NOTES

LIABILITY OF INFANTS FOR TORTIOUS CONDUCT IN CONNECTION WITH CONTRACTS—It is generally agreed that a contract of an infant is voidable at the infant's option.[1] The reason for the rule is a public policy to protect the infant from his immature judgment. The law has, however, refused to extend its protection to all civil conduct of the infant, and it has accordingly been held with equal uniformity that infants must respond for torts committed by them.[2] Between these points we have the troublesome area wherein the infant commits a tort which is associated with the performance of a contract, or wherein the infant in connection with the making of a contract is guilty of conduct which is wrongful in nature. It is the object of this note to deal with the last described situations.

It is generally held that where the wrong complained of is nothing more than a breach of contract, the plea of infancy prevails; and that is so whether the action against an infant sounds in tort or in contract.[3] The few cases in New Jersey dealing with this problem are entirely in accord with this proposition.[4] Thus in the case of *Brunhoelzl* v. *Brandes*,[5] where the plaintiff had loaned his automobile to the infant defendant, and the automobile was damaged because of the infant's carelessness, recovery, though in tort, was denied. The Court expressed the principle as follows:[6]

> The general liability of infants for their torts does not take from them their special immunity from liability for their contracts; each rests upon a policy of the law. Where these two policies come into conflict they cancel each other to the extent that they deal with the same subject-matter. If this cancellation be complete so that all that is claimed as the foundation of the infant's tort is covered by the breach of contract, nothing remains upon which to found an action of tort independently of contract. The practical test, therefore, would seem to be not whether the tort arose out of or was connected

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[1] Woolston v. King, 3 N.J.L. *1049 (Sup. Ct. 1913); Feir v. Weil, 92 N.J.L. 610; 106 Atl. 420 (E.&A. 1919); and cases cited in 31 C.J. 1060, note 76.

[2] See cases cited in 31 C.J. 1090, note 26; 14 R.C.L. 260, note 11.

[3] 2 ADDISON, TORTS (DUDLEY & BAYLIS' ED. 1876) 1126; Slayton v. Barry, 175 Mass. 513; 56 N.E. 574 (1900); Brooks v. Sawyer, 191 Mass. 151; 76 N.E. 953 (1906); Caswell v. Parker, 96 Me. 39; 51 Atl. 572 (1901); Wooldridge v. Lavoie, 79 N.H. 21, 104 Atl. 345 (1918); Young v. Muhling, 48 App. Div. 617, 63 N.Y. Supp. 359 (1900); Shenkein v. Fuhrman, 80 N.Y. Misc. 179, 141 N.Y. Supp. 909 (1913); Lowery v. Cate, 108 Tenn. 54, 64 S.W. 673 (1901).

[4] Shenk v. Strong, 4 N.J.L. 99 (Sup. Ct. 1818); Brunhoelzl v. Brandes, 90 N.J.L. 31, 100 Atl. 163 (Sup. Ct. 1917).

[5] *Supra* note 4.

[6] *Supra* note 4, 90 N.J.L. at p. 32, 100 Atl. at p. 163.

with the infant's contract, but whether the infant can be held liable for such tort without in effect enforcing his liability on this contract.

Where, however, the gravamen of the complaint, although there be a contract in the background, is a wilful and positive wrong, the infant is liable.[7] Thus, for example, where an infant receives a horse under a contract of bailment, and intentionally inflicts an injury upon the animal, or drives it to a point beyond that fixed by the contract,[8] or where an infant receives merchandise under an agreement of bailment and then intentionally converts it to his own use,[9] the infant is liable in tort. And where an infant who is liable for a tort, enters into a contract to compensate the injured party, the infant will be liable on the contract itself.[10]

In view of the numerous authorities holding that an infant is liable for a wilful and positive wrong notwithstanding the existence of a contract, one would expect equally uniform authority to the effect that an infant is liable in tort where he fraudulently induces the making of a contract. Yet, peculiarly, most cases exempt the infant. Thus three States have held that an infant is not liable in deceit for misrepresentations as to the subject matter of a contract; as for example, the quality of the goods sold. The courts hold that the misrepresentation is so intimate a part of the contract as to invoke the infant's mantle of protection in contractual matters.[11] One State holds to the contrary.[12]

