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Infancy - Shield or Sword

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NOTES

INFANCY — SHIELD OR SWORD?

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An infant enjoys a unique status in the eyes of the law. Though he is under certain legal disabilities, the law has deemed it wise to grant him certain legal privileges. Most of these legal disabilities and privileges stem from the common law and have long been recognized in the courts. In more recent times many of these disabilities and privileges have been codified in the statutes of most states. Consequently, it might be said that the infant is in a legal limbo. He is precluded from voting, holding public office, making a will, or suing in his own name. Privileges granted to infants include the general right to void his unwanted contracts, with certain limitations. On the other hand, an infant may be held criminally liable for his criminal delicts if he has reached an age of legal discretion. The infant is also liable for his torts substantially to the same extent as an adult.

The protection which the law accords infants in their contracts is one of their more strongly enforced and more valuable privileges. Certain rules applying to infants and their contract rights have become axiomatic. It is universally recognized that, as a general rule, an infant's contract is voidable unless it be made for certain necessaries or the infant himself reaffirms or ratifies it after attaining majority. As with any general rule of law, specific fact situations have made certain exceptions necessary. The purpose of this note is to outline the exceptions which the law has made in instances where an infant, through a fraudulent misrepresentation of his age, has induced another party to contract with him.

A question concerning such a contract was recently presented to the Colorado Supreme Court in *Doenges-Long Motor Company v. Gillen*,[1] in which the infant fraudulently misrepresented his age in order to induce the company to sell him a car. After reaching his majority, the plaintiff returned the car, announced that he was disaffirming the contract, and demanded the return of his down payment and the cash equivalent of his old car, which had been sold following its trade-in. The court held that the infant had an absolute right to disaffirm his contract and that he must be restored to his status as it had been at the time of making the contract. The court further held, however, that because of his fraudulent misrepresentation, the injured party was entitled to those damages resulting directly and proximately from the infant's tortious acts.

THE STATUS OF THE INFANT IN TORT AND CONTRACT

The question presented in *Doenges-Long* is more sophisticated than one pertaining simply to the venerable general rule permitting minors to disaffirm their contracts at will unless they be for necessaries. Mr. Justice Hall, in his presentation of the unanimous opin-

1 328 P.2d 1081 (Colo. 1958).

ion of the court in *Doenges-Long,* reaffirmed this general rule. This view was also followed in the only other similar case to be found in Colorado. The court in *Mosko v. Forsythe*[2] held that an infant has an absolute and paramount right to repudiate his contracts. This right is coupled with the infant's right to be returned to his original status as if the contract had never been made.

In contrast to the general rule of law exempting minors from responsibility for unwanted contracts, there is the equally ancient rule that minors are liable for their tortious acts to the same exent as an adult. These two diverse rules are usually distinguished by reason of the freedom of choice exercised by the other contracting party who voluntarily assumes the risk that the minor may later repudiate his contract. This is manifestly not the case where one is injured by the tortious act of a minor, since the damaged party is unable to avoid the consequences of the minor's wrongful act.

The court, in *Slayton v. Barry,*[3] took cognizance of the general rules pertaining to the rights and liabilities of minors in both tort and contract. The court refused to hold the infant liable for a contract which he had procured by a fraudulent misrepresentation of age, since to do so would violate the rule pertaining to contracts of a minor. The dominant consideration, the court felt, is not that of liability for torts which an infant may commit, but rather of protection from their improvident contracts.

It is apparent, as pointed out in the *Slayton* case, that there is a conflict between the general rules of law applicable to the torts and contracts of infants. The principal problems posed in such a dilemma, as found in *Doenges-Long* and many other such cases, are the questions of the infant's right of disaffirmance where the contract was fraudulently induced by the infant; and secondly, what rights and duties are to be granted to the parties should disaffirmance be permitted. It is indeed unusual that *Doenges-Long* is a case of first impression in Colorado, for the question has arisen in over half of the states and many times in England.

The solution of the question of an infant's rights, where he has fraudulently induced another to contract with him by misrepresenting his legal capacity, has resulted in the creation of two diverse schools of thought. It is difficult, if not impossible, to reconcile cases in these opposite camps. The philosophy of one of the two groups is typified by the frequently used quotation that "the privilege of infancy is to be used as a shield, and not as a sword."[4] This is the epigram of the middle-of-the-road cases. The other group of cases holds that an infant is not precluded from disaffirming his unwanted contracts even though he has fraudulently misrepresented his age. This view is sometimes modified by the theory that, although the infant's basic right of disaffirmance must be upheld, a fraudulent misrepresentation of age will permit recourse to be taken upon the fraudulent act itself.

