THE LIABILITY OF AN INFANT WHO REPRESENTS HIMSELF OF AGE.

Perhaps no other proposition of law has been so productive of confusion, doubt and conflict as that of the liability of an infant who fraudulently represents himself to be of full age, whereby he obtains some advantage to the damage of another.[1] Much of this doubt and confusion has been occasioned by a blind and servile adherence to rules laid down by the judges in England, two or three hundred years ago, which, in their application to modern business ideas and necessities, are utterly useless and inadequate.

The famous case of Johnson v. Pye[2] is the one upon which so many of the inequitable doctrines upon this subject are based. There, an infant, falsely affirming himself to be of full age, executed a mortgage which he afterwards sought to avoid, and the court held that he might plead his infancy to an action on the case; but one of the judges, seeing with a clearer vision than the others, doubted, realizing, even at that early day, what a source of injustice the promulgation of such inequitable principles would in time become, and thought that the infant would be liable, in like manner as he would be for trespass and cheating with false dice. The case is involved in obscurity, for there are three different reports of it, and in one it is stated that the case was adjourned, and in another that judgment was arrested, while in the third nothing appears as to its final disposition.[3] Chief Baron Comyns, one of the highest authorities of that time, seems to have taken no notice of the case whatever, for in

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[1] By the Civil Law, if a minor holds himself out to be of age, or produces a false certificate of the registry of his baptism, or in any other way has made people believe that he is an adult, he cannot be relieved against any acts into which he has engaged another by this fraud; thus a minor, having borrowed money by such means, although he has made no good use of it, yet his obligation will have the same effect as that of an adult, if the creditor has just reason to believe that the minor was of age. 1st Domat, part 1, Book 4, Tit. 6, Sect. 2. § 2377. So, also, under the Spanish Law, if an infant represents himself to be of age, and from his appearance seems to be so, any contract entered into with him will be valid, "for the law protects those who are defrauded and not those who commit fraud." Law 6, Tit. 19, Partidas 6th.

[2] Johnson v. Pye, 1 Sid. 258; reported also in 1 Keb. 905, 914 and 1 Lev. 169.

[3] See also Grove v. Nevill, 1 Keb. 778, 913 and 914; Manley v. Scott, 1 Sid. 129.

his Digest he lays down the rule that "If a man affirms himself of full age when an infant, and thereby procures money to be lent to him on mortgage, he is liable for the deceit."[4] So in Bac. Abr.[5] it is said: "Also it seems, that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself of full age, or if by combination with his guardian, etc., he make any contract or agreement, with an intent afterwards to elude it by reason of his privilege of infancy, that a court of equity will deem it good against him according to the circumstances of the fraud." But unmindful of these high authorities, and following with dogged pertinacity the doctrines attempted to be enunciated by Johnson v. Pye, it seems to be firmly established in England at the present time, that an infant is not liable at law for fraudulently representing himself to be of age.[6] And the English cases have frequently been followed and approved in this country.[7] But other cases hold the contrary.[8] And it would seem that the tendency of authority is now with them.[9]

The difficulty of the question appears to be in the failure of the courts to draw the distinction between actions upon contracts and actions sounding in tort. It is beyond all contro-

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[4] Com. Dig. "Actions on the Case for Deceit," A. 10 citing 1 Sid. 183; see also Fitts v. Hall, 9 N. H. 441; 2 Kent Com. 242 n. (c). Reeves Dom. Rel. 259.

[5] Bacon Abr., Infancy, I. 3.

[6] Add. on Torts 44 and 1031; Cooley on Torts 110; Price v. Hewitt, 8 Exch. 146; Liverpool, etc., Assoc. v. Fairchild, 9 Exch. 422; Bartlett v. Wells, 31 L. J. Q. B. 57; s. c. 1 B. & S. 836; Wright v. Leonard, 11 J. Scott (n. s.) 528; De Roo v. Foster, ib. 272.