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[7] ADDISON, *op. cit. supra* note 3; Vasse v. Smith, 6 Cranch 226, 3 L. Ed. 207 (U.S. 1810); Homer v. Thwing, 3 Pick. 492 (Mass. 1826); Churchill v. White, 58 Neb. 22, 78 N.W. 369 (1899); Fitts v. Hall, 9 N.H. 441 (1838); Wooldridge v. Lavoie, *supra* note 3; Campbell v. Stakes, 2 Wend. 137 (N.Y. 1828); Shenkein v. Fuhrman, *supra* note 3; Freeman v. Boland, 14 R.I. 39 (1883); Lowery v. Cate, *supra* note 3; Towne v. Wiley, 23 Vt. 355 (1851); Ray v. Tubbs, 50 Vt. 688 (1878); Burnard v. Haggis, 14 C.B. (N.S.) 45, 143 Repr. 360 (C.P. 1863). See, however, case of Penrose v. Curren, 3 Rawle 351 (Pa. 1832), where infant held not liable although he drove animal beyond point fixed by contract of bailment. In Shenk v. Strong, *supra* note 4, the New Jersey Court, notwithstanding an allegation that the infant drove the horse upon a different journey, held that there was no liability. This portion of the case is questioned by the case of Brunhoelzel v. Brandes, *supra* note 4, which, however, expressly leaves the point open.

[8] Homer v. Thwing, *supra* note 7; Churchill v. White, *supra* note 7; Campbell v. Stakes, *supra* note 7; Young v. Muhling, *supra* note 3; Freeman v. Boland, *supra* note 7; Towne v. Wiley, *supra* note 7; Ray v. Tubbs, *supra* note 7. See also discussion of Pennsylvania and New Jersey cases, *supra* note 7.

[9] Vasse v. Smith, *supra* note 7.

[10] Shaw v. Coffin, 58 Me. 254 (1870); Ray v. Tubbs, *supra* note 7. See also Bordentown v. Wallace, 47 N.J.L. 457, 1 Atl. 506 (Sup. Ct. 1887), where it is held that infancy is not a defense to an action on a bond given by infant to indemnify township for support of infant's bastard child.

[11] Brown v. Durham, 1 Root 272 (Conn. 1791); Prescott v. Norris, 32 N.H. 101 (1855); West v. Moore, 14 Vt. 447 (1842); Gilson v. Spear, 38 Vt. 311 (1865); note 57 L.R.A. 673 at 680.

[12] Word v. Vance, 1 Mott & M'c. 197 (S.C. 1818).

One of the three States mentioned has denied recovery in deceit where the infant misrepresented his ownership of the goods sold.[13] In New York, however, where the question of the infant's liability in tort for misrepresentation as to the subject matter has been expressly left open,[14] it was held that an infant is liable in deceit where he fraudulently misrepresented that he was a member of a firm thereby inducing an extension of credit;[15] and in Indiana, an infant who obtained an extension of credit by presenting a forged guarantee was held liable in deceit.[16] Where the misrepresentation relates to the age of the infant, most courts hold that the infant is not liable in deceit.[17] Two jurisdictions hold the contrary.[18] And strangely one of them is one of the States which holds that an infant is not liable in deceit for misrepresentation as to the subject matter.[19]

The question whether an infant, who misrepresents his age and appears to be within the age of discretion will be estopped to plead infancy in an action on the contract itself, has been litigated in many jurisdictions. Most courts hold that the infant is not estopped.[20] Included in this group are the two States which impose liability in deceit, the reason for the different result being a difference in the measure of the damages in deceit and contract actions.[21] A strong minority, how-

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[13] Doran v. Smith, 49 Vt. 353 (1877).

[14] Hewitt v. Warren, 10 Hun. 560 (N.Y. 1877); Collins v. Gifford, 203 N.Y. 465, 96 N.E. 721 (1911).

[15] Shenkein v. Fuhrman, *supra* note 3.

[16] Butler Bros. v. Snyder, 81 Ind. App. 44, 142 N.E. 398 (1924). See Walker v. Davis, 67 Mass. 506 (1854), where infant got adult drunk and then purchased a cow from him, giving a note for the purchase price; adult was not permitted to recover on the note, but recovery was allowed in tort.