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2 102 Colo. 115, 76 P.2d 1106 (1938).
3 175 Mass. 513, 56 N.E. 574 (1900).
4 Rice v. Butler, 160 N.Y. 578, 55 N.E. 275 (1899). Here the authority cited is Abbot v. Parsons, 3 Burr. 1794, 97 Eng. Rep. 1103 (Ex. 1765).

THE INFANT'S RIGHT IS INVIOLATE

Those jurisdictions holding that the infant may disaffirm his unwanted contracts, regardless of his fraudulent conduct, represent the majority view.[5] Some jurisdictions that take this view permit the complainant to sue the infant in tort.

Nevertheless, many jurisdictions balk at the use of a subterfuge that permits an action to be grounded in tort where a contract is at stake. *Brooks v. Sawyer*[6] is typical of this philosophy. Here the defendant had misrepresented her age and taken the plaintiff's money in return for an agreement to convey certain property to the plaintiff. The court said that the complainant could not change the infant's fraudulent misrepresentation of capacity to contract into a tort by changing the form of action. Similarly, in *Slayton v. Barry,*[7] it was held that the plaintiff could not maintain his tort action against the infant defendant, since his complaint would be invalid without first showing there had been a contract into which he had been induced by the infant's misrepresentation of age. In another case,[8] two juveniles purchased motorcycles by claiming to be of age, and later renounced their contracts. The court refused to permit the seller to sue the boys in tort for either their fraud or for damages to the machines while in their possession.

The plaintiff, an infant, in *Alvey v. Reed,*[9] was granted relief from the defendant's attempt to impose a mechanic's lien upon the house which plaintiff had induced the defendant to build for her. Here, the plaintiff had made no express representations as to age, but she was of sufficient maturity so as to appear to have reached majority. The court consoled the luckless defendant by informing him that persons who deal with infants do so at their own risk.

The rule applied in these cases, as well as many others, is that in order to charge the infant, the fraudulent act must be wholly tortious; a matter arising *ex contractu,* though infected with fraud, cannot be changed into a tort by a change in the form of action.[10]

Other reasons are often advanced for a refusal to charge an infant with the liability of a fraudulently induced contract. Typical of this line of cases is *Summit Auto Co. v. Jenkins.*[11] Here, the defendant auto company appealed from a judgment awarding the infant plaintiff return of all monies paid for a car which he purchased after misrepresenting his age. The appellate court affirmed, saying that should the defendant be permitted to recover, it would be equivalent to converting the infant's fraudulently induced capacity

5 Arkansas Reo Motor Car Co. v. Goodlett, 163 Ark. 35, 258 S.W. 975 (1924) (only means whereby an infant may be protected from improvident contracts); Creer v. Active Automobile Exch., Inc., 99 Conn. 266, 121 Atl. 888 (1923); Alvey v. Reed, 115 Ind. 148, 17 N.E. 265 (1888); Sawyer Boot & Shoe Co. v. Braveman, 126 Me. 70, 136 Atl. 290 (1927); Raymond v. General Motorcycle Co., 230 Mass. 54, 119 N.E. 359 (1918); Conrad v. Lane, 26 Minn. 389, 4 N.W. 695 (1880); Fulton Savings Bank v. Downs, 1 Misc. 2d 695, 148 N.Y.S.2d 556 (App. T. 1956); Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N.C. 323, 25 S.E. 975 (1896); Summit Auto Co. v. Jenkins, 20 Ohio App. 229, 153 N.E. 153 (1925); Beam v. McBrayer, 132 S.C. 72, 128 S.E. 34 (1925); Nash v. Jewett, 61 Vt. 501, 18 Atl. 47 (1889).

6 191 Mass. 151, 76 N.E. 953 (1906).

7 175 Mass. 513, 56 N.E. 574 (1900).

8 Raymond v. General Motorcycle Co., 230 Mass. 54, 119 N.E. 359 (1918).

9 115 Ind. 148, 17 N.E. 265 (1888).

10 Collins v. Gifford, 203 N.Y. 465, 96 N.E. 721 (1911); Falk v. Mac Masters, 197 App. Div. 357, 188 N.Y. Supp. 795 (1921); Nash v. Jewett, 61 Vt. 501, 18 Atl. 47 (1889).

