3-1-1932

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Recommended Citation

Leo O. McCabe, Infants' Liability--When Not Liable, 7 Notre Dame L. Rev. 292 (1932).
Available at: http://scholarship.law.nd.edu/ndlr/vol7/iss3/3

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INFANTS' LIABILITY—WHEN NOT LIABLE

Infants, whether they be called by that name or some similar one such as juveniles, children, or minors, have always been a problem in the field of social science. The difficulty of formulating and enforcing proper rules of conduct within the social arena has its counterpart in the vast field of doubt, confusion, and contradiction in the interpretation of simple rules and standards applicable to infants' contracts, especially when tortious conduct is connected therewith. There is one advantage in the legal as contra to the social problem involved and that is that infancy ceases in law at the age of majority, while in its social aspects of state and parental care there is no set or definite age of discretion. However, even here different states have different ages of majority. Infancy usually ceases by law at age twenty-one, although in the case of females, eighteen is very frequently prescribed and for some purposes such as marriage nearly always is.

It is my purpose herein to state a hypothetical case of not uncommon occurrence, a few simple accepted rules applicable thereto, and then note the different conclusions reached in the application of the rules stated. It is not claimed that other rules and laws than the ones mentioned have no bearing on the decisions, but in all cases covered some of the rules that I shall set out must be interpreted along with the others.

Hypothetical Case. A, an adult (a corporation or private individual) sells a truck to I, an infant, for the regular and reasonable selling price of $2000.00. I is twenty years of age, is engaged in the hauling business, and wants the truck for that purpose. He appears to be of age and is known by A to be in the business of hauling for hire. I
represents that he is twenty-one years old which A reasonably and readily believes. I pays $800.00 down and signs a conditional bill of sale agreeing to pay the balance in installments of $100.00 a month. He signs a note representing this balance which calls for reasonable attorney’s fees in case of default. I uses the truck for six months, pays in $600.00 on the contract, and earns $500.00 from the use of the truck in addition to his labor. At the end of six months I, due to negligent driving, smashes into a telephone pole and demolishes the truck so that it is now worth about $400.00. I takes the truck back to A, disaffirms his contract, and demands his money back with interest thereon. A, on the other hand, insists that I complete his payments, takes the truck according to the contract, and applies its value, $400.00, on the purchase price leaving a balance of $200.00 yet unpaid.

Rules

Rule One. An infant is not liable on his contracts except where the law creates a responsibility such as for the reasonable value of necessaries, the support of his wife, etc.

Rule Two. An infant is liable for his torts excepting those arising out of contract.

Rule Three. An infant can disaffirm his purchase or sale of personal property either before majority or within a reasonable time thereafter.

Rule Four. An infant, on disaffirming his contract, must restore the property he has received under the contract if it is still under his control.

1 It is not intended that any inference should be drawn to the effect that infants' contracts relating to realty cannot be repudiated. Except for the fact that an infant’s contract covering real property may only be disaffirmed after majority, and some few other differences, the discussion herein is as applicable to real property as it is to personal property.
RESULTS

If A sues I in an action on the contract for the balance due and I counterclaims for the money he has paid in, the following results will be obtained, depending on the jurisdiction where the action arises:

Result One. A recovers nothing; I recovers the entire $1400.00 paid in with interest.

Result Two. A recovers nothing; I recovers nothing.

Result Three. I recovers $900.00.

Result Four. A recovers on the contract, that is, the balance of $200.00 plus reasonable attorney's fees as set out in the note; I recovers nothing.

If I brings a bill in equity to recover his payments we obtain the same results as above, but not necessarily in the same jurisdictions.

If A sues I in an action at law in deceit for damages caused by the misrepresentation of age, which may or may not be allowed depending on the jurisdiction, the amount of recovery, where permitted, is the actual damage caused by the deceit which in some cases, including the "hypothetical case," will be a different sum from any listed in "Results" One, Two, Three, or Four, because the loss occasioned by the non-fulfillment of the contract is not necessarily the actual damage caused by the deceit. The contract loss may include reasonable attorney's fees on the notes given, and it may call for a higher rate of interest than that allowed by law on money damages.

In dealing with the problems involved in the "hypothetical case," I shall occasionally assume added facts, or delete some existing ones in order to show how such changes will add further differences in the decisions in some jurisdictions, whereas in others the same change of facts would have no
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legal effect. For example, I shall consider the “hypothetical case” with and without the misrepresentation of age, the truck as a passenger car for pleasure, the damage as wilful as well as negligent, or as accidental, etc.

Contract Action

There are three deductions made by different states in applying the rule that an infant can disaffirm his contract for the purchase or sale of personal property by restoring the property he has received under the contract if it is still under his control, that is, there are three rules of liability or responsibility where an infant is not liable on his contract.² These three deductions are made where there is no misrepresentation of age, but except for a very few states the misrepresentation of age does not affect the result obtained by these deductions where the action is one at law on the contract. The three rules (deductions) follow.

