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NOTES AND COMMENTS

MEETING OF NORTH CAROLINA BAR ASSOCIATION—The 1925 Annual Meeting of the North Carolina Bar Association will be held on July 1, 2 and 3 at Asheville, with headquarters at the new Battery Park Hotel. Beginning at 8:30 P. M. on Wednesday, July 1st., the sessions will continue throughout Thursday and end on Friday morning. One of the most interesting features of the Meeting will be the motor trip to the top of Mt. Mitchell, following the close of the Friday morning session. The start is scheduled for ten o’clock, and a luncheon will be given by the Buncombe County Bar. Those attending the Meeting may be assured of a good time in addition to an excellent program.

The principal event of the first session, at 8:30 P. M. on Wednesday, is the address of the President of the North Carolina Bar Association, Hon. G. V. Cowper of Kinston, on “The Administration of Justice in North Carolina, its Difficulties and Suggested Remedies.”
At the morning session on Thursday, July 2nd., at 9:30 o'clock, the following addresses will be made:


At this session, matters of large significance to the Bar of North Carolina will be presented by Chief Justice W. P. Stacy in his report of the Judicial Conference.

- The Thursday afternoon session at 3 o'clock will be given over to a Legal Round Table Conference, with the following interesting topics for discussion:
  1. What should be the educational prerequisites for admission to the Bar? Led by George E. Butler of Clinton.
  2. How can we relieve the congestion of our court dockets? Led by Louis M. Bourne of Asheville.
  3. What should be done to improve our jury system? Led by Associate Justice L. R. Varser.

From 5:00 to 7:00 P.M., there will be a Garden Party by Hon. Mark W. Brown and Mrs. Brown at their residence, "Many Oaks." Following this at 8:30 P.M., there will be an address by Hon. Finis J. Garrett, of Tennessee, on "Amendments to the Federal Constitution."

A business session on Friday morning at 9:15 and election of officers will bring the 1925 Bar Association Meeting to a close. The accessibility of Asheville, the interesting program and the good time which is assured merits a large attendance.

Loss of Consortium in North Carolina—The right of one spouse to recover for the loss of the consortium1 of the other has gone through many changes in North Carolina before arriving at the present holding in Hinnant v. Power Company.2

At common law this right existed only in the husband since he was regarded as the dominant member of the marital union. He was entitled to his wife's custody, her services, and her conjugal affection; and any infringement of these gave rise to a cause of action in him, as thereby his rights were directly infringed upon. It made

1 Bouvier defines this as "The right of the husband and wife respectively to the conjugal fellowship, company, cooperation and aid of the other."


no difference if the interference of the husband’s rights was intentional or caused by negligence. If the proprietary rights of the husband were infringed upon it was a direct injury to him for which he could recover.

The wife at common law did not have any legal right to her husband’s consortium. Blackstone, after discussing the rights of action of the “superior party” for the dissolution or any breach of the marital relation, says, “the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury.” Also the wife could not bring suit in her own name, and any recovery would have gone to the husband, since he was entitled to all her personal property. So if the wife was allowed to sue in her own name for an intentional invasion of the marriage relation (as adultery, alienation of affections, etc.) whereby she suffered through the loss of the husband’s consortium, it would amount to the husband deriving benefit for his own wrong, as he necessarily was a guilty party thereto; and if the wife was allowed to recover for an unintentional interference (as negligent injury, etc.) it would amount to the husband recovering twice for the same injury, as he also had a right of action therefor.

The Married Women's Acts greatly changed the idea of consortium. Recovery by the husband is still allowed for loss of consortium, but the basis for the recovery has undergone a change. The husband’s right to recovery seems now to be based more on the idea that he has suffered a personal and pecuniary loss from the invasion of the marriage relation, by the loss of his wife’s companionship and the habitual household services she was wont to perform for him, than on the idea of an invasion of the common law rights over his wife’s person. This change from the common

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3 Blackstone 142.

4 Property of married woman secured to her, C. S. sec. 2506, N. C. Const. 1868, art. X, sec. 6; Capacity to contract, C. S. sec. 2507 (Martin Act. 1911); Earnings of married women and damages recovered for personal torts are her sole and separate property, C. S. sec. 2513 (1913).

5 The recent case of Glaville v. the C. R. I. and P. Ry. Co. (1923) 196 Iowa 456, 193 N. W. 548 seems to hold also that a wife can recover damages resulting from her inability to perform her household duties as the Court holds that “the Iowa statute permitting a woman injured by negligence to recover for loss of time allows a married woman recovery for impairment of her capacity for manual labor as a wife and mother.”

6 Holleman v. Harward (1896) 119 N. C. 150, 34 L. R. A. 803, 25 S. E. 972, gives recovery to the husband for loss of companionship and services of wife caused by defendant continuing to sell drugs to his wife over his protest. The Court speaking through Justice Montgomery says “A married woman notwithstanding her greatly improved legal status still owes to the husband the duty of companionship and of rendering all such services in his home as her relation of wife and mother require her.”
law holding is seen in the many cases now holding that the husband can recover only for a direct and intentional invasion, and not where there is negligence alone causing the injury to his right of consortium. The reasons for this holding are that the right of action is vested in the person injured, or the personal representative in case of action for wrongful death, and to allow the other spouse to recover would be allowing two recoveries for the same cause of action; also the damages caused by loss of consortium through negligence are too remote and consequential to allow recovery therefor.

It is now well settled in practically every jurisdiction that the wife has a right to the consortium of her husband and can recover when there has been an intentional and direct invasion or breach of the marital relation. In every case, however, the recovery was allowed only where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled. The husband's right to recovery for loss of consortium was also settled, but whether he could recover for an invasion of his right to consortium when caused by negligence alone was a matter of some dispute. Kimberly v. Howland and Bailey v. Long appeared to hold that the husband could recover where the invasion of the marital relation was not intentional.

This was the situation confronting the Court when the case of Hipp v. Dupont came up for decision. In that case the plaintiff's husband had already recovered in Virginia for his personal injuries alleged to have been caused by the defendant's negligence; and the

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9 Brown v. Brown (1899) 124 N. C. 19, 32 S. E. 320. Kimberly v. Howland (1906) 143 N. C. 398, 7 L. R. A. N. S. 545, 55 S. E. 778. Plaintiff's wife had been injured through defendant's negligence and the Court said "it seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage as where he is put to expense, or is deprived of the society or services of his wife, he is entitled to recover therefor, and he may sue in his own name."

10 Kimberly v. Howland (1906) 143 N. C. 398, 7 L. R. A. N. S. 545, 55 S. E. 778. Plaintiff's wife had been injured through defendant's negligence and the Court said "it seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage as where he is put to expense, or is deprived of the society or services of his wife, he is entitled to recover therefor, and he may sue in his own name."

11 Bailey v. Long (1916) 172 N. C. 661, L. R. A. 1917 B, 90 S. E. 809. Plaintiff sued defendant for causing wife to catch cold thereby suffering death by the failure to properly keep his hospital in repair while wife was an inmate there. The Court allowed the plaintiff to recover for the damages suffered by him.

plaintiff then brought her action for damages which she alleged she personally had suffered from the same injury, as: (1) expenses paid by her, made necessary by her husband’s injuries; (2) services performed in nursing and caring for him; (3) loss of support and maintenance; (4) loss of consortium; (5) mental anguish. Recovery was allowed on all five points, including loss of consortium. In regard to consortium, Chief Justice Cark went deeply into the subject of married women’s rights, and concluded that to-day the rights arising out of marriage were identical for the wife and the husband. He then cited cases which apparently held that the husband had the right to recover for loss of consortium when caused by negligence alone. Thereby, he reached the natural conclusion that a wife could recover for loss of consortium, even though there was no direct and intentional invasion. The case was new and gave rise to much comment. The late Dean McGehee disapproved the holding as to recovery for loss of consortium, for the reason that the damages were too remote. In commenting on this case, he says in part: “Her losses are remote and consequential. With regard to her husband’s consortium, it is not the natural and probable consequence of a physical injury to decrease the society, companionship and affection between the spouses; and loss which results to her can only be because the consortium of which she is still in the enjoyment is less satisfactory and valuable than formerly. It is remote and consequential.”