11 20 Ohio App. 229, 153 N.E. 153 (1925).

to contract into actual capacity. It was said that the misrepresentation must be a substantive and distinct wrong in itself without reference to the contract, or there may be no recovery against an infant. The court, in *International Text Book Co. v. Connelly*,[12] thought that to permit recovery of damages in contract would deprive infants of the protection extended to them at an age where it is presumed that their minds and judgment are immature. They said that infants must be shielded from their own imprudence and folly. Similarly, the court in *Tobin v. Spann*[13] concluded that one under the disability of minority has no power to remove the disability by means of a representation, and consequently his representations cannot be of greater weight than the contract itself.

In *Greensboro Morris Plan Co. v. Palmer*,[14] the plaintiff attempted to recover, as damages in a tort action, the equivalent of the unpaid balance of the infant defendant's note given for the purchase of a truck which he had bought upon misrepresenting his age. The court refused recovery for fraud and deceit in the making of the contract. The court recognized that there is a difficulty encountered in the practical application of the general rule permitting infancy as a defense in an action for false representation as to anything which is essentially the subject matter of the contract. It was admitted that there is discord between courts as to when the alleged tort in such cases is independent of or is essentially connected with the contract, or when the contract is the essential basis of the action. However, the court found that since the tort action was merely an attempt to enforce the contract, recovery should be denied.

Some courts, while generally adhering to the basic principle that the fraudulent misrepresentation must be *ex delicto* to be actionable, have widened the breach in this basic principle so that equity may be granted. Where the defendant had misrepresented her age in order to obtain credit for the purchase of a diamond scarf pin, the court granted relief to the plaintiff who had brought suit for damages resulting from the fraudulent conversion of the pin. The court considered that the act of conversion per se was outside the protection of the infant's right to disallow her contract.[15] Along similar lines, the court in *Wyatt v. Lortscher*[16] permitted the infant to plead infancy in an action to foreclose a mortgage obtained by concealment of his age. However, in dictum, it was said that such misrepresentation might well give rise to a liability for deceit and fraud. Another court in the same jurisdiction as *Wyatt* permitted the infant to interpose his defense of infancy, but held the misrepresentation could be made the basis of an action for deceit without giving validity to the contract itself.[17]

The court refused to estop an infant in *Creer v. Active Automobile Exch., Inc.*,[18] but said that the injured party might sue in tort

12 206 N.Y. 188, 99 N.E. 722 (1912) (no misrepresentation).
13 85 Ark. 556, 109 S.W. 534 (1908).
14 185 N.C. 109, 116 S.E. 261 (1923).
15 Bergman v. Neidhardt, 37 Misc. 804, 76 N.Y. Supp. 900 (Sup. Ct. 1902).
16 217 App. Div. 224, 216 N.Y. Supp. 571 (1926).
17 New York Bldg., Loan & Banking Co. v. Fisher, 23 App. Div. 363, 48 N.Y. Supp. 152 (1897). Followed in Byers v. Lemay Bank & Trust Co., 365 Mo. 341, 282 S.W.2d 512 (1955); *cf.* Hecker-Jones-Jewell Milling Co. v. Bernstein, 142 Misc. 501, 254 N.Y. Supp. 588 (Sup. Ct. 1932) (misrepresentation not implied from mere fact that defendant purchased merchandise).
18 99 Conn. 266, 121 Atl. 888 (1923).

instead. The court noted that should the infant be sued in contract, he might be liable for breach; whereas, if sued in tort, the infant would be liable only for the actual damages.

A much stronger case than *Creer* is found in *Rice v. Boyer.*[19] Here, the defendant sold property which he had received on credit by misrepresenting his age. The court, in granting recovery to the complainant, felt that the infant was fully liable in tort to the extent of the loss actually sustained by the injured party. The logic for such a holding was that the recovery was not an indirect enforcement of the infant's contract, but was rather in the nature of compensation to the plaintiff for the actual loss caused by the defendant's fraud. The court proposed that the true test should be whether the infant could be held liable without thereby directly or indirectly enforcing the infant's promise. The rule was approved by the court since it would prevent unscrupulous individuals from taking advantage of an infant's immaturity, while still charging the infant with responsibility of making good any losses incurred by innocent parties.