The Massachusetts or majority rule is that an infant on disaffirming his purchase of personal property and offering to return that part of the property, if any, which he still has in his control may recover what he has paid therefor without deduction for its use or depreciation. Under this rule in the “hypothetical case” we would have Result One, that is, A would be entitled to nothing, but I, the infant, can recover all he has paid in on the truck without any deduction for its damage, use, or depreciation in value. The infant has paid in $1400.00, hence he will get judgment for $1400.00 plus proper interest.

The Massachusetts rule is followed in Arkansas,³ Illinois,⁴

² See rule four following the “hypothetical case.”
³ Arkansas Reo Motor Company v. Goodlett, 163 Ark. 35, 258 S. W. 975 (1924) (A pleasure car and a misrepresentation of age.)
Indiana, Maine, Massachusetts, Michigan, North Carolina, Rhode Island, Texas, Utah, and Vermont.

The reasoning for the decisions under the majority rule is simply that a minor may disaffirm his contracts except those for necessaries and since an article purchased for business purposes is not a necessary under any circumstance, he is not bound on the contract. All courts would so agree. Then since a truck is not a necessary, even though the minor earns his living by the use of it, and has no other means of support, the minor is no more liable for its use and depreciation than he would be for its agreed price. Its use or its depreciation is no more a necessary than is the article itself. If the minor had made no advance on the purchase price, the adult could recover nothing, and could not maintain an action for its use or depreciation. A contract to pay for such use or its depreciation, or damage is one the minor would be incapable of making to bind himself because his infancy, if pleaded, would be a bar to the suit. Then, if that is so, the adult cannot avail himself of and enforce a claim by way of recoupment which he could not enforce by a direct suit. In other words, if the adult sues

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6 Utterstrom v. Kidder, 124 Me. 10, 124 Atl. 725 (1924) (Truck for business. No misrepresentation of age.)
10 McGuckian v. Carpenter, 43 R. I. 94, 110 Atl. 402, 16 A. L. R. 1473 (1920) (Horse, harness, and wagon. Minor married.)
12 Blake v. Harding, 54 Utah 158, 180 Pac. 172 (1919) (Exchange of pony and buggy for stock.)
for the use, depreciation, or damage on a contract, he cannot recover, then why permit a recovery indirectly by allowing a set-off of the depreciation when the infant is suing the adult to get his money back. The contract when avoided by a minor is void *ab initio*.

The majority further reason that the law gives to a minor the right to disaffirm his contracts on the ground of the disability of his infancy, that is, to provide a protection for him from the consequences of his own improvidence and foolishness. If it is lack of foresight that leads to the contract, then it is the same lack of judgment that causes him to dissipate the proceeds of his contract. To hold otherwise than that he may not only disaffirm his voidable contracts without placing the adult in *status quo* and also that he need not account for depreciation or use, would be holding the infant to a sound discretion in the use of an article which he did not have a sufficient discretion to obtain in the first place. It is from the results of the infant’s improvidence that the law seeks to protect him and not against the contract itself, for the minor may always hold the adult to his contract if he desires. Hence depreciation and damage, the results of the infant’s contract, are the main items from which he is protected because of his indiscretion.

It is also reasoned that though the rule may be harsh in its application to a particular case, still in its general application, for which of course the law is made, it does not work out harshly and always gives the full protection desired. Any overreaching by the adult would not only be without profit, but would be positively unprofitable.

An illustration of this rule is *Reynolds v. Garber Buick Company*,\(^ {14} \) where the plaintiff, a minor twenty years of age, bought a Ford automobile from the defendant company,

\(^ {14} \) 183 Mich. 157, 149 N. W. 985 (1914).
paying $300.00 for it. Later he exchanged the Ford with the defendant for a Buick and paid $75.00 extra. The plaintiff became twenty-one years of age and shortly thereafter he asserted, says the court, his newly acquired manhood by disaffirming these contracts, returning the Buick and demanding that the money he paid in be refunded. In this case there was no misrepresentation of age. The plaintiff minor recovered the $375.00 with interest without any deduction for use or depreciation.  

In *Arkansas Reo Motor Company v. Goodlett*, Ora Goodlett, a girl slightly under eighteen, purchased a car from the motor company for $650.00, paying $425.00 in all. She ran it for three months and turned it back in a badly damaged condition. The gears were stripped, the motor was burned out from failure to keep oil in it, the tires worn out and replaced with cheap ones, and so generally wrecked that it would cost $800.00 in replacements to make it worth $500.00 to sell as a used car. It was worth between $10.00 and $25.00 as junk. She had misrepresented her age. Shortly after coming of age (eighteen) she sued to rescind the contract and to recover the $425.00 paid in. She recovered. The court said:

"It is said to be a harsh rule that permits an infant to purchase property, paying the price therefor, and, after consuming it, wasting it, or carelessly or wilfully destroying it, sue the seller and recover the price paid; but the rule, even in instances where it is harsh in its application, is justified as the only means whereby an infant may be protected from improvident contracts."

In *Greensboro Morris Plan Company v. Palmer*, Palmer, nineteen years of age, having the appearance of a man of

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15 In this case the defendant and plaintiff both received the consent of the plaintiff's guardian for the transaction. The court said this might make the guardian liable, but not the minor.

16 116 Ark. 35, 258 S. W. 975 (1924).