[7] Brown v. Dunham, 1 Root 272; Geer v. Hovey, ib. 179; Carpenter v. Carpenter, 45 Ind. 142; Curtiss v. Patton, 11 S. & R. 309; Livingston v. Cox, 6 Penn. St. 360; Witt v. Welch, 6 Watts 9; Brown v. McCune, 5 Sandf (S. C.) 224; Stoolfodz v. Jenkins, 12 S. & R. 403; Kean v. Coleman, 39 Pa. St. 299; Burley v. Russell, 10 N. H. 184; Conroe v. Birdsall, 1 Johns. Cases, 127; Merriam v. Cunningham, 11 Cush. 40; Burns v. Hill, 19 Ga. 22; Gilson v. Spear, 38 Vt. 311-315.

[8] Kilgore v. Jordan, 17 Tex. 341; Tucker v. Moreland, 10 Pet. 59; Ward v. Vance, 1 N. & McCord 197; Wallace v. Morss, 5 Hill (N. Y.) 391; Eckstein v Frank, 1 Daly 334; Schunemann v. Garadise, 4 How. Pr. 426; Peique v. Sutliffe, 4 McCord 387; Walker v. Davis, 1 Gray 506; Fitts v. Hall, 9 N. H. 441; Towne v. Wiley, 23 Vt. 359; Carpenter v. Pridgen, 40 Tex. 32; Davidson v. Young, 38 Ill. 145; Manning v. Johnson, 26 Ala. 453; Hughes v. Gallans, 10 Phila. (Pa.) 618; Norris v. Vance, 3 Rich. 164; Seabrook v. Gregg, 2 S. C. (n. s.) 79. It has also been said that an infant may be held criminally liable for his fraud. Neff v. Landis, 110 Pa. St. 204; People v. Kendall, 25 Wend. (N. Y.) 399.

[9] Schouler Dom. Rel. 4th Edit. § 425.

versy that an infant would not be liable in an action upon his contract except of course for his necessaries, whether procured by reason of his fraud or not, for the plea of infancy will always prevail in such a case;[10] but the privilege thus accorded to him is to be used as a shield and not as a sword,[11] and to allow him to induce another by fraudulent means to contract with him, and then to reap the benefit of such a transaction, and to hold him irresponsible for such fraud, would be to violate one of the fundamental principles of contracts, which makes any agreement procured by fraud void at its very inception. That an infant is liable for his tort is axiomatic.[12] Therefore, when a contract is procured by fraud, the tort is anterior to the contract and a distinct wrong in itself, and although he is not liable on his agreement, why should he not be liable for the tort? Such a liability would only further the plainest principles of justice, and the protection thrown by the law around infants would not be violated in the slightest degree, neither would the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract be infringed, for the recovery is not upon the contract, as that is treated as of no effect, nor is he made to pay the contract price of the article purchased by him, but he is only held to answer for the loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached which strictly harmonizes with the general doctrine that an infant is liable for his torts.[13] But in no event will he be held liable where the substantive ground of the action is contract, or where the contract is stated as inducement to the alleged tort.[14]

Equity, however, being free from the trammels of unyielding and ancient precedents, is consequently accomplishing results more widely useful and more in consonance with true principles of justice, both in England and in this country.[15]

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[10] Burley v. Russell, 10 N. H. 184; Merriam v. Cunningham, 11 Cush. 40; Brown v. McCune, 5 Sandf. (S. C.) 244; Studwell v. Shafter, 54 N. Y. 249; Hewitt v. Warren, 10 Hun. 560.

[11] Zouch v. Parsons, 3 Burr 1804; per Lord Mansfield.

[12] Conway v. Reed, 66 Mo. 346; Cooley Torts, 103.

[13] Rice v. Boyer 108 Ind. 472; S. C. 58 Am. Rep. 53.