In summarizing the cases for and against the holding in the Hipp case allowing recovery for loss of consortium through negligent injury, Dean McGehee said:

“The Hipp case says: ‘Our precedents established that such damages are not remote for the husband, and on parity of reasoning they are not remote for the wife.’

“The opposing cases say: ‘Such damages can be recovered by neither spouse. To allow the wife to recover for merely consequential unintentional losses resulting from negligent injury to the husband is opposed to the principle refusing consequential and remote damages and is not supported by any analogous line of cases. Old precedents allowing the husband to recover for injuries to the wife avail nothing, as they are founded on a barbarous exploded theory

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15 Wife’s separate action for personal injury to Husband, 1 N. C. Law Rev. 34, 35.
of the husband's ownership of the wife at a time when she was considered an inferior."

The same question came up for decision again in Hinnant v. Power Co.,17 in which the husband was killed through the defendant's negligence, whereas in the Hipp case, the husband survived the injuries. This distinction did not affect the result, as the principles of law involved are the same. In the Hinnant case, the personal representative of the plaintiff's husband had already brought suit18 under the North Carolina statute,19 giving an action for wrongful death resulting from defendant's negligence. Judgment was recovered against the defendant Power Company, and it had been paid. The plaintiff then brought her action to recover damages for loss of consortium and for mental anguish resulting from her husband's death caused by the same negligence. Justice Adams, in a learned and searching opinion, followed the Hipp case to the extent that the husband and wife have equal statutory rights of recovery for loss of consortium. But after a review of the authorities20 used to support the Hipp case, it was held that the Common Law right of the husband to recover for every invasion of the right of consortium had been done away with by the Married Womens Acts, and that now the husband could only recover for a direct and intentional invasion. That the damages by loss of consortium from negligent injuries, whether death results or not, are too remote and consequential. Therefore, since the husband could not recover for negligent invasion of the consortium, neither could the wife, and especially as she did not have this right at common law and it had not been given to her by any statute. Neither was the wife allowed to recover for mental anguish suffered, since, in the language of the court, "mental anguish unrelated to any other cause of action, is not sufficient basis for the recovery of substantial damages."

11 N. C. Law Rev. 34, 36.
C. S. 160.
20 The Court, intimating that these cases were not authority to uphold Hipp v. Dupont, said of Kimberly v. Howland, "We do not understand that decision to be authority for the position that the husband has the legal right, without regard to the loss of his wife's services, to recover remote and consequential damages arising from her personal injury."

The recovery in Bailey v. Long was held to be based on a contractual right between the plaintiff and defendant whereby the defendant should have taken proper care of plaintiff's wife while an inmate in defendant's hospital.
Hipp v. Dupont\textsuperscript{21} is clearly overruled, but husband and wife are left on an equal footing. Either husband or wife may recover for loss of consortium where there has been an intentional and direct invasion, but neither husband nor wife may recover for negligent invasion of the consortium.

C. G. B.

Attachment of Stock in Foreign Corporation—In Parks v. Express Co.,\textsuperscript{1} the defendant, a Georgia corporation, doing an express business in this state and having property herein, incurred a liability to a shipper for breach of its contract for the transportation and delivery of a shipment. The defendant corporation afterwards became absorbed in the American Railway Express Company, a Delaware corporation, carrying on the same business with the same property as the defendant company. It was held that stock in the American Railway Express Company belonging to the defendant was subject to attachment in this state, where the cause of action arose, and the fact that the certificates of stock were not physically within the state was immaterial.

The problem suggested by the decision is whether shares of stock owned by a non-resident in a foreign corporation are subject to attachment in this state, when the corporation carries on business and has property here, even though the stock certificates are not within the state.

The defendant resisted the attachment upon the ground that the sections of the Consolidated Statutes\textsuperscript{2} under which the action was brought did not authorize such attachment, and, if it did attempt to do so, it was beyond the legislative power. Attachment, being an extraordinary and summary remedy, a strict compliance with the statutory provisions is usually required,\textsuperscript{3} although there are cases which hold that an attachment will not be dissolved where there is substantial compliance with the statute.\textsuperscript{4} In either case, the law of the state in whose courts the remedy by attachment is sought must

\textsuperscript{1} Parks v. Express Co. (1923) 185 N. C. 428, 117 S. E. 505.
\textsuperscript{2} C. S., secs. 816, 817, 818, 819.
\textsuperscript{3} Carson v. Woodrow (1912) 160 N. C. 143, 75 S. E. 996; Parker v. Scott (1870) 64 N. C. 118; Leak v. Moorman (1868) 61 N. C. 168.
\textsuperscript{4} In other North Carolina cases the court, having regard to the intent of the legislature, inclined to the liberal construction, independently of express statutory provision. When it appears from the whole record that the statute has been substantially complied with, the attachment will not be dissolved. Best v. British and American Mortgage Co. (1901) 128 N. C. 351, 38 S. E. 923; Grant v. Burgwyn (1878) 79 N. C. 513.
\textsuperscript{21} See note 12, supra.
be complied with before a court can assume jurisdiction. But assum-
ing such a compliance with statutory provision, there remains the
larger question of jurisdiction over the property attached. A court
must have power over the property, or, in other words, the property
attached must be within the jurisdiction of the court.

Jurisdiction refers both to the power of the court to move in any
event by means of this particular process—jurisdiction over the sub-
ject matter—and also to the authority of the court to move in the
proceeding, as dependent upon compliance with the formalities pre-
scribed or the existence of the necessary grounds at the time the
remedy is asked for. As in other actions in rem, the proceeding in
attachment is based upon a claim to property and jurisdiction does
not exist unless a claim to property is made the basis of the suit.
Since the object of the suit is to obtain property, the court having
power over the property has jurisdiction to maintain the suit. The
court cannot exercise its jurisdiction unless there is property upon
which it can operate.5 The issue of the writ and its levy upon
property within the state bring the property within the jurisdiction
of the court and also give the court jurisdiction over the defendant
to the extent of his interest in the property.

Where the property attached is a chattel or any tangible personal
property, no difficulties arise in determining jurisdiction over the
property, as presence within the state is sufficient. The determina-
tion of the situs of a chattel is a question of fact, and jurisdiction
depends upon the chattel being within the state.8

Where the property attached is a debt, the presence of the debtor
is held to be enough to confer jurisdiction. The situs of a debt for
purposes of attachment is said to be with the debtor.7 Thus a debt
may be attached if, there is a general law which provides for the
attachment of debts and if the garnishee is found and process per-
sonally served upon him within the state. “It seems to be conceded
that if the creditor of the garnishee can sue the latter in this state,
then the plaintiff can proceed here against the garnishee.”8 Although
there are serious objections to this, the rule is well established, and a
judgment against the garnishee in such a case is entitled to full faith
and credit.9

5 Pennoyer v. Neff (1878) 95 U. S. 714; Woodruff v. Taylor (1847) 20 Vt. 65; Balk v. Harris (1898) 122 N. C. 64, 30 S. E. 318; Green v. Van Buskirk (1866) 5 Wall 307, 18 L. Ed. 599.
6 Sutherland v. Bank (1888) 78 Ky. 250.
8 Goodwin v. Claytor (1905) 137 N. C. 224, 231, 49 S. E. 173.
When shares of corporate stock are sought to be attached, a question arises as to the situs of such stock. The common law rule, supported by a great majority of state decisions, is stated as follows: "Corporate stock, for the purpose of attachment, has its situs where the corporation is located, and shares of stock in a foreign corporation cannot be attached, even though the corporation is carrying on business within the state. Capital stock of a domestic corporation is subject to attachment, although it is owned by a non-resident, or although the certificate of stock is in the possession of a debtor outside the state."10 "Shares of stock in a corporation are personal property, whose location is in the state where the corporation is created. . . . For purposes of attachment under the usual statute, stock is located where the corporation is incorporated. . . . The shares owned by a non-resident defendant in the stock of a foreign corporation cannot be reached and levied upon by virtue of an attachment. . . ."11

Under the modern view, expressed in the Uniform Stock Transfer Act, shares of stock have a situs wherever the stock certificates are found. Stock certificates acquire the character of negotiable instruments, requiring a transfer of the certificate in order to change ownership. The Stock Transfer Act provides that no levy or attachment of stock shall be good until the certificate is seized or its transfer by the holder is enjoined. This view has been developing under modern business conditions, and the certificates are looked upon as the stock itself.12

In most jurisdictions today, stock may be attached where the certificates are found or else at the domicile of the corporation. But in the principal case, neither of these conditions were present. The garnishee was a foreign corporation, and no certificates of stock in that corporation belonging to the defendant were found in North Carolina.