[17] Slayton v. Barry, *supra* note 3; Brooks v. Sawyer, *supra* note 3; Raymond v. General Motorcycle Co., 230 Mass. 54, 119 N.E. 359 (1918); Greensboro Morris Plan Co. v. Palmer, 185 N.C. 721, 116 S.E. 261 (1923); Penrose v. Curren, *supra* note 7; Neff v. Landis, 110 Pa. 204, 1 Atl. 177 (1885); Whitcomb v. Joslyn, 51 Vt. 79 (1878); Nash v. Jewett, 61 Vt. 501, 18 Atl. 47 (1889); Johnson v. Pie, 1 Keb. 905, 1 Syd. 258, 83 Repr. 353 (K.B. 1793).

[18] Rice v. Boyer, 108 Ind. 472, 9 N.E. 420 (1886); Fitts v. Hall, *supra* note 7; Burley v. Russell, 10 N.H. 184 (1839).

[19] Prescott v. Norris, *supra* note 11.

[20] Sims v. Everhardt, 102 U.S. 300 (1880); Meyers v. Hurly Motor Co., 273 U.S. 18, 71 L. ed. 515 (1926); Tobin v. Spann, 85 Ark. 556, 109 S.W. 534 (1908); Creer v. Active Automobile Exch. Inc., 99 Conn. 266, 121 Atl. 888 (1923); Carpenter v. Carpenter, 45 Ind. 142; Sawyer Boot & Shoe Co. v. Braveman, 160 Me. 270, 136 Atl. 290 (1927); Raymond v. General Motorcycle Co., *supra* note 17; Folds v. Allardt, 35 Minn. 488, 29 N.W. 201 (1886); Steigerwait v. Woodhead Co., Inc., 244 N.W. 412, (Minn. 1932); Burley v. Russell, *supra* note 18; International Text Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722 (1912); Wyatt v. Lortscher, 217 App. Div. 224, 216 N.Y. Sup. 571 (1926); Summit Auto Co. v. Jenkins, 20 Ohio App. 229, 153 N.E. 153 (1925); Bartlett v. Wells, 101 E.C.L. 836, 8 Jur. N.S. 762, 121 Repr. 924 (Q.B. 1862); Gerkey v. Hampe, 274 SW. 510 (Mo. 1926).

[21] Rice v. Boyer, *supra* note 18; Burley v. Russell, *supra* note 18.

ever, hold that an infant will be estopped under these circumstances,[22] and at least four States have embodied this rule in statutes.[23] New Jersey follows the minority rule, but with the qualification that it must appear that the infant has received and retained a benefit under the contract.[24]

In the recent case of *Sawicki* v. *Slahor*,[25] we have an unusual application of the estoppel rule. Here an infant entered into a contract to marry. His fraud was entirely as to his intention to perform the contract. It appeared that in reliance upon his representation of his intention to marry, the plaintiff entered into the contract, and was thereafter seduced, whereupon she brought an action for breach of promise. The trial court, on a rule to show cause, held that because of the defendant's fraud, he was estopped to plead his infancy.

This case is a peculiar extension of the estoppel doctrine, for here there was no misrepresentation as to defendant's age, and therefore no basis for a true estoppel as to that matter. In holding that a fraudulent representation other than as to age will result in an estoppel to plead infancy, this case stands without precedent to support it. It is also doubtful that the facts of the case meet with the requirement in this State that the infant receive and retain the benefits of the contract. The benefits arising from the intimate relations between the parties, to which the trial court alludes, are hardly the benefits contracted for; if they were, the contract would have been illegal, since it would contemplate illicit intercourse. The ultimate result of this decision is basically

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[22] Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787 (1924); Lewis v. Van Cleve, 302 Ill. 413, 134 N.E. 804 (1922); Young v. Daniel, 201 Ky. 65, 255 S.W. 854 (1923); Tuck v. Payne, 17 S.W. (2d) 8 (Ky. 1925); Pinnacle Motor Co. v. Daugherty, 231 Ky. 626, 21 S.W. (2d) 1001 (1929); Klink v. Reeder, 191 Neb. 342, 185 N.W. 1000 (1921); Grauman, Marx & Cline Co. v. Krientz, 142 Wis. 556, 126 N.W. 50 (1910).

[23] First Nat. Bank of Titonka v. Casey, 158 Iowa 349, 138 N.W. 892 (1912); Dillon v. Burham, 43 Kan. 77, 22 Pac. 1016 (1890); UTAH REVISED STATUTES, sec. 1543; Gill v. Perry, 114 Wash. 19, 194 Pac. 797 (1921). All of the statutes provide substantially as follows:

> "no contract can be * disaffirmed in cases where on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting."