[14] Hewitt v. Warren, 10 Hun. 560; Doran v. Smith, 49 Vt. 353; Gilson v. Spear, 38 Vt. 311; Witt v. Welsh, 6 Watts (Penn.) 1; 2 Kent Com. 241.

[15] "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.

Thus, if an infant procures an agreement to be made through false and fraudulent representations that he is of age, he will be bound in equity, and the court will enforce his liabilty as though he were adult, and may cancel a conveyance or executed contract obtained by such fraud.[16] Indeed, cases of this sort are viewed with so much disfavor by courts of equity that infancy will never constitute an excuse for the party guilty of misrepresentation, for not even an infant is privileged to practice cheats or deception on innocent persons.[17] So, also, the doctrine of the English equity courts seems to have been for years, that where payment is made to one fraudulently representing himself to be of age, this is a discharge for the sum paid.[18] And in a comparatively recent English bankruptcy case, this principle is carried still further. There, a young man, who from his appearance seemed to be more than 21 years of age, engaged in business, and having occasion to borrow or obtain credit for that purpose, represented himself as of the age of 22 years and obtained a loan. The court held that whatever the liability or non-liability of the infant at law, he had made himself liable in equity to pay that debt.[19] This certainly was a most striking decision, and is an excellent example of how, in modern times, the true principles of justice in these matters are being established at the expense of the old and inadequate precedents.

The Supreme Court of New Hampshire, in the case of Fitts v. Hall,[20] was the first in this country to shake off the old shackles which had bound them so fast since Johnson v. Pye[21] was decided, and in an exceedingly able opinion by Ch. J. Parker, says: "The principle seems to be that, if the tort or fraud of an infant arises from a breach of contract, although there may

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[16] Ex parte Unity Bank, 3 De G. & J. 63; Nelson v. Stocker, 4 Id. 458, 464; Cory v. Gertchew, 2 Madd. 40; Clark v. Cobley, 2 Cox 173; Hannah v. Hodgson, 30 Beav. 19. 25; Wright v. Snow, 2 De G. & Sm. 321; Overton v. Banister, 3 Hare 503; Lempière v. Lange, L. R. 12 Ch. Div. 675; Arnot v. Briscoe, 1 Ves. 95; Beckett v. Cordley, 1 Bro. C.C. 358; Ex parte Taylor, 8 De. G., M. & G. 254.

[17] 1 Foubl. Eq. B. 1, Ch. 3 § 4; Becket v. Cordley, 1 Bro. C. C. 357; Savage v. Foster, 9 Mod. R. 35; Sugden on Vendors, Ch. 16 p. 262, 9th edit.; Euroy v. Nichols 2 Eq. Abrig. 489; Clerc v. Earl of Bedford, cited 2 vern. 150, 151, reported 13 Vin. 536; see also Bright v. Boyd, 1 Story Rep. 478; Nelson v. Stocker, 5 Jur. N. S. 262.

[18] Overton v. Banister, 3 Hare 503; Stikeman v. Dawson, 1 De G. & S. 90.

[19] In re Unity Banking Assoc., 3 De. G. & J. 63.

[20] Fitts v. Hall, 9 N. H. 441.

[21] Johnson v. Pye, supra, page 2.

have been false representations or concealments respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract by a change in the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct wilful and positive wrong in itself, then, although it may be connected with a contract, the infant is liable. The representation in Johnson v. Pye, and in the present case, that the defendant was of full age, was not a 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 and 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 lots, 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." "If infancy is not permitted to protect fraudulent acts, and infants are liable in actions *ex delicto*, whether founded on positive wrongs, or constructive frauds, or frauds as for slander and goods converted, there is no sound reason that occurs to us why an infant should not be chargeable in damages for a fraudulent misrepresentation whereby another has received damage." This decision, although severely criticised, and even condemned very strongly in one instance,[22] but as it would seem unjustly and under a misapprehension,[23] has the support of such eminent authorities as Chief Justice Parsons[24] and Chief Justice Redfield[25] and has turned the current of opinion in this country[26] so that the doctrines there enunciated, which

[22] Editors' note, 1 Am. Lead. Cases, pp. 117 and 118.