Myers v. Hurley Motor Co., Inc.[20] is the leading case dealing with the question of the rights of an infant upon disaffirming an unwanted contract which he had induced by misrepresenting his age. The decision of the U.S. Supreme Court was that such an infant may not be deprived of his right of repudiation by any doctrine of estoppel. The court, however, ruled that the ancient doctrine of equity applied, in that one seeking equity, must first do equity. Though the infant was permitted to disaffirm, the party injured by the infant's fraudulent misrepresentation was entitled to limited damages for the amount of repairs necessary to recondition the automobile returned by the infant.[21]

A SHIELD BUT NOT A SWORD

Contrary to the majority view, some jurisdictions rely upon application of an equitable estoppel where an infant has fraudulently misrepresented his age in order to induce another to contract with him. A close study of the decisions following this doctrine will reveal that the courts in these jurisdictions are striving to prevent the "shield of infancy" from being used "as a sword." Full recognition is given to the basic tenet of the contractual immunity of infants; but, by the application of the doctrine of estoppel *in pais*, the injustice so often found in cases where the rights of infants are blindly upheld is sought to be eliminated. Estoppel *in pais* may well be considered a special application of the doctrine of promissory estoppel.[22] Estoppel *in pais* is aptly defined as the doctrine "that a person may be precluded by his act or conduct or silence, when it is his duty to speak, from asserting a right which he otherwise would have had."[23]

The opinion has been expressed that a fraudulent misrepre-

19 108 Ind. 472, 9 N.E. 420 (1886).
20 273 U.S. 18 (1927).
21 *Accord:* Sims v. Everhardt, 102 U.S. 300 (1880); Dick Murphy, Inc. v. Holcer, 57 F.2d 431 (D.C. Cir. 1932).
22 See Restatement, Contracts § 90 (1932) for definition of promissory estoppel.
23 Marshall v. Wilson, 175 Ore. 506, 154 P.2d 547, 551 (1944).

sentation as to age, by an infant seeking to induce another to contract with him, should not be considered as either part of the contract or as growing out of the contract. In such a case, no contract is made as to the infant's age, and the sale is not a consideration for the representation of capacity. However, to hold the infant estopped by his act, it should be found that there was an actual and positive fraud, committed by some unequivocal act, and not merely inferred by the silence or acquiescence of an infant having full knowledge of his rights.[24]

This doctrine has been widely followed in the South. Kentucky is perhaps the leader in this theory of estoppel; for the largest number of decisions where the theory has been applied have come from that state. Other jurisdictions adhering to the doctrine of estoppel include Texas, Georgia, Virginia, Mississippi, Florida, Tennessee, Missouri, Nebraska, Iowa, Wisconsin, and New Jersey.[25]

One of the earliest reported decisions applying the doctrine of estoppel was *Ryan v. Growney*,[26] where it was recognized that such a doctrine, though not applicable in a court of law, was permissible in a court of equity. Following this decision, other states began applying the doctrine of estoppel *in pais*. Where there has been an outright positive fraud on the part of the infant, it is not difficult to agree with the theory of estoppel. For example, it has been held that such fraudulent misrepresentation of age as positively swearing to be of age, [27] falsifying records in a family bible,[28] exhibiting a driver's license with a false age thereon,[29] and procuring a falsified affidavit from one's parents[30] will prevent an infant from reaching protection behind the shield of infancy.

The problem is compounded where the infant has not made a direct and positive misrepresentation that he is of legal capacity to contract. The rule followed in such cases is that estoppel will apply only where the conditions, appearances, and surroundings of the infant were such that one dealing with him would be deceived as to his true age. This effectively protects infants of such tender years that no one could honestly be deceived by their misrepresentations of majority.[31] Under this rule penalizing concealment of true age, it has been held that an infant is estopped from voiding his contract when the question of the infant's age was never raised at the time of negotiation, although he had ample opportunity to divulge his true age.[32]

Infants with a mature appearance, which is reinforced by the general reputation of supporting a family of their own, have often been estopped from taking refuge behind the shield of infancy. Estoppel was ruled where at the time of sale such an infant denied that there was any encumbrance or bar to his right to sell his prop-