17 The word "wilfully" goes too far even under the majority rule. The infant would be liable for wilful destruction or injury.

18 185 N. C. 109, 116 S. E. 261 (1923).
full age, bought a truck from a motor company for over $3000.00. He was emancipated, married, and engaged in the business of hauling lumber. He represented that he was over twenty-one. He paid in over $2000.00 on the truck, of which $1000.00 was from earnings from the truck. The truck, when seized by the Morris Plan Company, the assignee of the motor company's claim, was worth $700.00. The minor, Palmer, was allowed to recover the full amount paid in without accounting to the seller for the use of the truck while retained.

The Massachusetts rule, though at times harsh, is perhaps the most logical one if we assume that the law means what it states, that is, that twenty-one, or whatever age is set, is the age of discretion or majority. It is a fact that lack of discretion is not present in some of the cases.

The New York or minority rule is that an infant may rescind his contract for the purchase of personal property and on offering the return of the property purchased still in his control can recover the money paid in on the contract, but must allow for depreciation and use. However, in no case can the adult recover more than the amount he has already received on the contract regardless of the extent of the depreciation.

Under this rule in the "hypothetical case" we would obtain Result Two, that is, A recovers nothing; I recovers nothing. Since the infant has paid in $1400.00 and the depreciation is $1600.00 ($2000.00 original value less $400.00 present value) the infant can recover nothing. Neither can the adult recover anything more even though the depreciation is $200.00 more than the payments received. However, if we change the facts so that the de-

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20 The facts in this case are nearly identical to those in the "hypothetical case."
preciation is $600.00 and the amount paid in is still $1400.00, then the infant could recover the difference or $800.00.


The reasoning back of the minority view is that if the contract of a minor is in fact a fair and reasonable one with no overreaching of any kind on the part of the adult and the minor has taken and used the article, then he should not be allowed to recover the amount actually paid without allowing the adult seller the depreciation of the goods while in his hands because (1) this fully and fairly protects the infant against injustice and at the same time is fair to business men who have dealt with the minor in good faith, (2) it better fits our modern business conditions where infants are permitted to transact a great deal of business for themselves, (3) the moral influence is bad for their business future for it discourages rather than encourages honesty and integrity in dealing when a minor for his own benefit

21 McCarty-Greene Motor Co. v. McCluney, 219 Ala. 211, 121 So. 713 (1929) (Automobile. Misrepresentation of age.)
22 Creer v. Active Auto Exchange, 99 Conn. 266, 121 Atl. 888 (1923) (Misrepresentation of age); Shutter v. Fudge, 108 Conn. 528, 143 Atl. 896 (1928) (Radio parts for business.)
23 Sturgeon v. Starr, 17 Western L. R. 402 (1911) (No recovery of amount paid on rent and fixtures.)
24 Rice Auto Co. v. Spillman, 280 Fed. 452 (1921) (Car for business and a misrepresentation of age.)
25 Valentini v. Canali, L. R. 24 Q. B. D. 166, 59 L. J. Q. B. N. S. 74, 61 L. T. N. S. 731 (1889) (Rented house and used the furniture. No recovery of part paid.)
29 Pettit v. Liston, 97 Ore. 464, 191 Pac. 660, 11 A. L. R. 487 (1920) (Automobile. No misrepresentation.)
can buy and use an article, wear it out, and then compel the return of his money. Trickery and dishonesty should not be encouraged, (4) the law permitting an infant to disaffirm his contracts was meant as a shield and not as a sword. If there has been any fraud or imposition on the part of the adult, or advantage taken in inducing the contract, then the minor is not to be held accountable.

The courts following this rule generally use the words depreciation and use. What is usually allowed is depreciation. Likely the courts are using the two terms synonymously. However, the depreciation of an article might be small with considerable use, or large with no use at all. A Connecticut court refused to allow use and limited the minor's responsibility to depreciation. The argument given is similar to that under the majority rule, that is, to hold for use would be holding on the contract, and if the article is not a necessary, the use is not necessary.

A New York court held the minor for depreciation and use, or really for the reasonable value of the use of a car for a period of five months, although used but four or five times with no benefit received, and for all it appears the depreciation may have been trivial.

It seems that if this rule were to be followed the proper holding would be that the infant is responsible to the extent of his payments for depreciation in value, that is, the difference in value between the time of the contract and the time of disaffirmance. The courts in following this rule after all are not aiming to hold on any contract basis, or use, or usefulness to the infant, but to hold him to the amount of the damage caused to the merchant who acted in good faith, and limiting that liability to that which the infant has already parted with. Neither are they for that matter

30 Creer v. Active Auto Exchange, op. cit. supra note 22.
holding for depreciation, obsolescence, or wear, but simply
that of changed value while in the hands of the infant.

A leading case supporting the New York rule is Pettit v. 
Liston where the plaintiff, a minor, bought a motorcycle
from the defendant company for $325.00, paying $125.00
down. He used the machine a little more than a month,
returned it to the company and demanded his money back.
The damage to the machine was $156.65, as admitted by
the demurrer, and since that was more than the minor had
paid in, he was denied any recovery.