[23] See Cooley on Torts 110, N. 2; Pars. Cont. 7th edit. 357, note (x).

[24] Pars. Cont. 7th edit, 356 et seq. and note (x).

[25] Towne v. Wiley, 23 Vt. 359.

[26] Wallace v. Morss, 5 Hill 392; Eckstein v. Frank, 1 Daly 334; Badger v. Phinney, 15 Mass. 359; Green v. Sperry, 16 Vt. 393; Gurley v. Russell, 10 N. H. 184; Homer v. Thwing, 3 Pick. 492; Jervis v. Littlefield, 15 Me. 233; Norris v. Vance, 3 Rich. 164; Rice v. Clark, 8 Vt. 109; Ward v. Vance, 1 Nott & McCord 17; Towne v. Wiley, 23 Vt. 361; Kilgore v. Jordan, 17 Tex. 349; Peique v. Sutliffe, 4 McCord 387; Vosse v. Smith, 6 Crauch 236; Carpenter v. Pridgen, 40 Tex. 32.

are obviously so much fairer and more reasonable than the earlier ones, are fast becoming the true guide to the solution of these difficult questions. And the result of the late English cases has been to reopen in that country the whole subject of the infant's liability for his fundamental misrepresentation, and although at the present time it is impossible to say whether the new or the old doctrine in the end will prevail, yet if the latest decisions of the common law courts there are any guide, it will not be long before the question is decided in favor of the new principles which are so manifestly more just and equitable.[27]

Whether the mere silence, or omission of an infant to disclose his minority is a sufficient fraud to invalidate the contract has been decided both ways;[28] but the weight of authority would seem to be that the contract would not be invalidated upon that ground. And where an infant, carrying on trade as an adult, made his note to one who did not know of his infancy, it was held that the note was voidable.[29] So where an infant formed a partnership with an adult, it was held that by so doing he held himself out fraudulently to the world.[30]

It has been said in many cases that the doctrine of estoppel in pais has no application whatever to infants;[31] and while this

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[27] See DeRoo v. Foster, 12 C. B. (n. s.) 272; Wright v. Leonard, 11 C. B. (n. s.) 258. In a recent case, where an infant obtained a lease by fraudulently representing himself to be of age, it was held by a Court of Equity that the lease must be declared void and possession given up, and the infant was enjoined from parting with the furniture. But the infant was held not liable for use and occupation. Lemprière v. Lange, L. R. 12 Ch. Div. 675.

[28] That it would be, see Hall v. Timmons, 2 Rich. Eq. 120; 20 Am. Jur. 265. Contra, Norris v. Wait, 2 Rich. Eq. 148; Stikeman v. Dawson, 1 De G. & S. 90; cf. Baker v. Stone, 136 Mass. 405, where the infant did not misrepresent, but merely knew that the adult supposed her to be of age. She was held not liable.

[29] Van Winkle v. Ketcham, 3 Caines 323.

[30] Kemp v. Cook, 18 Md. 130; as to a partnership where the infant deceived the adult concerning his age. See 59. Md. 344.