24 Tuck v. Payne, 159 Tenn. 192, 17 S.W.2d 8 (1929).
25 Cases subsequently cited are from these jurisdictions.
26 125 Mo. 474, 28 S.W. 189 (1894).
27 Johnson v. McAdory, 228 Miss. 453, 88 So. 2d 106 (1956); Commander v. Brazil, 88 Miss. 668, 41 So. 497 (1906); Ostrander v. Quin, 84 Miss. 230, 36 So. 257 (1904); Klinck v. Reeder, 107 Neb. 342, 185 N.W. 1000 (1921); Evans v. Henry, 230 S.W.2d 620 (Tex. Civ. App. 1950).
28 Turner v. Stewart, 149 Ky. 15, 147 S.W. 772 (1912).
29 Mossler Acceptance Co. v. Perlman, 47 So. 2d 296 (Fla. 1950).
30 Edgar v. Gertison, 112 S.W. 831 (Ky. 1908).
31 New Domain Oil & Gas Co. v. McKinney, 188 Ky. 183, 221 S.W. 245 (1920).
32 First State Bank v. Edwards, 245 S.W. 478 (Tex. Civ. App. 1922).

erty.[33] Even though such an infant of apparent majority had made no express representation as to his age, the court held that he was estopped from rescinding his unwanted contract.[34]

Looney v. Elkhorn Land Co.[35] involved a situation where a married woman, prohibited from contracting by virtue of her marital status, misrepresented her age and concealed her disability of coverture. In an action to void her sale, the court held that even though the contract was void *ab initio* because of her disability by coverture, the general rule that a void contract could not work an estoppel did not apply where a fraudulent misrepresentation was made.

In *Harseim v. Cohen*[36] the infant defendant had a business in her name; but, in actuality, her father managed it. A salesman had negotiated a contract with the father in the mistaken belief that the father was the true owner. The father, using his daughter's name, ordered some merchandise and then failed to pay for these goods. The court held the infant liable for the contract made in her name because she had known of and consented to the fraudulent scheme of her father. This case was distinguished in *Memphis Coffin Co. v. Patton*,[37] where, under similar circumstances, the infant's father conducted a business under the infant's name. Here, however, the court refused to hold the infant liable for a note signed in the infant's name by the father when it was shown that the infant had no knowledge of his father's wrongful act.

An unusual case is found in *Asher v. Bennett*,[38] where the misrepresentation of an infant was used to the disadvnatage of an innocent party. In this case, the infant conveyed some land to the defendant after fraudulently misrepresenting his age. After reaching majority, the infant conveyed the same land to a third party, who subsequently conveyed the property to the plaintiff. In an action to quiet title, the plaintiff was held to be without a valid title. The court held that the original conveyance to the defendant was valid, notwithstanding the later rescission by the infant.

ESTOPPEL WITH A BENEFIT

The rule that estoppel will preclude an infant from disaffirming his unwanted contracts is applied in New Jersey, Wisconsin, and Georgia. In these states, however, an added requirement is that such an estoppel will apply only when the infant has in some way retained a benefit from the fraudulently induced contract. Because of this added requirement, cases in these jurisdictions naturally turn upon the question of whether the infant has received and retained some benefit from the contract.

The doctrine that estoppel will be applied where the infant retains a benefit from the contract was first intimated in *Pemberton Bldg. & Loan Ass'n v. Adams*.[39] Here, in an action to collect on a

33 Goff v. Murphy, 153 Ky. 634, 156 S.W. 95 (1913); County Board of Education v. Hensley, 147 Ky. 441, 144 S.W. 63 (1912).

34 Young v. Daniel, 201 Ky. 65, 255 S.W. 854 (1923); Smith v. Cole, 148 Ky. 138, 146 S.W. 30 (1912). *Contra*, Stallard v. Sutherland, 131 Va. 316, 108 S.E. 568 (1921) (infant estopped by express misrepresentation, but dictum said that concealment alone would not be sufficient to establish an estoppel).

35 195 Ky. 198, 242 S.W. 27 (1922).

36 25 S.W. 977 (Tex. Civ. App. 1894).

37 106 S.W. 697 (Tex. Civ. App. 1907).

38 143 Ky. 361, 136 S.W. 879 (1911).

39 53 N.J. Eq. 258, 31 Atl. 280 (Ch. 1895).

loan contract, it was held that a court of equity would not permit an infant to avoid the enforcement of a contract procured by his fraudulent misrepresentation of age without return of the money to the lender.

