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INFANTS - MINORITY AS A DEFENSE TO RESCISSION FOR FRAUD

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INFANTS — MINORITY AS A DEFENSE TO RESCISSION FOR FRAUD — Two defendants, one of whom was a minor, sold a business to the plaintiff. The plaintiff, in seeking to rescind the contract on the ground that it was induced by fraud, obtained a decree declaring the contract cancelled, and judgment was entered against the defendants for the sums they had received from the plaintiff. The minor defendant filed a petition to vacate the judgment as to him because during the trial no guardian ad litem had been appointed to represent him. *Held*, defendant is entitled to a new trial only if he could have made a good defense, and here since the plea of infancy, which the defendant wished to make, would not have defeated the plaintiff's action, the petition is denied. *Beardsley v. Clark*, (Iowa, 1940) 294 N. W. 887.

The infant's disability to contract is usually held not to exclude liability in tort.[1] In some cases, however, the distinction between tort and contract liability becomes very tenuous, and in such situations it is usually held that society has a greater interest in protecting the infant from his improvident contracts than it has in holding him liable for his torts. Thus when an infant fraudulently induces another to contract with him by representing himself to be an adult, the usual holding is that this misrepresentation does not estop the infant from asserting his infancy to disaffirm the contract.[2] Also many courts deny the defrauded party an action in fraud and deceit against the infant on the basis that a recovery in such an action would indirectly enforce the contract.[3] The principal case, however, is novel in that the plaintiff is not utilizing the infant defendant's fraud as a means of enforcing the contract, but is relying upon the fraud only as a basis for setting the contract aside. It would seem that the exercise by the plaintiff of his right to rescind contracts induced by fraud in no way conflicts with the

[1] HARPER, TORTS, § 282 (1933).

[2] International Text Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722 (1912); Wisconsin Loan & Finance Corp. v. Goodnough, 201 Wis. 101, 228 N. W. 484 (1930); Miller v. St. Louis & San Francisco R. R., 188 Mo. App. 402, 174 S. W. 166 (1915). *Contra*: Hood v. Duren, 33 Ga. App. 203, 125 S. E. 787 (1924); Young v. Daniel, 201 Ky. 65, 255 S. W. 854 (1924); Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176 (1896). In some jurisdictions the infant who misrepresents his age is prevented by statute from disaffirming contracts resulting from these misrepresentations. Wash. Rev. Stat. (Remington, 1932), § 5830; Iowa Code (1939), § 10494.

[3] Nash v. Jewett, 61 Vt. 501, 18 A. 47 (1889); Raymond v. General Motorcycle Sales Co., 230 Mass. 54, 119 N. E. 359 (1918); Greensboro Morris Plan Co. v. Palmer, 185 N. C. 109, 116 S. E. 261 (1923). Other courts allow the action on the theory that this is merely the enforcement of a tort liability. Rice v. Boyer, 108 Ind. 472, 9 N. E. 420 (1886); Wisconsin Loan & Finance Co. v. Goodnough, 201 Wis. 101, 228 N. W. 484 (1930). The holdings in the various jurisdictions are given in 57 L. R. A. 673 at 675 (1902); 6 A. L. R. 416 (1920); 67 A. L. R. 1264 (1930).

policy against holding infants liable on their contracts,[4] since recovery here would neither directly nor indirectly enforce the contract. Yet once the contract is rescinded, the minor defendant may argue that the plaintiff should recover only the amount of the purchase price which is still in the defendant's possession, on the theory that when an infant disaffirms a contract most courts do not hold him accountable for that portion of the consideration which he has received but which is no longer in his possession.[5] The same indiscretion which disables him from making judicious contracts also prevents him from conserving property in his possession. The Iowa court properly rejected this argument and held the defendant liable for the entire sum he had received. Since the plaintiff in seeking to recover this money is in no way relying on the contract, the defense of infancy should be inapplicable. Further, the practical result of a contrary holding would be to enable the defendant to utilize his infancy to enforce a contract which he has induced by fraud. If the defrauded party cannot recover the consideration with which he has parted, then there is no point in his rescinding the contract, for he will be in no better position than he would be if he affirmed. Consequently, to hold that the infant is not accountable for all the consideration he has received is in effect to deprive the plaintiff of his remedy of rescission. Thus infancy could be used to perpetrate a fraud and achieve a result clearly inconsistent with the purpose of the infant's disability, to protect their rights, "but not to enable them to invade or assail the rights of others."[6]

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[4] 1 WILLISTON, SALES 50 (1924). In Patterson v. Kasper, 182 Mich. 281, 148 N. W. 690 (1914), the court said the safe test to apply is: "can the infant be held liable without directly or indirectly enforcing his contract?"

[5] Arkansas Reo Motor Co. v. Goodlett, 163 Ark. 35, 258 S. W. 975 (1924); Story & Clark Piano Co. v. Davy, 68 Ind. App. 150, 119 N. E. 177 (1918); Reynolds v. Garber Buick Co., 183 Mich. 157, 149 N. W. 985 (1914); Shutter v. Fudge, 108 Conn. 528, 143 A. 896 (1928); Gray v. Grimm, 157 Ky. 603, 163 S. W. 762 (1914). In New York the infant is held accountable for depreciation on the ground that he has had the use and benefit of the property. Rice v. Butler, 160 N. Y. 578, 55 N. E. 275 (1899). The Supreme Court held that disaffirmance by an infant is equitable in nature, and, on the ground that he who seeks equity must do equity, allowed the vendor defendant to recoup the entire amount of consideration which had passed from him to the infant, by way of set-off. Myers v. Hurley Motor Co., 273 U. S. 18, 47 S. Ct. 277 (1927). In some states statutes require that a minor over eighteen years of age must return the consideration to the party from whom it was received, or pay its equivalent, if he wishes to disaffirm. See Cal. Civ. Code (Deering, 1937), § 35; Idaho Code Ann. (1932), § 31-103; N. D. Comp. Laws (1913), § 4340; S. D. Code (1939), § 43.0105. The Indiana statute provides that in sales of real estate by an infant, the infant will not be permitted to disaffirm the sale without first restoring the consideration received in the sale, if the infant falsely represented himself to the purchaser to be over the age of twenty-one. Ind. Stat. Ann. (Burns, 1933), § 56-302.

It would seem clear that if the minor is required to make full restitution as a condition precedent to his own right to rescind, *a fortiori* he should be required to make full restitution when rescission is sought against him on the ground of his fraud. Quaere, however, as to whether this conclusion should follow when the rule constituting the major premise above is adopted by statute in derogation of the common law.

[6] Harris v. Collins, 75 Ga. 97 at 106 (1885).