[31] Brown v McCune, 5 Sandf. (S. C.) 224; Ackley v. Dygert, 33 Barb. 176, 193; Lackman v. Wood, 25 Cal. 147, 153; Norris v. Wait, 2 Rich. Eq. 148; Burley v. Russell, 10 N. H. 184; s. c. 34 Am. Dec. 146; Prescott v. Norris. 32 N. H. 101; Brown v. Dunham, 1 Root (Conn.) 272; Merriam v. Cunningham, 11 Cush. 40; Cannam v. Farmer, 3 Exch. 698; Carpenter v. Carpenter, 45 Ind. 142; Conrad v. Lane, 26 Minn. 389; Heath v. Mahoney, 14 N. Y. Supr. 100; Studwell v. Shafter, 54 N. Y. 249; Whitcomb v. Joslyn, 51 Vt. 79; s. c. 31 Am. Rep. 678; Hughes v. Gallans, 10 Phila. (Pa.) 618; Conroe v. Birdsall, 1 Johns. Cas. (N. Y.) 127; Wieland v. Kobick, 110 Ill. 16; s. c. 51 Am. Rep. 676; Norris v. Vance, 3 Rich. Eq. 164: Conrad v. Lane, 26 Minn. 389; s. c. 37 Am. Rep. 412; Burditt v. Williams, 30 Fed. Rep. (Conn.) 697; Sims v. Everhardt, 102 N. S. 300; Price v. Hewitt, 8 Exch. 146; De Roo v. Foster, 12 C. B. & S. 272.

proposition is in a sense true, because that, as an infant cannot be directly bound by his ordinary contracts, unless ratified after he becomes of age, so no obligation in the nature of a contract can be indirectly enforced against him by means of an estoppel created by his conduct while still a minor; yet, on the other hand, it is not true, for an equitable estoppel arising from his conduct may always be interposed with the same effect as though he were an adult, to prevent him from affirmatively asserting a right of property or of contract in contravention of his conduct, upon which the party contracting with him had relied, and by which he was induced to act.[32] Thus, if an infant who has arrived at years of discretion, and having a right to an estate, permits or encourages anyone to buy it as the property of a third person, the purchaser shall hold it against the infant who has the right, and he will be estopped to reclaim it.[33] So also an infant, nearly of age, who entrapped another into a purchase or mortgage loan by direct participation in a fraud as to her age, has been estopped in chancery from attacking the title to the land afterwards on that ground, because she would thereby perpetrate a fraud.[34] And after a sale has been consumated, the retention of the purchase money has been held to create an estoppel in equity.[35] Where an infant made a false oath before a magistrate that she was of full age in order to induce a purchaser to buy her land, she was not allowed to disaffirm the sale and recover the land.[36] And an infant ward,

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[32] Donlarque v. Cress, 71 Ill. 380; Wright v. Snowe, 2 De G. & S. 321; Montgomery v. Gordon, 51 Ala. 377; Upshaw v. Gibson, 53 Miss. 341; Padfield v. Pierce, 72 Ill. 500; Wilie v. Brooks, 45 Miss. 542; McBeth v. Trahne, 69 Mo. 642; Handy v. Noonan, 51 Id. 166; ex-parte Unity, etc. Assoc., 3 De G. & J. 63; Drake v. Wise, 36 Iowa 476; Stikeman v. Dawson, 1 De G. & S. 90; Overton v. Banister, 3 Hare 503; Esron v. Nicholas, 1 De G. & S. 118; Wilkinson v. Filby, 24 Wisc. 441; Tantun v. Coleman, 26 N. J. Eq. (11 C. E. Green) 128; Nelson v. Stocker, 4 De G. & J. 458; Thompson v. Simpson, 2 Jo. & Lat. 110.

[33] Sug. V. & P. 522, citing Watts v. Creswell, 9 Vin. 413; 9 Mod. 38, 96-97; 4 Bro. C. C. 507 n.; Clerc v. Earl of Bedford, 13 Vin. 536; and see 3 Cha. Ca. 85, 123; Cory v. Gertcken, 2 Madd. 40; Thompson v. Simpson, 2 Jones & L. 110; Barham v. Turbeville, 1 Swan 437; Irwin v. Morell, Dud. 72; Whittington v. Wright, 9 Ga. 23; Hall v. Timmons, 2 Rich. Eq. 120

[34] Ferguson v. Bobo, 54 Miss. 121. In this case there seems to have been no positive misstatement as to age.

[35] Telegraph Co. v. Davenport, 94 U. S. 369; Merritt v. Horne, 5 Ohio St. 307 Com. v. Sherman, 18 Penn. St. 343; Goodman v. Winter, 64 Ala. 410. But generally there must be some fraud in the transaction; Schnell v. Chicago, 38 Ill. 382.