In North Carolina, as well as in all jurisdiction, attachment is authorized against the property of the defendant.13 If there is no property of the defendant within the jurisdiction, an attachment cannot lie. But the North Carolina statute specifically provides that "The rights or shares of the defendant in the stock of any association or corporation, with the interest and profits thereon, and all other

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10 Cook, Principles of Corporation Law, pp. 204, 205.
13 C. S., sec. 798.
property in this state of the defendant, are liable to be attached, levied on and sold to satisfy the judgment and execution." In the principal case, the court held that this section of the statute means clearly what it says and therefore the shares of the defendant in the stock of the American Railways Express Company are subject to attachment. But it may be pointed out that this section also says "all other property in this state of the defendant," clearly making the situs of property in North Carolina a prerequisite to attachment.

In Evans v. Monot, the nature of a share of stock is discussed as follows: "A share of stock of the corporation is a thing incorporeal—a mere right—which entitles its owner to participate in the general management of the concerns of the corporation by being a member; in the meetings of the stockholders to elect officers and do other acts of the kind, to demand and receive from the corporation a dividend of profits, whenever dividends are declared, and to demand and receive a portion of whatever may be on hand at the dissolution." That a stockholder is not an owner of corporate property is common learning. So it becomes difficult to understand the conclusion of the Court in the principal case, that "... the American Railway Express Company, though incorporated in Delaware, was doing business in this state and subject to its jurisdiction. The shares of stock held by the defendant in that company was an obligation of the company doing business here due to its stockholder. It was the "property of the stockholder in the hands of the company doing business here." Whether it be treated as a liability or obligation of the company issuing the stock, or as an interest which the defendant owns in that company and its assets here, it was the "property" of the defendant, and in either event it was subject to payment of the debts of the defendant stockholder."

But it is submitted that while the shares of stock owned by the defendant in the foreign corporation are his property, there is no possible way to sustain the result that such shares are property in North Carolina without disregarding the corporate entity. The foreign corporation owned property in North Carolina consisting of equipment, trucks, franchises, etc. It seems to be going too far to say that the defendant shareholder owned any property in the State. However this view of the shareholder's interest in corporate property

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14 C. S., sec. 816.
is sustained in a more recent case, discussed in the following note, where the Supreme Court upheld an inheritance tax on stock in a foreign corporation owned by a non-resident decedent.

B. S. G.

INHERITANCE TAX ON STOCK OWNED BY NON-RESIDENT IN FOREIGN CORPORATION—In a recent case, a resident of the State of Rhode Island died owning shares of stock in the R. J. Reynolds Tobacco Company which has its principal places of business in this State, and two-thirds of the total value of its tangible property is located herein. The Corporation maintains a stock transfer office in New York City, and the paper certificates representing the shares of stock owned by the deceased at the time of his death have never been in this state. None of the beneficiaries under the will lived in North Carolina. It was held that these shares of stock were subject to the North Carolina inheritance tax.

The question faced by the court is: Can North Carolina levy an inheritance tax upon shares of stock owned by a non-resident decedent in a foreign corporation doing business in this State? Or in the words of Justice Stacy: "The question, therefore, directly presented is whether the Legislature of this State can impose an inheritance or a transfer tax upon the right of non-resident legatees or distributees to take by will or receive under the interstate laws of another state from a non-resident testator or intestate, shares of stock in the R. J. Reynolds Tobacco Company and to require the payment of such a tax as a condition precedent to the right to have said stock transferred on the books of the corporation."

The Supreme Court held that the Legislature had the power to impose such a tax. Chief Justice Clark filed a vigorous dissenting opinion in which he contended that such a tax was unconstitutional.

The decision seems entirely consistent with the adopted policy of the Supreme Court of North Carolina concerning the nature of a shareholder's interest in corporate property. This is illustrated by the discussion in the preceding note concerning the attachment of stock in foreign corporations.

North Carolina levies a capital stock tax on domestic corporations and, since 1921, exempts from taxation in the hands of the

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17 Trust Co. v. Doughton (1924) 187 N. C. 263, 121 S. E. 741.
1 Rhode Island Hospital Trust Co. v. Doughton (1924) 187 N. C. 263, 121 S. E. 741.
2 187 N. C. 263, 265.
3 C. S., sec. 7771.
individual stockholder shares of stock in corporations which have already paid a capital stock tax. This policy is based on expediency and economy in the collection of taxes, through the corporation itself or "at its source," rather than in the hands of the owner. The statute in 1921 was designed to prevent double taxation, the state choosing to collect annual property taxes on shares of stock at their source and exempting them in the hands of the owner.

Under this doctrine North Carolina could not have laid an annual property tax on the shares in the present case, because the stock was owned in a foreign corporation and the owner was a non-resident. In other words, North Carolina could not collect at source by means of a capital stock tax since this was not a North Carolina corporation.

Since North Carolina could not have levied an annual property tax on these shares of stock, could it impose an inheritance tax upon their transfer under the facts of this case? The answer to this question depends on whether any property was transferred under the laws of North Carolina. An inheritance tax is not a property tax, but a tax on the privilege granted by the state of taking by inheritance or will. It is fundamental that under the Fourteenth Amendment, a state has jurisdiction to impose an inheritance tax only when the exercise of some essential privilege incident to transfer of title to the property in question depends for legality on the law of that state. This principle renders the tax in the present case invalid because no property was transferred in North Carolina or under North Carolina law. The property in North Carolina did not belong to the shareholder but to the corporation. "The corporation owned it prior to the shareholder's death; it continues to hold it after his death. No succession takes place in North Carolina and there is nothing upon which to impose an inheritance tax. What the shareholder owned was a membership in the corporation, a right to his proportion of the dividends declared if any, and a right to his proportion of the assets remaining after paying debts if the business is discontinued. The corporation and the shareholder are separate and distinct." 5

"Since the property belongs to the corporation, not to the shareholder or his successor, both before and after the shareholder's

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death, and only the intangible interest in the corporation represented by the shares has changed hands, no transfer has taken place which depends for its validity in any way upon the laws of the state in which the property lies (North Carolina in the present case), and there is consequently no jurisdiction to tax. The courts have, therefore, almost unanimously frustrated these attempts to levy tribute, declaring either that the statute in question did not sufficiently manifest any such covetous intention on the part of the legislature or that, if it did, it was so shamefaced a tearing of the corporate veil as to be unconstitutional."

There is no doubt in the present case but that the legislature intended to levy the tax in question. The decision is based on the theory that the decedent shareholder owned property in North Carolina which passed under the laws of this state. That the court proceeded on this theory appears from the following quotation, which is paraphrased from the language of the court in *Parks v. Express Co.* (discussed in the preceding note): "In the present case the R. J. Reynolds Tobacco Company though incorporated in New Jersey is doing business in this State and is subject to its jurisdiction. The shares of stock held by the decedent at the time of his death in that company was an obligation of the company to its stockholder. It was the property of the stockholder in the hands of the company doing business here." But it is submitted that the property in North Carolina belonged to the corporation and not to the shareholder, and therefore no property passed under the laws of this state.