Justice Bennett in deciding the case gave a very strong
argument for the New York rule, but refused to recognize
it as the minority. He cites many cases to support his
view, but some of them do not support his contention. The
Illinois case of Chicago Mutual Life Ind. Ass'n v. Hunt,
which he cites, does not strictly support the New York rule
and in so far as it does, it was expressly overruled in Wuller
v. Chuse Grocery Store.

Minnesota and New Hampshire cases are also cited in
accord, but in fact the two states have a rule of their own
which will be discussed later under the third or provident
rule. Under the facts in the Oregon case, neither Minne-
sota nor New Hampshire would allow anything for depre-
ciation, but would permit the infant to recover the entire
$125.00 paid in.

In Shutter v. Fudge the defendant, a minor seventeen
years of age, purchased merchandise which he manufactured
into radio sets and sold. The agreed reasonable market
value of the merchandise purchased was $415.87 and the
unpaid balance $213.00. The minor sold the sets and re-
ceived the benefits. The plaintiff adult sued, but no fur-

33 127 Ill. 257, 277, 20 N. E. 55, 2 L. R. A. 549 (1889).
35 108 Conn. 528, 143 Atl. 896 (1928).
ther recovery was allowed because where an infant has lost, wasted, or disposed of the property received, he may nevertheless repudiate the contract without making restitution in order to give effect to his disaffirmance. It might be noted here that under the majority rule, the minor could have recovered the $213.00 paid in.

This rule in many cases more nearly approaches justice for the adult who has acted in good faith, but it seems that it should be limited to depreciation caused by wear and tear in the use of the article obtained and should not cover damage caused by the minor's indiscretion. The very purpose of allowing minors the power of disaffirmance is to protect them against injury from lack of capacity. There are times when the damage caused to the article is due to the minor's lack of sound judgment, though the contract was fair and reasonable.

The third or provident rule is that the contract of an infant, though a fair, reasonable, and provident one, may be rescinded, but the infant is entitled to recover only the amount of his payments over and above the actual benefits received from the contract. Benefit is used in the narrow sense of actual gain from the contract.

Under this rule in the "hypothetical case" we would obtain Result Three, that is, the infant would recover $900.00. The amount paid in was $1400.00, the earning or gain from the use of the truck was $500.00 and subtracting his liability, or the benefits, he has a net balance of $900.00 due him.

If the property purchased had been a pleasure car, or even a truck from which no earning or benefit accrued, the infant on rescinding and returning the article purchased in whatever condition of depreciation would recover the entire amount paid in, as he would under the majority rule.
This rule is followed in Minnesota and New Hampshire, but it is not often recognized as a rule. Hence, cases from these jurisdictions have been cited to support both the Massachusetts and New York rules. It is more closely akin to the Massachusetts or majority rule, since it permits recovery without accounting for depreciation and only rarely is there a benefit to deduct except mainly where the article is to be used in business, and not always then.

This rule has also been referred to as placing business contracts of an infant in the category of necessaries for which an infant is liable. This, however, is not exactly accurate because the infant does in all cases have the power to disaffirm which he does not have in executed contracts for necessaries. Furthermore, the rule in theory applies to all contracts for non-necessaries where actual benefits are received, not merely business contracts.

An illustration of this rule is Berglund v. American Multigraph Sales Company, where the plaintiff, a minor nineteen years of age, bought a multigraph machine from the defendant for $475.00 on the payment plan, agreeing that the amount paid in would cover the value of the use in case of default. He kept the machine from April till July, his business became unprofitable, and the machine was taken by the defendant. The minor sought to recover the $160.60 paid in and was allowed $62.00 by the jury. The upper court stated that the minor was obliged to account for the benefits received from the use of the goods, but that the benefits would not necessarily be the market value of such use, or the rental value, or contract value, but the value of

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the benefit to the minor. The court deemed $30.00 a sufficient deduction and gave the minor $130.60 plus interest.

In Klaus v. A. C. Thomson Auto & Buggy Company the plaintiff, a grocery clerk twenty years of age, bought an automobile for $1000.00, paid $200.00 cash and gave a note for $800.00 covering the balance. He used the car a few days, damaged it to the extent of $500.00 because of his negligence, returned the car, and demanded his note and money back. Full recovery was allowed. The Supreme Court of Minnesota conceded that the contract was fair and without overreaching, but held it not sane, reasonable, or provident for a minor in plaintiff’s circumstances to contract for a pleasure car. Chief Justice Gilfillan’s dissent in the Minnesota case of Johnson v. Northwestern Mut. Life Ins. Co. was quoted on the meaning of “reasonable” and “fair” as used in these decisions as follows:

"If from the subject-matter or terms of the contract, it is a wasting of his estate, so that to require him to restore what he has received will likewise waste his estate, it will not be required of him. But if the contract be, both in subject-matter and terms, a provident one,—advantageous to the minor,—the court, to prevent a fraud on the other party, unnecessary to his protection, will not permit him to recover what he has parted with without setting off against it what he has received.""

Result Four to the effect that A, the adult, can recover $200.00, the balance due on the contract plus reasonable attorney’s fees according to the terms of the note, is obtained in those states, though few in number, which estop an infant in law from using his infancy as a defense or for disaffirmance, if by fraud and misrepresentation he has induced the adult to contract with him. Under this rule if the infant who has misrepresented his age were to be sued in an action at law based on the contract, he would be liable thereon according to its terms.