[36] Shimitheimer v. Eiseman, 7 Bush 298; see also Davidson v. Young, 38 Ill. 145.

who fraudulently procured a settlement from his guardian, was not allowed to repudiate the settlement upon attaining his majority.[37] But there must be active fraud upon the part of the infant in order to effect an estoppel.[38] And an estoppel always arises where the action of deceit is maintainable.[39]

Where goods have been sold and parted with to an infant in reliance upon his fraudulent representations that he was of full age, and he refuses to pay for them on the score of infancy, the seller may rescind the contract and take the goods; and perhaps he need not wait for such refusal to pay, but may reclaim the goods on the ground that he never parted with his property.[40] For the protection against personal responsibility which the law accords to an infant, does not go so far as to vest in him the title to the property which he has obtained by his fraudulent acts, or on a contract which he disaffirms.[41] If he has parted with the goods so obtained, he is liable in an action of trover for their value, upon the ground that although he is not liable on his contract, he is chargeable because of his fraud, which is a tort.[42] And if, upon demand, he refuses to restore the goods, the original owner may obtain them on replevin, or recover their value in an action of trover against the infant.[43] So the infant has been held liable, where the property was obtained by fraud, although the conversion took place before the money was payable under the terms of the fraudulent contract.[44]

The obvious injustice of the old rules which gave to an infant such complete immunity from his fraudulent acts, and the power which such a privilege would give to so many unscrupulous infants, who have arrived at the age of discretion, and who are more competent to devise and carry out fraudulent and

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[37] Hayes v. Parker, 41 N. J. Eq. 630.

[38] Baker v. Stone, 136 Mass. 405; Brantley v. Wolf, 60 Miss. 420.

[39] Big. on Estoppel, 2nd edit. 449.

[40] Story, Cont., § 66; Badger v. Phinney, 15 Mass. 359; Mills v. Graham, 4 B. & P. 140, and in 1 New Rep. 140, per Mansfield, C. J.; Furness v. Smith, 1 Roll Abr., 530, C. pl. 3: Pars. Cont. 7th edit., vol. I, p. 318.

[41] Cooley on Torts, 111.

[42] Story Cont. § 66; see also Whitcomb v. Joslyn, 51 Vt. 79; Burns v. Hill, 19 Ga. 22.

[43] Mills v. Graham, 1 Bos. & Pul. 140; Badger v. Phinney, 15 Mass. 359; Walker v. Davis, 1 Gray 506; Kilgore v. Jordan, 17 Tex. 341; Reeves Dom. Rel., 243, 244, 259; Sch. Dom. Rel. 555; see also Strain v. Wright, 7 Ga. 568; Jefford v. Ringgold, 6 Ala. 544: Carpenter v. Carpenter, 45 Ind. 142; Goulding v. Davidson, 26 N. Y. 608; Chandler v. Simmons, 97 Mass. 514; 2 Kent Com., 6th edit., 241; Sikes v. Johnson, 16 Mass. 389; Boyden v. Boyden, 9 Met. 519.

[44] Walker v. Davis, 1 Gray 506; Sch. Dom. Rel., 555-556.

deceitful schemes than those of riper years, has been recognized, not only by so many of the courts, but also by some of the States, and in these States statutes have been passed forbidding an infant to disaffirm a contract or conveyance procured through his own fraudulent misrepresentations.[45] But such a statute would not apply, if the other contracting party knew of the infancy and was equally at fault.[46]

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[45] Rev. Code of Iowa, § 2239; Comp. Laws of Kas. ch. 67, § 3; Prouty v. Edgar, 6 Iowa 353; Jaques v. Sac., 39 Iowa 367; Sch. Dom. Rel., 570; Ewell's Lead. Gas., 205, 206.

[46] Beller v. Marchant, 30 Iowa 350.