The issue presented has not been passed on yet by the Supreme Court of the United States, but the great weight of state authority is against the Court's opinion and in accord with the dissenting opinion in *Trust Co. v. Doughton*, on the theory that no property passed in North Carolina and therefore the state has no jurisdiction to levy an inheritance tax.

C. C. P.

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9 *Jurisdiction to Tax Shares of Stock*, 38 Harv. Law Rev. 811.
10 C. S., sec. 7772.
*Parks v. Express Co.* (1923) 185 N. C. 428, 117 S. E. 505.
LIABILITY OF INFANT FOR INDUCING CONTRACT BY MISREPRESENTATION AS TO AGE—Some very interesting problems in the law of infant's contracts are presented in the case of Greensboro Morris Plan Co. et al. v. Palmer.¹ The case involved a suit to recover damages for false representation and deceit. The defendant, aged nineteen, emancipated and married, misrepresented to the plaintiffs that he was of full age, as his mature appearance might indicate. He thus induced them to sell him an automobile truck for about $3,000.00, to secure which he executed his note and chattel mortgage on the truck. He paid to the plaintiffs approximately $2,000.00, of which $1,200.00 had been made from the use of the truck. The plaintiffs, in claim and delivery proceedings, seized the truck, which sold for $700.00.

These facts being alleged by plaintiffs, the defendant moved for judgment on the pleadings. The court held that the plaintiffs could not recover either on the contract or in tort and that the defendant is entitled to recover the sums which he paid to the plaintiffs with interest.

The above case is one of many similar cases, apparently increasing in number, which are occupying the attention of the courts today. To reconcile the law as laid down in the different jurisdictions is impossible. This discussion is necessarily limited to infant's contracts in relation to personal property, and will be dealt with under the following topics:

1. Disaffirmance and return of consideration.
2. Estoppel as basis of infant's liability on contract.
3. Liability of infant in action of deceit.

I. DISAFFIRMANCE AND RETURN OF CONSIDERATION—The rule as laid down in the case referred to above is, that concerning personal property, and excluding contracts for necessaries² and such contracts as a minor is authorized by statute to make,³ an infant may, during his minority,⁴ avoid his contracts, and such avoidance when effected, is irrevocable and renders the contract null and void ab initio.⁵ This doctrine is in accord with the general rule of modern

¹ Greensboro Morris Plan Co. et al. v. Palmer et al. (1923) 185 N. C. 109, 116 S. E. 121. See also Hight v. Harris (1924) 188 N. C. 329, 124 S. E. 623.
² Jordan v. Coeffields (1872) 70 N. C. 110.
³ C. S., sec. 994 (conveyance by infant trustee).
⁵ Pippin v. Insurance Co., supra.
law in effect in the majority of American jurisdictions, the later decisions of the American courts having departed from the law as laid down in the early cases where the contracts of an infant were classed as void, voidable and binding, depending upon whether or not they were beneficial or prejudicial to the best interests of the infant. The modern rule seems to offer fully as much protection to the infant as did the old doctrine for he has a legal right to disaffirm his contracts, and his motive for doing so is not a proper subject of inquiry. However, an attempt on the part of the infant to rescind his agreement in part is not effective. If he is going to assert his legal right at all, it must apply to the whole contract. The contracts of an infant are said to be voidable, a North Carolina case defining this to mean incapable of being enforced at law by the adult party if the infant pleads his infancy. The contract is, however, capable of being ratified by the infant when he attains his majority.

The general rule, which includes the rule stated above, is that "voidable" as applied to an infant's acts is taken to mean a valid act which may be avoided, rather than an invalid act which may be confirmed. In other words, the contract is valid until the infant, by pleading his infancy, uses the proverbial shield given him by the law on the theory that until he attains the age of twenty-one years, his judgment is not so matured that he may be depended upon to act for his best interests; nor is he able to protect himself from those who may be too clever for him and would persuade him to act to his own detriment. Thus the law has given the infant a defense to what would otherwise be a perfectly valid contract enforceable at law. Therefore, the deed of an infant is universally agreed to transfer a title though that title is voidable. Accordingly the deed or mortgage of an infant, since they are voidable only and not void, hold good until some act is done to disaffirm them, but an infant who has executed a deed of land cannot

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6 31 Corpus Juris 1060.
7 Forsee's Adm't. v. Forsee (1911) 144 Ky. 169, 137 S. W. 836.
8 Roeder v. Simonson et al. (1923) 180 Wis. 155, 192 N. W. 477.
9 Skinner v. Maxwell (1871) 66 N. C. 45.
10 Ward v. Anderson (1892) 111 N. C. 115, 15 S. E. 933.
11 Williston, Contracts, Vol. 1, sec. 231.
12 Baggett v. Jackson (1912) 160 N. C. 26, 76 S. E. 86. Also the indorsement of negotiable paper by an infant payee or indorsee transfers title, and therefore the infancy of the indorser is no defence to an action by the holder against the maker. C. S., sec. 3012 (N. I. L.). Nightingale v. Withington (1818) 15 Mass. 272, 8 Am. Dec. 101.
make the deed absolutely void or valid by any act of his own before attaining majority.\textsuperscript{18}

The acts by which a minor may avoid his contracts differ and depend upon the circumstances of the particular case. Any action on his part which clearly shows an intent to disaffirm the contract is sufficient to do so.\textsuperscript{14} For instance, where the infant brought suit for the purpose of rescinding his contract and it was alleged in the complaint that the plaintiff, at the date of his contract with the defendant, was a minor, and the defendant did not deny the allegation, the court held that the prayer in the complaint disaffirmed the contract.\textsuperscript{15} On the same principle, a sale or purchase of personal property may be revoked by demanding back or surrendering the property.\textsuperscript{16} An offer by an infant to return a horse which he had purchased was held sufficient to rescind the trade although the offer was refused. The rescission was complete without an actual tender of the property.\textsuperscript{17} Also notice by an infant of his disaffirmance of a contract with a partnership is sufficient if this notice is given to one of the partners.\textsuperscript{18} The disaffirmance may also take place when an infant is sued on a contract. By making the plea of infancy, the infant shows his intention to rescind, which prevents a recovery on the part of the plaintiff. But an infant may rescind at other times than when he is sued on a contract. He may disaffirm at any time during his minority.\textsuperscript{19} The fact that the law in regard to the avoidance of contracts, pertaining to personal property is different from the law in regard to real property, is probably to be accounted for by the transient nature of personal property, by the ability of the parties to transfer certain kinds of personal property from place to place and by the fact that if an infant were not allowed to rescind such a contract until he became of age, so far as practical results are concerned, this would be equivalent to removing altogether his right to disaffirm.