40 59 N. W. 992, 995 (Minn. 1894).
It must be remembered that this rule of estoppel does not apply unless there is fraud such as a misrepresentation of age, which in fact induces the contract. If there is no such inducing misrepresentation by word or conduct, then the states following this rule decide under one of the three previously named rules, that is, the New York, Massachusetts, or provident rule.

Some of the states following this rule are Georgia, Nebraska, New Jersey, and Texas. This is also the rule in Kansas, Iowa, Utah, and Washington by statute. These statutes provide that no contract can be disaffirmed where, on account of the minor's own misrepresentation as to his majority, or from his having engaged in business as an adult, the other party had good reasons to believe the minor capable of contracting.

An illustration of the rule of estoppel is *Klinck v. Reeder*, where an infant, nineteen years of age, married, emancipated, and having the appearance of a man, bought a tractor from the plaintiff and gave his notes therefor. The infant was engaged in business and stated that he was of age. In an action against the minor on the notes, the plaintiff was allowed recovery. The court reasoned that though generally the doctrine of estoppel *in pais* is not applicable to infants, yet where the infant, mature of appearance and transacting business for himself, falsely represents his age.

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42 Klinck v. Reeder, 107 Neb. 342, 185 N. W. 1000 (1921).
45 REV. STAT. OF KAN. (1923) c. 38, § 103.
46 CODE OF IOWA (1931) c. 472, § 10494.
47 COMP. LAWS OF UTAH (1917) Title 67, § 3957.
48 REMINGTON'S COMP. STAT. OF WASH. (1922) Vol. II., Title 37, § 5830.
49 See also Tuck v. Payne, 159 Tenn. (6 Smith) 192, 17 S. W. (2d) 8 (1929); Pinnacle Motor Co. v. Daugherty, 231 Ky. 626, 21 S. W. (2d) 1001 (1929).
51 See note 19, op. cit. supra.
to enter a contract with a person who believes such statements to be true and relies thereon, thus parting with his property, the benefit of which the infant receives and retains, the doctrine of estoppel will apply.

In *La Rosa v. Nichols* the plaintiff, a minor twenty years of age, stored his car with the defendant who did some work on it. The bill was $74.49 and defendant held the car for payment. The minor brought replevin, but was held estopped to assert his infancy because of a misrepresentation of age. The court said that the doctrine of equitable estoppel, although the creature of equity, and depending upon equitable principles, is recognized and enforced alike by courts of law and equity.

A few states have statutes which provide that the contract of a minor may be disaffirmed, but if he be over eighteen years of age when contracting he must restore the consideration to the party from whom it was received or must pay its equivalent with interest. This rule requires the minor to put the adult in *status quo* as a condition of disaffirmance. It differs from the New York or minority rule in that the infant not only has to pay for depreciation and damage to the extent of payments already made, but to the full extent of the loss regardless of the amount paid in.

**IN EQUITY**

It is laid down as a general rule that the doctrine of estoppel *in pais* does not apply to a minor, and therefore his misrepresentation of age, or other deceit, does not estop him in equity any more than it does at law. Despite this rule, decisions may be found in the majority of the states where

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the courts have refused an infant equitable relief in the recovery of property he has transferred where he has been guilty of fraud and misrepresentation. The decisions are based on grounds of equitable estoppel, or at least, the courts so say.

The decisions mentioned have caused comments to the effect that estoppel of infants does not apply at law, yet in equity the courts are about evenly divided with probably a majority allowing estoppel.

Naturally those states heretofore mentioned which stop a minor for deceit at law and hold him to his contract will do so in equity. However, even in equity, the overwhelming weight of authority is that the infant is not stopped to repudiate his contract.55

The courts in barring recovery to the infant for misrepresentation and fraud in equity recognize the rule that an infant is not stopped either in law or in equity since deceit cannot give validity to a contract which has no validity, but state there is an exception to the rule. What this exception is has not been clearly defined, yet the results are fairly uniform in applying the alleged exception. In fact what the courts are doing is simply denying equitable relief to an infant in the particular case because due to the nature of the deceit and fraud in that case to grant him relief would not be equitable. It would be making the court a partner in the injustice and would be abolishing the equitable doctrines that he who seeks equity must do equity and he who seeks equity must come into court with clean hands. In other

words, an infant is not estopped by misrepresentation of age since estoppel in pais does not apply to infants, but equity jurisdiction, and rules of equity are not limited to adults. They are applicable to all.

Thus, for example, though Illinois does not recognize that an infant is estopped either in law or in equity to disaffirm his contracts because of a misrepresentation of age or other such deceit, yet in the case of *Lewis v. Van Cleve* the court denied the quondam infant relief on the alleged ground of estoppel. In that case the minor's mother conveyed her property to him, without consideration, to defraud her creditors. A few months later the minor, seventeen or eighteen years of age, reconveyed to his mother, and sometime afterward assisted her in selling it. He told the agent who had charge of the sale that when he sold it to his mother that he was of age. The minor received considerable from the proceeds of the sale by the mother. The quondam minor sought to repudiate his deed and assert title as against subsequent purchasers and mortgagees who acted in good faith.