In what is perhaps the most widely quoted case propounding the doctrine that estoppel will be applied where the infant retains a benefit, the infant misrepresented his age to induce the defendant to permit him to store his automobile in the defendant's garage. The defendant was also asked periodically to furnish supplies for the car and to repair it. In an action to replevy his automobile, which the defendant had seized upon non-payment of charges, the court refused to allow the defendant's counter-claim since it was public policy not to require enforcement of infant's contracts.[40] The defendant appealed; the appellate court reversed the decision and found for the defendant, saying that an infant under such circumstances is estopped when he obtains *and retains* a benefit from a contract induced by fraudulent misrepresentations as to his age.[41] This case now represents the prevailing rule, in other states as well as New Jersey.

Following *La Rosa v. Nichols,* it has been held that an infant is estopped when he fails to pay a charge account,[42] is unable to return the chattel contracted for,[43] or returns the property after using it for six months.[44] However, in *Feinsilver v. Schifter Motors, Inc.*,[45] the infant plaintiff was permitted to recover his payments, *less* depreciation, for a car which he returned after misrepresenting his age. Relief was granted when it was shown that he had offered to return the car and asked that the defendant refund his payments minus a fair amount for depreciation. This case would seem to follow the rule that "he that seeks equity, must first do equity."

It is necessary that the infant himself obtain the benefit before the estoppel will apply. The defendant in *Public Finance Service, Inc. v. Amato*[46] misrepresented her age in applying for a loan for the use of her brother who had been previously denied a loan by the plaintiff. Upon obtaining the loan, the defendant gave the money to her brother and did not receive any of its benefits. The court permitted her to rescind her contract, and held that estoppel did not apply since she had not received or retained any of the benefits of the fraudulently induced contract. Similarly, in an action on default of a note upon which the infant defendant was an accomodation maker, the court refused to estop him. In this case, the defendant had become a guarantor for the wife of a friend. The friend's wife failed to pay, and to obtain the forebearance of the plaintiff from suing the wife, the defendant signed a new note as an accomodation maker. The court felt that the infant defendant had not received any benefit from the agreement of the plaintiff.[47]

40 La Rosa v. Nichols, 91 N.J.L. 355, 103 Atl. 390 (Sup. Ct. 1918).
41 La Rosa v. Nichols, 92 N.J.L. 375, 105 Atl. 201 (Ct. Err. & App. 1918).
42 Clemons v. Olshine, 54 Ga. App. 290, 187 S.E. 711 (1936); R. J. Goerke Co. v. Nicolson, 5 N.J. Super. 412, 69 A.2d 326 (Super. Ct. 1949).
43 Watters v. Arrington, 39 Ga. App. 275, 146 S.E. 773 (1929).
44 Brinkmann v. Dorsey Motors, Inc., 121 N.J.L. 115, 1 A.2d 473 (Sup. Ct. 1938).
45 127 N.J.L. 459, 23 A.2d 283 (Sup. Ct. 1942).
46 22 N.J. Misc. 331, 38 A.2d 857 (Dist. Ct. 1944).
47 Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N.W. 50 (1910) (estoppel permitted only where an infant of actual discretion fraudulently receives a benefit from contract).

Another imprudent infant was protected by the court in *Mechanics Finance Co. v. Paolino.*[48] Here, the defendant had signed a note to the plaintiff to secure a debt owed by a girl whom he had known for only a few weeks. The defendant expressly misrepresented his age in signing the note in return for the plaintiff's promise not to sue the girl. Here, too, the court felt that although the infant's conduct was reprehensible, he had not received any true benefit from the contract, and therefore, should not be held responsible for the note.

Another improvident infant was spared responsibility for his contract where he had returned the stock certificates purchased under a contract which he did not take time to read before signing. The contract contained a clause by which the signer affirmed that he was of age. The court held that to estop the infant would enforce a contract which the law permits a minor to avoid. The court also thought that the law does not impose a duty upon an infant to read a contract, and does not attach to his failure to do so the consequences that are attached to the failure of an adult to so read. When it was shown that the infant had returned the stock certificates to the seller without loss to either party, the court held that the infant was not liable for his contract.[49]

The general rule in these three jurisdictions, therefore, is that an infant is estopped from exercising his privilege of avoidance where the benefit is in some way retained, and where it appears that the other party, dealing in good faith, was induced to act by reason of the fraudulent misrepresentation of the infant as to his age. The other party must be justified in accepting such misrepresentation as true. He must also be free from fault or negligence on his own part, such as a failure to use all ready means of ascertaining the truth touching upon the infant's apparent majority.[50] However, it is not necessary that the creditor make an independent investigation of the truthfulness of the infant's representations, unless the youthful appearance of the infant purchaser or other facts or circumstances appear, such as would reasonably tend to cast doubt or suspicion on the truthfulness of the representation.[51]

It is not necessary that the misrepresentation be made concurrently with the obtaining of the benefit or goods contracted for. In *Horwitz v. Hudson County Nat'l Bank,*[52] the plaintiff falsified her age some two years before obtaining a personal loan from the bank. The court held that she was estopped when she sought to recover her deposits, which the bank had refused to turn over until her loan was paid.

