascertaining his age, when the specific property obtained by defendant was not a necessity, and the authorities do not support any contention that an automobile, under the facts here appearing, is a necessity."[13] (Italics ours.)

The statement above appears to be *dictum* but there is at least an implication that the adult might have a remedy if the minor had fraudulently misrepresented his age.

(b) Action in fraud or deceit denied.

As stated above, the weight of American authority holds that an action for fraud or deceit may be maintained against an infant where

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[10]*Supra* note 8, at 109, 228 N. W. at 486.

[11]Davidson v. Young, 38 Ill. 145 (1865); Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53 (1886); Yaeger v. Knight, 60 Miss. 730 (1883); Eckstein v. Frank, 1 Daly (N. Y.) 334 (1863); Schunemann v. Paradise, 46 How. Pr. (N. Y.) 426 (1873); Neff v. Landis, 110 Pa. 204, 1 Atl. 177 (1885); Kilgore v. Jordan, 17 Tex. 341 (1856); 27 Am. Jur. 818, §96.

[12]102 Colo. 115, 76 P. (2d) 1106 (1938).

[13]*Ibid.* at 118, 76 P. (2d) at 1107-1108.

the latter falsely represents that he is of full age. But a smaller, though respectable, number of cases hold to the contrary. The rule that such an action cannot be maintained is sometimes referred to as the English or the Massachusetts rule. It finds its foundation in the case of *Johnson v. Pie.*[14] There the defendant falsely and fraudulently asserted that he was of full age. He thereupon executed a mortgage to the plaintiff and then repudiated the mortgage. It was held that the defendant was not liable in fraud or deceit, and the reason given was that to hold him liable for the tort would be to hold him liable on the very contract which the minor had entered into with the plaintiff.

An analysis of this position clearly shows its error, because the action is founded on deceit and not on contract, and the measure of damage is the value of that which the adult has parted with on the faith of the infant's misrepresentation and not what the infant promised to do or what he promised to pay. It is true that if the contract were a reasonable one, the two might probably be nearly the same, but that is purely a coincidence.

The rule laid down in *Johnson v. Pie* has been followed quite generally by the English courts. But the injustice of the rule has been the cause of many limitations.

The dissatisfaction of the English courts with their own rule is probably best shown in the case of *Leslie v. Sheill.*[15] In that case an infant, misrepresenting that he was of age, obtained a loan of £400 from money lenders and the latter brought an action of deceit. The court felt that it was obligated to follow the rule of *Johnson v. Pie,* but from a reading of the whole opinion it can be seen that the court was reluctant to do so. Said the court:

> "As Lord Kenyon says in *Jennings v. Rundall* (1765), 3 Burr. 1804, alluding to *Zouch v. Parson* (1799), 8 T. R. 335, at p. 337, 'this protection was to be used as a shield and not as a sword; therefore if an infant commits an assault or utter slander, God forbid that he should not be answerable for it in a Court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a Court of law to enforce such contract.' It is perhaps a pity that no exception was made where, as here, the infant's wickedness was at least equal to that of the person who innocently contracted with him, but so it is. It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through. The rule is well

[14] 1 Lev. 169, 1 Keble 905, 83 Eng. Rep. 353 (1665).
[15] 3 K. B. 607, Ann. Cas. 1916C 992 (1914).

settled. No action of deceit lay against the present appellant * * *."[16]

But while the English courts have steadily held that an action for fraud or deceit could not be maintained against the infant, it was held in *Valentini v. Canali*[17] that where the contract related to property or the use thereof, before the minor was entitled to rescind he must make full restitution, even in the absence of fraud. It would seem that this would have the effect of enforcing the contract even more directly than if the minor were held liable for his fraud.

It is difficult to see why an infant should be allowed to retain the fruits of his fraud if it is money and be forced to return what he has obtained if it is property. The mere fact that the infant must be sued when he has obtained money and himself sue where he has obtained property (his action being to recover back money that he has paid for property) should provide no reason for the distinction. Nevertheless, such is the English rule.