\textsuperscript{13}McCormick v. Leggett (1861) 53 N. C. 425. In case of grants of land, the effect of disaffirmance is to suspend the matter until the infant becomes of age.
\textsuperscript{14}31 C. J. 1068.
\textsuperscript{15}Skinner v. Maxwell, supra, note 9.
\textsuperscript{16}4 R. C. L. 237.
\textsuperscript{17}Bombardier v. Goodrich (1920) 94 Vt. 208, 110 Atl. 11.
\textsuperscript{18}Spenser v. Collins (1909) 156 Cal. 298, 104 Pac. 320.
\textsuperscript{19}Note 4, supra. As to reasonable time for disaffirmance after majority, see Weeks v. Wilkins (1904) 134 N. C. 522, 47 S. E. 24; Faircloth v. Johnson (1925) 189 N. C. 429, 127 S. E. 346.
In taking up the subject of the return of consideration, several conditions have been assumed which cover the majority of cases in regard to this matter and state the general rules now applying. The law on this question is so complicated that it would be impracticable to go into details in a note of this length. The above rule which states that any act on the part of the infant which clearly shows an intent to disaffirm is sufficient, seems to warrant the inference that a tender by the infant to the other party of the consideration received from him is not a condition precedent to disaffirmance. Therefore, the right of the infant to rescind his contract, his right to recover any consideration that may have passed from him and his obligation to return the consideration that he has received are three separate and distinct propositions though in most cases, for practical purposes, they are taken as one. If an infant has entered into a contract with an adult whereby each party received consideration and later he disaffirms the contract, the disaffirmance, when effective, renders the contract void \textit{ab initio} and thereby restores the specific consideration, or any part of it that remains in the hands of the infant, to the person from whom it was obtained. That is, the infant cannot disaffirm without vesting a right in the other party to recover the consideration. Some jurisdictions leave upon each party the burden of demanding that which he has parted with. Others, presumably to prevent any increase in litigation, require the infant to offer as a condition of disaffirmance, so much of the consideration as is still in his possession. Suppose that the infant avoids and attempts to retain the consideration. "His right to avoid cannot be questioned, but he cannot retain the property purchased and at the same time repudiate the contract under which he received it; and if he does repudiate the contract under such circumstances, the title remains in the vendor and he is entitled to the immediate possession of the property. Such a refusal to give up the consideration is a wrongful conversion." 

\footnote{Note 9, \textit{supra}.} \footnote{\textit{Millsaps v. Estes} (1905) 137 N. C. 536, 50 S. E. 227. This seems the more logical rule.} \footnote{Williston, \textit{Contracts}, Vol. 1, sec. 19; \textit{Reynolds v. Garber Buick Co.} (1914) 183 Mich. 157, 149 N. W. 985; \textit{Jones v. Valentines School of Telegraphy} (1904) 122 Wis. 318, 99 N. W. 1043. An infant cannot repudiate his contract and invoke judicial remedies to restore him to his former position, until he shall have, so far as he reasonably can, made or offered to make restitution. This rule, however, does not prevent an infant from disaffirming his contract where he has parted with the consideration and cannot make restitution, \textit{Barr v. Pachard Motor Co.} (1912) 172 Mich. 299, 137 N. W. 697.} \footnote{\textit{Bennett v. McLaughlin}, 13 Ill. App. 349.}
The infant is liable in trover or replevin for the return of the goods, and he has the same right to recover the specific res transferred by him to the other party, if it is still in existence. If the other party has transferred it, the infant's right still exists even against a bona fide purchaser. If the consideration consisted of money, and is therefore not traceable, or if the res no longer exists in specie, he can sue the transferee in quasi-contract for the value thereof. However, if the infant no longer has possession of the goods, the vendor cannot maintain replevin and recover a money verdict for the goods, for the reason that this would be contrary to the rule that if an infant has spent, consumed, wasted or destroyed the consideration that he received under a contract, he may disaffirm his contract and recover the consideration that passed from him without restoring any equivalent for that which he received. Thus where an infant purchased a horse and wagon and gave a promissory note in part payment, in a suit on the note he was allowed to recover the money that he had paid to the vendor although he had sold the horse and wagon. "To say that he (the minor) shall not have the protection by disaffirmance, with which the law seeks to guard him, unless he has sufficient prudence to retain the consideration of the contract he wishes to avoid, would in many instances deprive him, because of his indiscretion, of the very defense which the law intended that he should have against the results of his indiscretion." The doctrine of requiring the infant to return the specific consideration is extended in some jurisdictions so that it may include not only the specific property received by the infant, but if he has exchanged it for other property of value, which, or a part of which, he still has, the latter may take the place of the original and come under the same obligation. "The same reason that impresses the original impresses the substitute. No question of imprudence or immature folly is in-

24 L. R. A. 683, note.
25 Tipton v. Tipton (1850) 48 N. C. 552.
26 In regard to the sale of goods, Downing v. Stone (1891) 47 Mo. App. 144; as to land, Jackson v. Beard (1913) 162 N. C. 105, 78 S. E. 6. This rule as applied to personal property has been changed in those states which have adopted the Uniform Sales Act.
27 Anson, Contracts, p. 192; Waugh v. Emerson (1885) 79 Ala. 295.
29 14 R. C. L. 238; Uiterstrom v. Kidder (Me.—1924) 124 Atl. 725.
31 McGreal v. Taylor (1897) 167 U. S. 688. 42 L. Ed. 326; Chandler v. Jones et al. (1916) 172 N. C. 569, 90 S. E. 580 discusses the application of this rule to real property.
volved. It carries out precisely the same principle of fair dealing as the required restitution of the specific property.\(^3\)

If a minor purchases some article of personal property, such as an automobile or truck, and uses it for some time it seems unreasonable to allow him to disaffirm without making any allowance whatever for the decrease in the value of the property, yet the rule has been generally declared to be that an infant, on disaffirming his purchase of personal property returned or tendered back by him, may recover what he has paid therefor without deduction for the use or depreciation in the value of the property.\(^3\) However, the law is divided on this question. It has been held that where the depreciation in value exceeded the amount paid in by the infant, he is not entitled to recover.\(^3\) Also, an infant rescinding the purchase of a bicycle and claiming a return of the installments paid upon it must account for the use of the wheel and the deterioration in value while in his possession.\(^3\) These cases seem to rest on the principle that an infant should be held liable for any benefits that he has received by the use of the property. They cannot be said to assert the doctrine that an infant may make a provident contract to purchase that which is not a necessary. In a New Hampshire case, an infant who had purchased an automobile was allowed to rescind the contract and recover the money he had paid toward the purchase price by returning the car and (1) accounting for any benefit he had received from its use, and (2) paying any damage to the car that was caused by his tortious acts, but not those caused by his ignorance or unskillfulness in operating the car.\(^3\) In a Minnesota case where the contract was found by the jury to be a reasonable and provident one, the minor was held liable for benefits.\(^3\) In a Texas case, a minor was held not liable for depreciation unless on the ground of tort.\(^3\)

The North Carolina Court, in the principal case, adhering to the majority rule, allowed the infant to recover all of the consideration

\(^{23}\) Whitman v. Allen (1923) 123 Me. 1, 121 A. 160.

\(^{24}\) Greensboro Morris Plan Co. et al. v. Palmer et al., note 1, supra; Uttestrom v. Kidder, note 30, supra; also Creer v. Active Automobile Exchange, Inc. (Me.—1923) 121 A. 888; Hauser v. Marmon Chicago Co. (1917) 208 Ill. App. 171. 11 L. R. A. 491, note, gives this as the majority rule.

\(^{24}\) Spandora v. Staten Island Garage (1922) 193 N. Y. S. 392.

\(^{25}\) Rice v. Butler (1899) 160 N. Y. 275, 55 N. E. 275. Indiana and Oregon are in accord—see 11 L. R. A. 494, n.

\(^{26}\) Lavoie v. Woolridge (1918) 79 N. H. 21, 104 A. 346.


\(^{28}\) Mast v. Strahan (Tex.—1922) 255 S. W. 790.
he had paid, although it was shown that about three-fifths of it had been earned from the use of the truck. Not only was the infant not obliged to account for the benefits received from the use of the truck, but he was not charged with any amount to represent the fair rental value of the truck while used in carrying on his lumber business. Furthermore the infant was not liable in any way for deterioration or depreciation in value of the truck, although it was sold for less than one-fourth of its original cost.

W. H. A.

II. ESTOPPEL AS BASIS OF INFANT'S LIABILITY ON CONTRACT—
The question of estoppel did not arise in the Greensboro Morris Plan Case,8 but it has occurred with such frequency in similar cases in other jurisdictions that a short discussion in connection with the other phases of the case is deemed necessary.