The benefit can be rather remote and still be such that the court will estop an infant from avoidance. Thus, the court in *Sawic-*

48 29 N.J. Super. 449, 102 A.2d 784 (Super. Ct. 1954).

49 Woodall v. Grant & Co., 62 Ga. App. 581, 9 S.E.2d 95 (1940); cf. Sternlieb v. Normandie Nat'l Securities Corp., 263 N.Y. 245, 188 N.E. 726 (1934) where the court refused to estop an infant seeking return of monies paid for stock which subsequently became valueless following the 1929 stock market crash. The court refused to permit the defendant to plead as an affirmative defense that the infant plaintiff had fraudulently misrepresented his age in inducing the stock purchase contract.

50 Carney v. Southland Loan Co., Inc., 92 Ga. App. 559, 88 S.E.2d 805 (1955); Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787 (1924).

51 Clemons v. Olshine, 54 Ga. App. 290, 187 S.E. 711 (1936).

52 125 N.J.L. 3, 13 A.2d 495 (Sup. Ct. 1940).

ki v. Slahor[53] held the defendant liable for breach of promise when he misrepresented his age to the infant plaintiff. Shortly following the defendant's promise to marry her, the plaintiff submitted to his embraces and later found that she was pregnant. The court felt that the defendant had obtained a benefit sufficient to prevent him from pleading infancy as a defense.

Sonntag v. Heller[54] involved a situation where the infant plaintiff sued the defendant to collect upon the first of three plumbing contracts between the two parties. The defendant counter-claimed for damages on the non-performance of the other contracts. The court refused to estop the plaintiff in his reply and permitted him to disallow the unperformed contracts on the ground of infancy. Here, the court felt that the plaintiff had not received any benefit from the last two contracts.

THE QUESTION OF DAMAGES

Several points must be determined before damages can be computed. The most important consideration is that of the values to be assigned to the property obtained by the infant, and, when necessary, to the property which he traded to the injured party. The next point is what recognition, if any, should be given to the depreciation of the purchased chattel returned by the infant. It is difficult to find a line of authority answering these questions. Few cases are found concerning these questions where the infant had induced the contract by fraudulent misrepresentation of his age. In the few cases that are found, it is difficult to find a set pattern to govern the computation of damages. The cases appear to be in hopeless conflict.

Many cases may be found that involve the question of damages where an infant repudiated his contract; but without the element of fraudulent misrepresentation, it seems logical that little weight should be given to them. Without such misrepresentation, the courts should strive to return the infant to the same position he occupied before the contract was made. However, where there is such a misrepresentation, it would seem that equity should be done to both parties without regard to the general rule requiring that the infant be restored to his initial status.

Myers v. Hurley Motor Co., Inc.[55] is the leading case concerning both the rights of the infant, where he had fraudulently misrepresented his age, and the damages to which the injured party is entitled. The court in that case allowed disaffirmance by the infant despite his misrepresentation, and awarded him damages in the amount of the sums already paid under the contract. The defendant had counter-claimed for an amount in excess of the plaintiff's claims. This amount was the sum required to restore the returned automobile to the same condition as when the plaintiff had received it. The court allowed the defendant to recover only that amount equal to the amount claimed by, and awarded to, the plaintiff, despite the fact that the defendant had proved his damages to be

53 11 N.J. Misc. 604, 167 Atl. 691 (Cir. Ct. 1933).
54 97 N.J.L. 462, 117 Atl. 638 (Ct. Err. & App. 1922).
55 273 U.S. 18 (1927).

larger. It should be pointed out, however, that the court's decision to limit the defendant's damages to an amount equal to the plaintiff's claim was colored by the doctrine of recoupment.