The courts of Maryland, Massachusetts, North Carolina, Oklahoma and Vermont have carried the rule of non-liability of the infant even beyond that followed by the English courts.[18] Massachusetts, in particular, appears to give to an adult no protection whatever from a conniving minor.[19]

The courts of New York have arrived at a thoroughly inconsistent result. In *Steckly v. Normandy National Securities Corporation*[20] the infant tendered back stock which he had purchased from the defendant and then sued for the purchase price. In the meantime, while the infant held the stock, it had greatly depreciated in value. The defendant pleaded that the infant had fraudulently misrepresented his age and that the defendant relied upon those statements in selling the stock. The court, while approving *Rice v. Butler*,[21] which held that the infant must pay for wear, tear and depreciation regardless of whether he was guilty of fraud or not, held that no counterclaim for fraudulent misrepresentation or estoppel might be urged, thus apparently overlooking *Eckstein v.*

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[16]*Ibid.* at 612, Ann. Cas. 1916C at 993.

[17]L. R. 24, Q. B. Div. 166, 59 L. J. Q. B. (N. S.) 74, 61 L. T. (N. S.) 731, 38 Week. Rep. 331, 54 J. P. 295 (1889).

[18]Monumental Building Assn. v. Herman, 33 Md. 128 (1870); Slayton v. Berry, 175 Mass. 513, 56 N. E. 574 (1900); Greensborough Morris Plan Co. v. Palmer, 185 N. C. 109, 116 S. E. 261 (1923); International Land Co. v. Marshall, 22 Okla. 293, 98 Pac. 951 (1908); Nash v. Jewitt, 61 Va. 501, 18 Atl. 47 (1889). In Maryland, however, it is held that the minor must make restitution even in the absence of fraud. Adams v. Beall, 67 Md. 53, 8 Atl. 664 (1884).

[19]Slayton v. Berry, *supra* note 18.

[20]263 N. Y. 245, 188 N. E. 726, 90 A. L. R. 1437 (1934).

[21]*Supra* note 2.

Frank[22] and *Schunemann v. Paradise*,[23] two early New York cases. The New York court, therefore, reaches the inconsistent rule that even though the minor be guilty of no fraud, if the transaction involves tangible personal property which has been depleted or depreciated, the minor before rescinding must put the adult in *status quo*, but if the transaction involves intangible property as stocks which have depreciated in value while held by the infant, even though the infant be guilty of fraud, no similar obligation is placed on the infant.

NECESSITY OF RESTITUTION

In *Myers v. Hurley Motor Company*[24] the Supreme Court of the United States probably definitely settled the rule with regard to the necessity of restitution by the minor before he should be allowed to rescind his contract. There the plaintiff, who was twenty years of age, represented that he was twenty-four and on the faith of that representation was allowed to purchase an automobile from the defendant at a price of $650. The plaintiff used the automobile for approximately six months, made default in his payments under a conditional sales contract, and finally the car was repossessed by the defendant. The plaintiff then brought an action to recover back the amount he had paid down and the payments which he had made on the conditional sales contract. The defendant set up as a counterclaim the amount of money necessarily required to repair the automobile in order to put it in the condition in which it was before it was sold to the plaintiff.

Two questions were certified to the Supreme Court. The first was whether the plaintiff was estopped by his misrepresentations to set up his true age. The court noticed the conflict in the authorities but, following *Sims v. Everhardt*,[25] held that an estoppel could not be pleaded by the adult. The second question was whether the defendant, by way of affirmative defense, might set up the amount paid to repair the damages to the car. In answering that question, the court held that an action brought to recover back any part of the payments made was an action in assumpsit to which equitable principles were applicable.

> "How far the equitable maxim, that he who seeks equity must do equity, applies generally in suits brought for relief because of infancy, we need not inquire; nor do we need here to go as far as the authorities just cited. The maxim applies, at least, where there has been, as there was here, actual fraud on the part of the infant.

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[22] 1 Daly (N. Y.) 334 (1863).

[23] 46 How. Pr. (N. Y.) 426 (1873). It should be pointed out that these two early New York cases may not have been brought to the attention of the court since neither is cited in 90 A. L. R. 1438, which gives the citations of counsel.

[24] 273 U. S. 18, 47 S. Ct. 277, 71 L. ed. 515, 50 A. L. R. 1181 (1927).

[25] 102 U. S. 300, 26 L. ed. 87 (1880).

When an infant of mature appearance, by false and fraudulent representations as to his age, has induced another person to sell and deliver property to him, it is against natural justice to permit the infant to recover money paid for the property without first compelling him to account for the injury which his deceit has inflicted upon the other person.