Lord Coke says the name estoppel was given because a man's own act "stoppeth up his mouth to allege or plead the truth."40 Since the cases under consideration involve only equitable estoppel or estoppel in pais, it is unnecessary to go into the various other kinds. Equitable estoppels are estoppels which "prevent a party from asserting his rights under a general technical rule of law, where he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth."41 "The principle of estoppel is sometimes spoken of as a rule of evidence. But it is not such; estoppels differ from evidence in this, that the former are received as conclusive and preclude all inquiry into the merits of the title, while evidence is merely the medium of establishing facts which do exist or have existed."42

It can be said in general that the doctrine of estoppel does not apply to an infant even though he is capable of exercising discretion.43 However, there are cases that are exceptions to this rule, or deny its application where the conduct of the infant, on which the estoppel is sought to be based, was intentional and fraudulent, and the infant, at the time, had reached an age when he is capable of

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8 See note 1, supra.
40 Martin v. Maine Cent. R. Co. (1890) 83 Me. 100, 21 Atl. 740.
41 Hallowell Nat'l Bk. v. Marston (1893) 85 Me. 488, 27 Atl. 529
42 21 C. J. 1060.
exercising discretion. In some cases where, in addition, benefits have been appropriated to his advantage, a form of equitable estoppel also arises.

For an estoppel to arise against an infant, all the elements of estoppel must be present. The conduct of the infant must be fraudulent and misleading, and it must have been believed, relied on, and acted upon by the other party.

As a general rule, the doctrine of estoppel not being applicable to infants in so far as voidable transactions are concerned, the courts are in no haste to hold that the acts of an infant create an estoppel against him to disaffirm his acts or transactions where the facts are at all consistent with a contrary opinion. Clearly, if he cannot be estopped himself, neither will the acts or admissions of other persons estop him. Some authorities, however, which maintain this doctrine assert the right of estoppel against him, where, by his conduct he has led others to act to their prejudice in dealing with persons other than himself, and it is generally held that if an infant has reached years of discretion and wilfully and intentionally conducts himself so that the other party in good faith relied upon his conduct to his detriment, he may be estopped from avoiding his acts or transactions, at least unless he returns the consideration.

On the question as to what effect a false statement as to age has upon a voidable transaction, where the other party to the transaction relies thereon, there is a conflict. In the jurisdictions representing the weight of authority, it is held that the fact that an infant falsely represented himself to be of age to the one with whom he dealt does not estop him from disaffirming the contract and setting up the defense of infancy against the enforcement thereunder. In

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\[44\] Harmon v. Smith (1889) 38 Fed. 482; Lewis v. Van Cleve (1922) 302 Ill. 413, 134 N. E. 804.

\[45\] Fowler v. Ala. Iron and Steel Co. (1910) 164 Ala. 414, 51 So. 393; Marx et al. v. Clisby et al. (1901) 130 Ala. 502, 30 So. 517.

\[46\] Sanger v. Hibbard (1900) 104 Fed. 455; Dohms v. Mann (1888) 76 Iowa 723, 39 N. W. 823; George et al. v. Delaney (1904) 111 La. 760, 35 So. 894.

\[47\] Clark v. Goddard (1863) 39 Ala. 164, 84 A. D. 777; Missouri Central Bldg. and Loan Ass'n v. Eveler et al. (1911) 237 Mo. 679, 141 S. W. 877, Ann. Cas. 1913 A. 486.


\[49\] U. S. Burdett v. Williams (1887) 30 Fed. 697.


Conn. Geer v. Hovey (1790) 1 Root 179.

Ga. McKamy v. Cooper (1888) 81 Ga. 679, 8 S. E. 812.

Ind. Price v. Jennings (1877) 62 Ind. 111.

other jurisdictions, such false representations may give rise to an estoppel. All elements of estoppel must be present, and the other party to the transaction must act in good faith especially if the situation and appearance of the alleged infant at the time were such as tended to substantiate the statement as to his full age.

The former jurisdictions have the weight of authority with them, but the latter seem to have the better reasoning. A few well-considered cases on both sides will illustrate this point.

The New York court held that if an allegation that the infant represented that he was of full age "were even permitted to destroy an infant's right of avoiding contracts, not one in a hundred of his contracts would be placed in his power to avoid, for nothing would be easier than to prevail upon the infant to make a declaration which might be shown as evidence of deliberate imposition on his part, though prompted solely by the person intended to be benefitted by it." Merriam v. Cunningham held that "the fraud of the defendant, if ever so clearly shown, does not restore validity to his promise, or in any way enhance its obligation. . . . The doctrine contended for by the plaintiff would effectually deprive infants of that protection which the law sedulously seeks to afford them in their dealings." It seems logical that an infant who has the appearance of an adult; who fraudulently misrepresents his age; and who is intelligent enough to appreciate the fraud, and set up his infancy, should

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Minn. Folds v. Allardt (1886) 35 Minn. 488, 29 N. W. 201.
N. Y. Conroe v. Birsall (1799) 1 Johns. Cas. 127, 1 A. D. 105.

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Miss. Commander v. Brazil (1906) 88 Miss. 608, 41 So. 497, 9 L. N. S. 1117.
Australia Campbell v. Ridley, 13 Vict. L. 701.

34 Conroe v. Birsall (1799) 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105.
35 Merriam v. Cunningham (1853) 11 Cush. (Mass.) 40.
be liable on an action of contract. Lord Mansfield remarked with much wisdom that the defense of infancy was given as a shield and not as a sword, and that it should never be turned into an offensive weapon to assist fraud.\cite{53}

Following this line of reasoning, the Louisiana court said, "It is an error to suppose that the law can sanction the perpetration of frauds by minors; the truth and reality of bona fide transactions are as binding upon them as upon majors."\cite{54}

In Klinck v. Reeder,\cite{55} it was held that a minor, doing business in his own name and fraudulently misrepresenting himself to be of age, and giving notes in payment for a tractor used in his business, was not permitted to defeat a recovery on the notes because of his infancy. The court, in that case, said, "While generally the doctrine of estoppel in pais is not applicable to infants, yet where an infant of so mature an age and appearance as makes his statement of being of age plausible, while actually transacting business for himself, makes fraudulent and false representations that he is of age to another for the purpose of transacting business with him, and such other person believes such statements to be true and relies and acts thereon and parts with his property because thereof, the doctrine of estoppel in pais will apply and such infant will not be permitted to set up his minority as a defense to an action to enforce the performance of the contract so entered into."

Another case in accord is Commander v. Brazil.\cite{56} It was there held that an infant, who, after reaching the stage of maturity indicating that he is of full age, enters into a contract falsely representing himself to be of age and accepts the benefits thereof, is estopped from denying that he is not of age when the contract is sought to be enforced against him; the party dealing with him believing him to be of full age. Justice Calhoon, concurring in the opinion handed down said, "Recoiling from the multitude of undistinguishable distinctions in the books, I take the law to comport with what is plainly right. Infants are shielded from their own improvidence, and their contracts as to them, are of no force except for necessities. But when a minor whose appearance justifies belief in such, induced a contract, which is reasonable, by false assurance that he is of the

\cite{53} Zouch v. Parsons (1765) 3 Burr. 1794, 97 Eng. Reprint 1103.
\cite{54} Guidry v. Davis, 6 La. Ann. 90.
\cite{55} Klinck v. Reeder (1921) 107 Neb. 342, 185 N. W. 1000.
\cite{56} Commander v. Brazil (1906) 88 Miss. 668, 41 So. 497, 9 L. N. S. 1117.
age of majority, he should be, and is compellable to carry it out, or to fully restore the status quo by returning that which he has received and making compensation if he has wasted it."

In four of the states of the union, statutes have been passed (that of Iowa being the original) providing, in identical language, that an infant cannot disaffirm his contracts 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 has good reason to believe him (the minor) capable of contracting. 67

Mere failure to give notice of the fact of infancy without any misrepresentations upon the subject or any intent to defraud has been held insufficient to create an estoppel, although the infant appeared to be of age, and was believed by the other party to be so. 58 However, there is authority to the effect that if the infant has arrived at years of discretion and under the circumstances of the case it was his duty to disclose his minority, he may be estopped by his failure to do so. 59

Although the above cases are in the minority and do not represent the North Carolina view, yet the principles involved seem to be correct and the conclusions desirable. To adopt this view is not to take away the infant's power to disaffirm his contracts generally. It means that in a limited field of cases, and only then when certain facts are present, will the infant be bound by his contracts. The doctrine by which this is accomplished is equitable estoppel.