In denying relief some of the statements of the court are as follows: "'Estoppel will not ordinarily be based on the acts and declarations of infants, but cases may arise in which, for the prevention of fraud or unfairness, a court of equity may decree such an estoppel.'" "Cases recognizing an exception... (are) in case the conduct of the infant... has been intentional and fraudulent and the infant was at the time of years of discretion." "'Such estoppels are, and should be, favored in law, honor and conscience, for the truest and best of reasons...'" "'This principle, so equitable and legal, runs throughout all the transactions and contracts of civilized life.'" "'He has no more right to commit a fraud than an adult.'" "'This principle of equitable estoppels of this character applies to infants, as well as adults...'."

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The court had before it the case of *Wieland v. Kobick*\(^5\), where the plaintiff, a girl seventeen years of age, had conveyed land, had misrepresented her age, received the money and spent it, and then sought to disaffirm. In her ejectment suit the court held she was not estopped to disaffirm the deed.

In both cases the age at the time of conveyance was about the same, and in both a misrepresentation of age. The *Wieland* case was a law case in ejectment, and the *Lewis* case, one in equity which might seem to sustain that an infant is estopped in equity, but not in law for a misrepresentation of age. However, law or equity case had little to do with it. The court in the *Wieland* ejectment suit simply applied the rule that a minor may disaffirm an executed contract and is not estopped by a misrepresentation of age since estoppel *in pais* does not apply to infants. The court found no injustice or such fraud that called for the application of a third rule that he who seeks equity must come into court with clean hands. A girl seventeen, without intent to defraud, sold her land, misstated her age to do so, and later on decided to disaffirm. The law aims to protect minors against their own improvidence, hence in this case the court saw in the application of the usual legal rule no injustice, though in fact it did cause injury.

In the *Lewis* case, however, the minor was a boy of considerable discretion, though only seventeen or eighteen at time of first conveyance. He gave active assistance thereafter, both before and after age, in carrying out what he knew to be a fraudulent transaction throughout. His mother conveyed to him, without consideration, to defraud. He profited by the transaction in which formerly he had no claim. The court recognized the legal rules, but found an exception. The court really found it necessary to apply a third rule, that he who seeks equity must come into court with clean hands. There was no desire on the part of the

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\(^5\) 110 Ill. 16, 51 Am. Rep. 676 (1884).
court to make itself a party to the fraud by granting the quondam minor the relief he sought. There is no denial of the rules regarding minors in this case, and really no exception to them. The rules of law allowing disaffirmance or denying estoppel of infants do not destroy all other rules when applicable. It seems to me that to allow an infant to take advantage of an actual fraud on the ground that an infant can disaffirm a contract and is not subject to estoppel *in pari* because of a misrepresentation of age, is like dismissing a speeder for violating a valid city ordinance limiting the speed to twenty miles per hour, because the state law says you can drive up to forty miles per hour. A rule of law on a given situation does not destroy the other rules when applicable any more than the law which makes killing a human being while engaged in a robbery, murder, demands a dismissal for robbery if the victim is not killed.

The federal courts\(^\text{58}\) recognize this principle by tentatively conceding that estoppel does not apply to infants, and place their decisions denying relief squarely on rules of equity which apply to both infants and adults.

The courts are not enforcing the contract, but enforcing equity. At times, incidentally, the result is the same.

**IN TORT FOR DECEIT**

In the "hypothetical case" there was a misrepresentation of age which gives rise to another problem and that is, can the infant be held liable in a tort action for deceit? Since an infant is liable for his torts not arising out of contract, can the adult by charging deceit recoup his loss caused thereby without resorting to the contract?

All of the elements of a tort action for deceit are present in many cases where the infant misrepresents his age, that is, there is a false representation of a material existing fact

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with intent to deceive and to induce a person to act, and that person relying on the representation is thereby induced to act and to his injury. If then there is as in the "hypothetical case" an actual deceit, should not the action lie for the actual damages caused to the adult?

The objection raised is that an infant is not liable on his contracts, nor for his torts arising out of contract, since to enforce the tort liability would indirectly be enforcing the contract and would be depriving the infant of the protection of the laws so meant for him. To this statement there is no objection, but the question remains, is the misrepresentation of age a tort arising out of contract, or is it independent of it.

The great weight of authority is that it is a tort independent of the contract. England, Massachusetts, Maryland, and North Carolina are to the contrary.

There is no contract about the age of the infant when, for example, he buys an automobile. It is a contract concerning the motor vehicle as to its identity, description, price, mode of payment, and the like. The age stated is incidental to the contract and is material only because of the purely collateral matter that an infant is not bound if he is not of age, the adult seeking to determine if he shall contract.