"Our conclusion that the affirmative defense is available in this action does not rest upon the doctrine of estoppel, though the result may be the same. It recognizes the plaintiff's right to repudiate his promise and sue for the return of his payments, and his immunity from a plea of estoppel in so doing. Its effect is not to enforce the disaffirmed contract directly or indirectly, but to allow him to invoke the aid of the court to enforce an equitable remedy arising from the disaffirmance, only upon condition that 'seeking equity, he must do equity.' And the application of maxim is not precluded because defendant's claim might not be enforceable in any other manner."[26]

This case seems to have been the turning point with reference to the necessity of restitution where the minor was guilty of fraud. Two cases from Ohio illustrate the change in thought. In *Summit Auto Company v. Jenkins*,[27] which was decided before *Myers v. Hurley Motor Company*, the Ohio Court of Appeals held that where a minor falsely represented his age in purchasing an automobile, and where the seller took possession thereof, the minor could recover the amount paid by him without diminution for the use of the automobile or damages for its depreciation. Later in *Mestetzko v. Elf Motor Company*[28] the Supreme Court of Ohio, on similar facts, came to an altogether different conclusion. Concerning *Myers v. Hurley Motor Company*, the court said:

"The court therefore held that, seeking to disaffirm and avoid his contract, the court should deal with him as it would with an adult party, and should require him to restore what he received when he parted with the property which he seeks to get back, and this the more especially where it appears that the other party dealt with him in ignorance of the fact of his nonage. The court further held that the amount of the vendor's damage could only be allowed in abatement or diminution of the infant's claim, and that the vendor could not in any event recover an affirmative judgment. All these principles are declared by the highest authority in the land upon a review and discussion of the authorities and are in harmony

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[26] *Supra* note 24, at 26, 47 S. Ct. at 279, 71 L. ed. at 519.
[27] 20 Ohio App. 229, 153 N. E. 153 (1925).
[28] 119 Ohio St. 515, 165 N. E. 93 (1929).

with our own views, and we therefore adopt them as the proper principles of law to be applied in the retrial of this case."[29]

Another case following *Myers v. Hurley Motor Company* is *Steigerwalt v. Woodhead Company*,[30] decided by the Supreme Court of Minnesota. The court there found that the contract was not a provident one, under the peculiar Minnesota rule mentioned above,[31] but held on the authority of *Myers v. Hurley Motor Company* that the defendant was entitled to recoup for the depreciation of the automobile and the loss sustained in repairing the automobile.

Analyzing the rule, it will be noticed that it arrives indirectly at the same conclusion that would have been reached directly had an action in fraud or deceit by way of cross-complaint been permitted.

The rule of *Myers v. Hurley Motor Company* applies general rules of tort law. But so far it has been applied and is perhaps impliedly limited to those cases in which restitution may be urged as a set-off—cases in which the infant has sought to recover moneys paid on the purchase price. The Supreme Court has not yet decided whether the rule should be extended to permit the adult, in a direct action, to recover money or property of which he has been defrauded by the infant's tort.

SUMMARY

In conclusion, we believe that the most advisable rule, the rule which would protect the infant and at the same time protect the adult, is the one holding an infant liable in an action for deceit where there is fraud. This rule is not based on the contract but applies well known and well established rules of tort law.

To require restitution, in the absence of fraud, will take away much of the protection to which an infant is entitled. Not to permit an action in fraud or deceit will leave an unsuspecting adult at the mercies of a conniving infant. The doctrine of the necessity of restitution where there is fraud, announced in *Myers v. Hurley Motor Company*, is a good rule so far as it goes. But it was applied—perhaps limited in that case—to those instances in which it might be urged by way of counterclaim to an action brought by the minor. However, there is no reason why it should not apply as well to a direct action to recover money or property furnished to an infant. While there have been no cases in Colorado exactly in point, it is to be hoped that the Colorado Supreme Court will follow the implication in *Mosko v. Forsythe*[32] and hold the infant liable in fraud or deceit.

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[29] *Ibid.* at 584, 165 N. E. at 95-96.
[30] 186 Minn. 558, 244 N. W. 412 (1932).
[31] *Supra* note 3.
[32] 102 Colo. 115, 76 P. (2d) 1106 (1938).