H. A. B.

III. LIABILITY OF INFANT IN ACTION OF DECEIT—We have seen that infants have always occupied a favored place in the common law. At first, infants were subject to no liability for their torts, except those that were wilful and opposed to the public peace. This indulgence, however, was ere long taken away, with the result that, by unquestioned authority in all common law jurisdictions, infants are now held for all their torts which are not connected with contract—"pure torts" or "torts simpliciter"—on an equal basis with adults,

68 Grauman, Marx and Cline Co. v. Kreinitz (1910) 142 Wis. 556, 126 N. W. 50.
no distinction being made between infants and adults in that respect.\footnote{1 Cooley, *Torts*, page 177; 2 Kent. Com. 241; *Moore v. Horne* (1910) 153 N. C. 415, 69 S. E. 409; *Kron v. Smith* (1887) 96 N. C. 393, 2 S. E. 533.}

But it has always been the established policy of the common law to protect infants in the use of their property; and since by lack of mature business sense an infant may often be induced to make a contract that would be clearly against his interests, the law makes the contracts of infants voidable, and gives them the privilege of disaffirming such contracts, either before or after the attainment of majority.\footnote{1 Williston, *Contracts*, sec. 226, p. 443; *Pippen v. Insurance Co.* (1902) 130 N. C. 23, 40 S. E. 822; *Norwood v. Lassiter* (1903) 132 N. C. 56, 43 S. E. 511. An exception is made to the rule in the case of contracts for personal necessities, and contracts permitted by statute.}

Such avoidance renders the contract null and void \textit{ab initio}, and the right to disaffirm may be exercised at the infant’s discretion. This principle is today universally recognized, and, with the exception of a few jurisdictions, is not altered by circumstances which would give rise to an estoppel, as discussed in the preceding section.

Each of these principles is in itself simple enough, and in those cases where only one rule is applicable there is no difficulty. But frequently we find cases arising where elements of tort and of contract are involved in the same set of facts. As to these cases the courts are inclined to hold the contract immunity of an infant more inviolable than his tort liability. And accordingly, they all agree that the infant cannot be held in a tort action, if by so doing he is indirectly required to carry out his disaffirmed contract.\footnote{1 Barnes v. Harris (1852) 44 N. C. 15; Poe v. Horne (1853) 44 N. C. 398; *Collins v. Gifford* (1911) 203 N. Y. 465, 96 N. E. 721.} This rule is simple enough and undisputed, but nevertheless a great conflict of opinion has arisen in regard to its application—a situation which is due chiefly to a disagreement as to when the tort is inseparably connected with the contract.

There are several types of cases in which the application of the rule is relatively simple. For instance, an infant is not held for a false warranty in regard to the nature or quality of goods which he has sold, for in such a case the fraud is clearly a part of the contract itself. The false statement is about the subject matter of the con-
tract, and the person who relies on such a warranty does so at his peril.\(^6\)

Again, when an infant holds property under a contract of bailment and through his ignorance or negligence injures it, he is not liable in tort;\(^6\) for here again the damage to the property arises through a risk incident to the contract of bailment itself, and the other contracting party must consider such loss as one to which he had given his consent. As to whether an infant holding property under a bailment is liable for damage to such property caused by his willful act, there is a conflict in the authorities. In most of the jurisdictions the infant is held accountable for such willful and positive wrongs, notwithstanding the contract, the courts going on the belief that the wrongful act is so separate from the contract itself that the plea of infancy is not applicable.\(^6\) The act in question is held not to be strictly related to the contract or its performance, but clearly outside the bounds of it. However, in at least two jurisdictions we find the courts holding the opposite view, on the ground that it is impossible to enforce a tort liability without taking notice of the contract and that the privilege of disaffirmance cannot be undermined in any such indirect manner.\(^6\)

As to contracts other than bailments—as, for example, to perform work—there are cases which hold, on what seems to be just and logical grounds, that if the infant is negligent in the manner in which he performs his contract he should not be held accountable for losses resulting from his carelessness, for the wrong is clearly inseparable from the contract.\(^6\)

The most interesting cases and those in greatest disagreement are those in which we find the infant resorting to fraudulent repre-

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\(^6\) The leading case is Vasse v. Smith, 6 Cranch (U. S.) 226, 3 L. Ed. 207, opinion by Marshall, C. J.; Homer v. Thwing, 3 Pick (Mass.) 492; Towne v. Wiley, 23 Vt. 355. Here an infant hired a horse to go a certain distance. He returned by a circuitous route nearly double the distance and left the horse out over night so that it died from over-driving and exposure. The infant was held liable, for the reason that he had gone outside the scope of the bailment.


\(^6\) Lowery v. Cate (1901) 108 Tenn. 54, 64 S. W. 1068; Caswell v. Parker (1901) 96 N. E. 39, 51 Atl. 238.
sentations in order to induce another to contract with him. Most of the cases involving this point have arisen where the infant either expressly or impliedly represented himself to be of full age and where the other party, relying on the infant's statement, entered into the contract, only to find the infant later failing to perform and setting up the plea of infancy. Of this type of case, *Greensboro Morris Plan Co. v. Palmer* is typical. Here again the courts all admit the rule that if the infant cannot be held in an action *ex contractu*, he cannot be required to carry out his contract by the indirect method of resorting to an action sounding in deceit. But the cases disagree on the point whether allowing a tort action would be enforcing his contract. The authorities are in such conflict that it is futile to try to reconcile them. The best we can do is to recognize the two lines of cases and to examine the reasoning upon which each rests. For convenience we will arbitrarily designate as the "English view" that which refuses to hold the infant in tort. The opposite view we will call the "American view," although it shares with the English view a large following in this country.

It seems that the question first definitely presented itself in 1665 in the famous case of *Johnson v. Pye*, which has served as a guide for all the subsequent cases following the English rule. According to a report of that case,

"The defendant affirms to the plaintiff that he was of full age, on which the plaintiff lends him money. And he takes his security (a mortgage) when in truth he was only twenty and a half. Then he avoids his security. And a difference was taken between torts and contracts of infants, for though infants will not be bound for contracts, yet they will be bound for torts. But though infants will be bound for actual torts, as trespass, etc., which are *vi et contra pacem*, yet they will not be bound for those which sound in deceit, for if they should be, all the infants in England would be ruined."

This early case has been the basis for numerous later decisions, and now the unquestioned law in England is that the infant who induces a contract by fraudulent statements as to his age is not liable, either in contract or in tort, the reason, as shown, being that a tort action would indirectly enforce the contract.71

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71 See note 1, supra.
68 Siderfin, pt. 1, p. 258. See Keeling, J., in 1 Keble 913, "Also by this means all the pleas of infancy would be taken away, for such affirmations are in every contract."
This view has a large following in the United States, a recent important and often quoted case being Slayton v. Barry.\footnote{Slayton v. Barry (1900) 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560. This case is inherently of doubtful soundness, for its supporting cases seem to be distinguishable on their facts. In one of them, Gilson v. Spear (1865) 38 Vt. 311, 88 Am. Dec. 659, the infant falsely represented that the horse sold the plaintiff was sound. This is clearly a part of the subject matter of the contract. Doran v. Smith (1877) 49 Vt. 353 apparently follows Gilson v. Spear. Another, Nash v. Jewett (1889) 61 Vt. 501, 4 L. R. A. 651, 18 Atl. 47 follows Gilson v. Spear and Doran v. Smith and several inapplicable cases. But Slayton v. Barry is still the law in Massachusetts, being followed by Raymond v. Cycle Co. 230 Mass. 54, 118 N. E. 359.} The Massachusetts court said: "In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract," etc. This is a good statement of the principle ruling in the numerous cases in several jurisdictions, and the principle upon which the Greensboro Morris Plan Co. v. Palmer is decided.