In many cases the question of age is antecedent to the contract, a preliminary precaution, and not part of the con-

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INFANTS' LIABILITY—WHEN NOT LIABLE

tract at all. Here quite clearly it seems to be a tort independent of the contract. However, even if it were stated in the contract as part of it, it is still only incidental. A similar case would arise where an infant agrees in a contract not to wilfully injure the property he receives. The infant is liable for wilful injury and I think it would not be seriously contended that the infant is not liable for his tort in wilfully injuring the property because that is part of the contract, whereas if that had been left out he would be liable. He is liable in such a case, contract or no contract. Whether it is a tort independent of contract as is conceded, or simply the law desires to create that responsibility, need not be determined, but it seems to me that a misrepresentation of age, even if in the contract, and a wilful injury, even if the subject of specific agreement are both incidental to the contract and are torts independent thereof within the contemplation of the principles of the law making minors "liable for their torts, excepting those arising out of contract."

It is conceded that if an infant who hires a horse, or an automobile, wilfully injures or destroys the bailed property, he is responsible for the damage, or is liable in an action of trover for conversion; yet surely the wilful injury of an article obtained by an infant by contract is as closely connected with the contract and rises therefrom as much as a wilful misstatement of age to get possession of such property.

It is not contended that the deceit makes the infant responsible for his contract any more than that wilful injury makes the infant so liable. It is, however, submitted that such tortious conduct entails liability, or should do so, in an action of tort for deceit, if it causes damage to an innocent party, and to the extent of the damage only, no more, no less, regardless of the contract.

It has been advanced that to hold an infant in tort would make it a simple matter for anyone with such intent to hold
all infants by getting them to misstate their ages. It must be kept in mind that an action of deceit requires more than proof of misrepresentation. In addition to other things, the statement must be the inducement to contract, must be relied on, and must cause injury. Quite uniformly the cases hold that the fraud must be actual, not constructive only, that is, mere failure to disclose age is not enough.\(^6\) It is also obvious that a boy fifteen or sixteen years of age could not represent himself to be twenty-one so as to induce a reliance on that representation. The same would be true of anyone not appearing of age. Also, if the adult would have sold to the infant, whether of age or not, it could not be said he was induced to act by the false representation. The burden of proving all the elements of the deceit would be on the adult and in addition the contract must be a fair one with no overstepping. Even where fair, the adult's recovery would be the actual damage of the deceit and not the contract price.

In *Johnson v. Pie*,\(^65\) the leading case holding that deceit will not lie against an infant for misrepresentation in inducing a contract, the court says that if infants were bound by their deceits all the infants in England would be ruined. The courts have, in many cases other than when dealing with infants, refused a recovery on grounds of policy in that to hold otherwise would let loose a flood of litigation, yet when some state passed a law allowing recovery in the identical situation no such dire results followed.\(^66\) The same has been found true with infants in deceit cases.

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\(^66\) For examples, see dissenting opinion of Justice Crownhart in *Wick v Wick*, 192 Wis. 260, 212 N. W. 787, 52 A. L. R. 1113 (1927).
As a further answer to the English court, it might be said that it is doubtful if all infants are liars in such cases. Besides the same court would hold the infant liable for trover, slander, trespass, and for wilful injuries. In doing so they would find no serious evil results; why here? It also might be suggested that a little responsibility for intentional wrong-doing would not be remiss for a twenty-year-old infant when the only result would be to require payment of actual damages for his deceit in an otherwise fair and reasonable contract.

In England the consequence of not holding the infant for deceit is counteracted by a far more liberal appliance of equitable doctrines.

One of the more recent cases upholding the minority view is *Greensboro Morris Plan Company v. Palmer* which stressed the fact that the age was in the contract as part of it and not antecedent to it as in *Fitts v. Hall*, which held contra. It has already been suggested that this point should not be controlling.

In *Vermont Acceptance Corporation v. Wiltshire* the defendant, an infant nineteen years of age, purchased a car from the motor company on a conditional bill of sale agreement giving a note for the balance due. The conditional sales agreement contained a stipulation that the car should not be used in connection with any violation of state or federal law. The defendant infant was arrested for transporting intoxicating liquor in the automobile and it was seized. The plaintiff, the assignee of defendant's note, contended that the defendant's wilful use of the car for transporting intoxicating liquor in violation of the federal law, and of his agreement, was a conversion for which he is liable in tort. The court upheld the plaintiff's contention ruling that the

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69 153 Atl. 199, 73 A. L. R. 792 (Vt. 1931).
quondam infant was liable in conversion for such an intentional and wilful use of the property contrary to the consent of the creditor, and in violation of the agreement resulting in its loss.

It is difficult to see where the above tort for conversion is any more independent of the contract than the age representation in making a contract to purchase the same car. In fact this seems much more a part of and dependent on the contract than the infant's age.