Under the doctrine of recoupment, it was necessary that the counter-claim arise out of the same transaction which formed the basis for the plaintiff's cause of action. Also, recoupment was a purely defensive measure and, at most, could only cancel the plaintiff's claim.[56] The Federal Rules of Civil Procedure have removed this limitation of recoupment.[57] It is problematical as to what damages would have been awarded in *Myers* had the present-day rules been in use. Despite the modern license to include all damages that the defendant has incurred, the recoupment limitation has become entrenched in many jurisdictions.[58]

What value should be assigned to the items in question? Should the agreed-upon contract prices be used, or should some other yardstick be applied? Here again, few cases are found in which the question has arisen in a suit involving a fraudulent misrepresentation. The Colorado Supreme Court in *Doenges-Long* approved the rule laid down in *Collins v. Norfleet-Baggs, Inc.*[59] which, although there was no question of fraud, held that the infant was entitled to only the fair market value at the time of the transaction.[60] This was thought to be fair, as neither side is bound by any part of the contract once it is rescinded. Other authorities are cited in *Doenges-Long* as approving the use of the contract price;[61] but, our court wisely disapproved this valuation since it would tend to give limited effect to the now-voided contract. Neither of these cases involved a question of fraud.

Depreciation has been awarded in several cases where fraudulent misrepresentation was an issue. Obviously, however, these awards are found only in those jurisdictions approving either the estoppel *in pais* doctrine or the tort responsibility exception rule. The court in *Steigerwalt v. Woodhead Co., Inc.*,[62] though not approving of estoppel, thought it equitable for the injured party to *recoup* damages for depreciation.[63] In *Sparandera v. Staten Island Garage, Inc.*,[64] even though the infant had misrepresented his age, the defendant did not make any allegation as to the fraud. However, the court dismissed the infant's complaint when it was shown that the seller's loss from depreciation of the car had exceeded the amount prayed for by the plaintiff.

With the apparent conflict between jurisdictions as to the entire problem of what to do when an infant procures a contract by the fraudulent misrepresentation of his age, it is thought that the

56 State v. Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S.W. 843 (1911).
57 Fed. R. Civ. P. 13(a).
58 Berryman v. Highway Trailer Co., 307 Ill. App. 480, 30 N.E.2d 761 (1940); Mestetzko v. Elf Motor Co., 119 Ohio St. 575, 165 N.E. 93 (1929); Rush v. Grevey, 90 Ohio App. 536, 107 N.E.2d 560 (1951); Smith v. Newark Shoe Co., 42 Ohio App. 437, 182 N.E. 347 (1932).
59 197 N.C. 659, 150 S.E. 177 (1929).
60 See Carpenter v. Grow, 247 Mass. 133, 141 N.E. 859 (1923) (no fraud; infant entitled to value of his car as of time of making contract).
61 Lockhart v. National Cash Register Co., 66 S.W.2d 796 (Tex. Civ. App. 1933) (trade-in value approved); Schoenung v. Gallett, 206 Wis. 52, 238 N.W. 852 (1931).
62 186 Minn. 558, 244 N.W. 412 (1932).
63 See also Scalone v. Talley Motors, Inc., 3 App. Div. 2d 674, 158 N.Y.S.2d 615 (1957).
64 117 Misc. 780, 193 N.Y. Supp. 392 (N.Y.C. Mun. Ct. 1921).

Colorado Supreme Court handled the situation in a very logical and straight-forward manner. Perhaps *Doenges-Long* will become a landmark case and set the pace for courts to follow in the future.

Colorado would do well to adopt a statute such as that found in Iowa.[65] Such a statute, prohibiting the disaffirmance of infant's contracts where it is shown that the infant induced the contract by his fraudulent misrepresentation of age, would go far in eliminating the problems created for innocent business men in such instances. Any such statute, it is felt, should be so worded as to require (1) a positive showing that the infant actively sought the contract, (2) that there was an express misrepresentation of age by the infant, (3) that the contract was one through which the infant derived and retained a finite benefit for himself, and (4) that both parties be restored as nearly as possible to their original status. Damages awarded to the injured party should be limited to those that result directly and proximately from the infant's misrepresentation. Depreciation and devaluation of the chattel in question would be considered. The statute should also require that damages be computed from the reasonable value of the property in question at the time of making the contract.

65 Iowa Code Ann. § 599.3 (Supp. 1954). "No contract can be thus 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." See Martin v. Stewart Motor Sales, 247 Iowa 204, 73 N.W.2d 1 (1955) for a case much like *Doenges-Long* where the statute was applied. See also Kan. Gen. Stat. Ann. § 38-103 (1949); Utah Code Ann. § 15-2-3 (1953); Wash. Rev. Code § 26.28.040 (Supp. 1953).