But though, as we have seen, the English rule met with strong support in this country, there is a very decided contrary view. As early as 1838 the New Hampshire court, in Fitts v. Hall,\footnote{Fitts v. Hall (1838) 9 N. H. 48.} expressly repudiated the doctrine of Johnson v. Pye. Since this case is the fore-runner of practically all the American cases in accord and also because it states clearly the principles upon which these cases go, we again quote at length:

"The next question is, whether this action can be maintained against the defendant for the fraudulent representation that he was of full age, by reason of which the plaintiff was induced to sell him the hats. . . . There is no sound reason that occurs to us why an infant should not be chargeable in damages, for a fraudulent misrepresentation whereby another has received damage. But the representation in Johnson v. Pye, and in the present case, that the defendant was of full age, was not a part of the contract nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation. The representation was not a foundation for an action of assumpsit. The matter arises purely ex delicto. The fraud was intended to induce and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it a part and parcel of the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract."
The doctrine of *Fitts v. Hall* was accepted as the law in New York in 1843, and, after a period of doubt was in 1863 expressly declared the proper rule in a case which again rejected the English rule as embodied in *Johnson v. Pye*, and cited in support of its stand cases from New Hampshire, the United States Supreme Court, Texas, Maine, and South Carolina. Since that time, the doctrine has been adopted in a number of other jurisdictions. The concensus of opinion is that the fraud is not “part and parcel” of the contract, and that to allow the exemption would make the defense of infancy both a shield and a sword, whereas the principles of justice, and the original purpose of the law, require that it should be only a shield of defense.

The objection that to hold the infant for his fraud would be an indirect enforcement of the disaffirmed contract is untenable, for both of the original contracting parties agree that there is no contract. The infant has disaffirmed it, and the plaintiff has waived it. The former contract is now treated as a nullity, and the action is solely upon the fraud. And the amount of the tort liability would not necessarily be the same as the amount of the contract liability. In the two cases, the methods of calculating the damages would be different. In the action in deceit, it is required only that the defendant answer for the actual loss caused by the fraud, and not for the original purchase price nor for the amount unpaid under the contract. The infant might have agreed to pay too much, and in

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74 *Wallace v. Morse*, 5 Hill 392.
75 *Brown v. McCune*, 5 Sandf. 222.
76 *Eckstein v. Frank*, 1 Daly 334. This case is expressly followed in *Schumpman v. Paradise*, 46 How. Pr. 426.
77 *Monumental Building Association No. 2 v. Herman*, 33 Md. 128; *Yeager v. Knight* (1883) (obiter) 60 Miss. 730. See also cases cited in Anno. Cases 1913 A, 971, and in 1 Williston 481. For *contra* cases, in accord with *Johnson v. Pye*, see 1 Williston 480.

It is uncertain which view has the weight of authority. Cooley says that it is with the English view. *1 Cooley, Torts*, p. 186. Other writers say it is with the American rule. 57 L. R. A. 676, n; Annotated Cases, 1913 A, 971, n.

In this connection, it is interesting to note that the Civil Law is in accord with the American view. It says that if the infant misrepresents his age, “yet his obligation will nevertheless have the same effect as that of a major.” *Civil Law 1. Domat*, pt. 1, Bk. 4, title 6, sec. 2, par. 2378.

Note also that the Spanish law says on this point: “The law protects those who are defrauded, and not those who commit the fraud.” Spanish Law, law 6, title 9, partidas 6th.

no case would the plaintiff be allowed to make a profit on the transaction. If in a particular case it should happen that the amount of damages recoverable in the tort action equals the amount due on the disaffirmed contract, that would be merely a co-incidence, and as such it should of course have no weight in establishing a general rule. If, as in the Morris Plan case, the plaintiff brings his action for damages to the amount unpaid on the contract, through error or otherwise, a court of justice should not hold that fact against his chances for recovery. The jury should be trusted here, as in other cases, to award the amount of damages properly due under the circumstances.

Moreover, there is the fundamental rule of contracts that an agreement procured by fraud is not binding, but is voidable only, at the option of the party defrauded. To allow the plea of infancy to prevail in such a case as Morris Plan Co. v. Palmer is to violate this principle. It is not contended that the rule must not have exceptions, but certainly in a case of this kind, where the infant has the discretion of an adult and his appearance and other circumstances are such that a reasonable person is led to believe that he is in fact an adult, as he claims to be, the injured party should not be deprived of his usual remedies. Whether the circumstances of the particular case are such that the plaintiff, as a reasonable person, was justified in relying on them should be considered a question of fact to be determined by a jury. Some of the states have recognized the reasonableness of this argument and have removed the possibility of a miscarriage of justice in such cases by passing statutes providing that in cases of this kind the infant cannot escape the consequences of his fraud by resorting to the plea of infancy. When this contention is carried out, either by judicial decision or by statute, no assault is made upon the infant's ancient shield of protection, for in all cases the law requires the other contracting party to exercise good faith and reasonable diligence. If he does not, he is not allowed recovery, and obviously should not be. So the infant is still allowed his "shield of protection" in those cases where he needs it. He is merely disarmed of his sword, which he has no just cause to carry.

It is difficult to see the consistency in requiring an infant to be held for his positive torts, as trespass, trover, etc., and not holding

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80 See note 57, supra.
NOTES AND COMMENTS

him in cases of the type under discussion. One is inclined to think that such a decision is based too much on sensitiveness to precedent, or supposed precedent. What seems to be the better view is admirably expressed by Judge Stacy in his dissenting opinion:

"I hold it to be a sound principle of law, certainly approved in morals, that an infant who obtains my property by deceit injures me no less than the infant who negligently destroys that which is mine. If he is liable in the latter case, where the heart is free from guilt, why should he not be required to answer in the former, where forsooth his moral turpitude makes the injury more reprehensible on his part, if not more grievous to me? The absence of a contract in the one case and its existence in the other is not a sufficient reason for the difference."

Of course, the professed purpose of the law is to protect the infant in his property and against the wiles of designing persons who would take advantage of his immaturity. Admittedly, the purpose is admirable enough, and the strict rule prevailing in England and North Carolina may have been entirely proper and necessary in the day when it was first promulgated. But reflection reminds us that conditions in England three hundred and more years ago were very different from what they are today. Perhaps at that time persons barely under twenty-one years of age might have needed all the protection allowed by the law. But considering the advances made in education and civilization since that time, it is obvious that the youth of today is much more able to take care of himself in business affairs than an average youth of the same age in that day. The bulk of our college and university students today is made up of persons not yet twenty-one years of age. The rule, therefore, when applied strictly as in the Morris Plan case, seem out of date, as well as unfair. While the very soul of the common law is its regard for precedent, at the same time it is manifestly true that the law cannot and does not remain static; it must be capable of making reasonable adjustment to change. In the field of infants' liability, as in other phases of the law, we should recognize that changed conditions call for a new application of well-settled principles.

D. H. D.

185 N. C. 109, 116 S. E. 177.

83 It is suggestive to recall that at early common law the age of majority was placed at twenty-five. Later it was reduced to twenty-one. California has passed a statute, the practical effect of which is to reduce the age of majority to 18 when the question of return of consideration is involved. See Spenser v. Collins, note 18, supra.
NEW PICTURE OF THE UNITED STATES SUPREME COURT

This is the first photograph of the United States Supreme Court to be made since the appointment of Harlan Fiske Stone, former Attorney General, as Associate Justice. The photograph was taken in the studio of Harris and Ewing at Washington, D.C., November 7, 1925. Seated, left to right: Justices James Clark McReynolds, Oliver Wendell Holmes, Chief Justice William Howard Taft, Justice Willis Van DeVenar and Louis Dembitz Brandeis. Standing, left to right: Justices Edward Terry Stanford, George Sutherland, Pierce Butler, and Harlan Fiske Stone.