In Wisconsin Loan & Finance Corporation v. Goodnough the defendant, a minor nineteen years ten months old, and mother, were co-partners in a confectionary store. To enlarge the business they borrowed money to purchase equipment for a lunch counter. They signed a judgment note to the plaintiff for $400.00, carrying 10 per cent interest, and for reasonable attorney's fees. The defendant misrepresented his age to induce the contract. At the time of the suit $25.00 had been paid on the note. A jury found $370.42 was still unpaid and $30.00 a reasonable amount for attorney's fees. The actual sum received on the note was $352.00. The upper court in reversing the case set aside the judgment on the note and refused to recognize an estoppel against the infant because of the misrepresentation of age, but did enter judgment against him for $352.00 plus interest less the $25.00 repaid. This the court allowed as actual damage caused by the deceit. The court after holding that a misrepresentation of age is a tort not arising out of contract said:

"It is a matter of some importance, however, to determine whether an infant who secures benefits by misrepresenting his age to the person from whom he secures them is estopped to set up his infancy in order to defeat the contract, or whether he becomes liable in an action for deceit for damages. In this case, if there is an estoppel which operates to prevent the defendant from repudiating the con-

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tract and he is liable upon it, the damages will be the full amount of
the note plus interest and a reasonable attorney's fee. If he is held
liable, on the other hand, in deceit, he will be liable only for the
damages which the plaintiff sustained in this case, the amount of
money the plaintiff parted with, which was $352 less the $25 repaid.
There seems to be sound reason in the position of the English courts
that to hold the contract enforceable by way of estoppel is to go
contrary to the clearly declared policy of the law. But, as was pointed
out by the New Hampshire court,\textsuperscript{71} that objection lies no more for
wrongs done by a minor by way of deceit than by way of slander
or other torts. The contract is not enforced. He is held liable for
decit as he is for other torts such as slander, trover, and trespass.\textsuperscript{70}

There is a dictum in \textit{Keal v. Rhydderck} \textsuperscript{72} which, in recog-
nizing estoppel of minors in certain exceptions only and
recognizing his liability in tort for deceit, indicates that the
estoppel is to prevent a circuity of action. The estoppel un-
der such a condition would be really holding liability in tort,
but enforcing it in the suit before the court to avoid allow-
ing a recovery to the minor and then nullifying it later by
allowing the adult recovery in a tort action for deceit. This
dictum is supported by decisions in other states.\textsuperscript{73}

\textbf{Summary of Law}

(1) A minor may rescind his executed or unexecuted
contracts for the purchase of personal property, and on of-
fering the return of the property received in its existing
condition, if still in his control, or nothing if not, may in
the majority of American jurisdictions recover whatever
money or property he has parted with without deduction
for depreciation, use, or benefits. This rule is followed in
Arkansas, Illinois, Indiana, Maine, Massachusetts, Michigan,
North Carolina, Rhode Island, Texas, Utah, and Vermont. This view is sometimes spoken of as the Massachu-
setts or majority rule.

\textsuperscript{71} Fitts v. Hall, \textit{op. cit. supra} note 59.
\textsuperscript{72} 317 Ill. 231, at 239, 148 N. E. 53 (1925).
\textsuperscript{73} Chasser \textit{v. Hutton, op. cit. supra} note 59.
(2) The New York, or minority rule, is that a minor may repudiate as in (1) above but in the recovery must allow, by way of deduction, the amount of depreciation and use of the article, if a fair contract. If the depreciation is more than the amount paid in, the minor can recover nothing, but in no case can the adult recover more than the amount already received. This rule is followed in Alabama, Connecticut, Canada, District of Columbia, England, Federal Courts, New York, Ohio, and Oregon. Connecticut allows depreciation, but not use.

(3) The third, or provident rule allows repudiation as in (1) and (2) above, but if the contract is a fair, reasonable, and provident one, he must allow in his recovery a deduction for the benefits or profits actually received from the contract. Under this rule benefits ordinarily arise only in case of business contracts, hence full recovery is usually allowed. This rule is followed in Minnesota and New Hampshire.

(4) Some few states hold the minor to his contract, if fair, on the grounds of estoppel where he has misrepresented his age. If, however, there has been no such misrepresentation then the Massachusetts, New York, or provident rule applies depending on the jurisdiction. This rule is followed in Georgia, Mississippi, Nebraska, New Jersey, and Texas. This is also the rule by statute in Kansas, Iowa, Utah, and Washington.

(5) In an equitable proceeding the great weight of authority is also that a minor in seeking relief is not estopped by a misrepresentation of age, or other deceit, in inducing the contract. However, the weight of authority is that an infant is estopped where he is seeking to take advantage of his fraud to obtain positive relief or gain which would be fraudulent and unjust. This is often called an exception to the rule that infants are never estopped in pais, but usual-
ly the case is one where the equitable principles of he who seeks equity must do equity or else he who seeks equity must come into court with clean hands are applicable. Stated in another way, equity has jurisdiction to apply its rules to infants as well as to adults.

(6) Some states by statute permit a minor to rescind his contracts, but if eighteen years of age or over when contracting, he must restore the adult to status quo where the contract is a fair and reasonable one. Statutes of this nature may be found in California, Idaho, and North Dakota.

(7) A minor who has knowingly misrepresented his age to induce a contract and his statement is relied on and does induce the contract to the adult's injury, the adult may hold the minor liable for actual damages caused thereby in an action of tort for deceit. The great weight of authority is that this is a tort not arising out of contract, but independent thereof. England, Massachusetts, Maryland, and North Carolina hold contra on the principle that it is a tort arising out of contract and an indirect enforcement of the contract.

(8) A dictum in an Illinois case suggests that if for any reason such as deceit, estoppel, or equitable rule, cross rights are recognized between the adult and the infant, it should be all settled in one suit, presumably equity, to avoid a circuity of action.

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