[24] LaRosa v. Nichols, 92 N.J.L. 375, 105 Atl. 201 (E.&A. 1918); Sonntag v. Heller, 97 N.J.L. 462, 117 Atl. 638 (E.&A. 1922). The same rule has been applied in equity. Hayes v. Parker, 41 N.J.Eq. 631, 7 Atl. 511 (E.&A. 1886); Pemberton Building & Loan Ass'n. v. Adams, 53 N.J.Eq. 258, 31 Atl. 280 (Ch. 1895). Compare, however, the cases of Feir v. Weil, *supra* note 1, and Volpe v. Hammersley Mfg. Co., 96 N.J.L. 489, 115 Atl. 665 (E.&A. 1921), holding that in view of the legislative purpose as gleaned from the statutes, the doctrine of estoppel will not be invoked to bar an action at law by an infant who obtains employment by the false representation that his age exceeds the minimum age fixed by such statutes.

[25] 11 N.J.Misc. 604, 167 Atl. 691 (Circ. Ct. 1933).

in keeping with the growing sentiment that infants within the age of discretion should be held amenable for fraudulent conduct, but analytically, such relief should be granted in an action in deceit, and not in an action on the contract. The difference may be not only in the burden of proof, but also in the measure of damages.[26]

IMPLIED REVOCATION OR ADEMPTION OF DEVISE BY SUBSEQUENT CONTRACT TO CONVEY—While the New Jersey Statute of Wills[1] expressly provides the manner and circumstances under which a devise may be revoked by some positive act[2] or by operation of law,[3] it remains silent as to the common law of implied revocation by alienation or alteration of the lands devised.[4] If a testator devises property and thereafter makes an absolute conveyance, such alienation operates as a revocation,[5] for the devisor does not die seized, and his sale after making

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[26] See Rice v. Boyer, *supra* note 18; Burley v. Russell, *supra* note 18.

[1] 4 Comp. Stat. (1910) p. 5860.

[2] "No devise * * * shall be revocable otherwise than by some other will in writing * * * or by burning, canceling, tearing, or obliterating the same by the testator himself or in his presence * * * " 4 Comp. Stat. p. 5861, Sec. 2.

[3] "That every last will * * * made when the testator had no issue living * * * if at the time of his death, he leaves a child, * * * such will shall be void, and such testator be deemed to die intestate." 4 Comp. Stat. p. 5865, Sec. 20. Section 21 provides that if the testator has issue born at the time of the making of the will, he shall die intestate as to subsequent born children.

[4] It was assumed, soon after the Statute of Frauds was enacted that revocation by alienation remained in force. Dister v. Dister, 3 Lev. 108. The courts have adhered to this view with great uniformity. Kreig v. McComas, 126 Md. 377, 95 Atl. 68 (1915); 1 PAGE, WILLS, p. 741, Sec. 455. Phillippe v. Clevenger, 239 Ill. 117, 87 N.E. 858 (1909).

[5] It was the settled rule at common law and under the original statutes of wills (32 Hen. VIII. Chap. 1; 34 Hen. VIII. Chap. 5) that a will as far as it operates on real estate speaks as of the time of its execution, and real estate acquired after the execution cannot pass thereby without a re-execution or republication after such re-acquisition. 75 A.L.R. 484. It followed therefore that an alienation of the testator's interest in realty which he had devised operated as a revocation of such devise. Bruen v. Bragaw, 4 N.J. Eq. 261 (Ch. 1842); Lanning v. Cole, 6 N.J. Eq. 102 (Ch. 1847). The rule that alienation of realty operated as a revocation was a special application of the general principle that after-acquired realty could not be devised. Since the general principle has been abolished by statute in New Jersey (4 Comp. Stat. (1910) p. 5870, Sec. 26) and other states expressly stating that after-acquired property may be devised, it would seem inevitable that the rule itself should disappear, and that a subsequent conveyance of realty devised by will and not re-acquired is more like an ademption of a legacy than like a technical revocation of a devise at common law. To avoid confusion, it would seem advisable to use the word "ademption" as is done by some courts. 1 PAGE, WILLS p. 744, Sec. 456.