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Contracts--Rescission--Right of Infant to Disaffirm Contract (Sternlieb v. Normandie National Securities Corporation, 263 N.Y. 245 (1934))

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CONTRACTS—RESCISSION—RIGHT OF INFANT TO DISAFFIRM CONTRACT.—Plaintiff, while a minor, purchased from defendant securities which subsequently dropped in value until they were practically worthless. On arriving at majority, he notified defendant that he rescinded transaction, tendered back the certificates and demanded repayment of purchase price. Defendant pleaded that plaintiff induced him to part with securities by falsely representing himself to be of full age. On appeal, *held,* defense invalid. Plaintiff's fraud arose out of contract; to uphold the defense would, in reality, be to deny to plaintiff his right to disaffirm the contract. *Sternlieb* v. *Normandie National Securities Corporation,* 263 N. Y. 245, 188 N. E. 726 (1934).

Where the action is in contract it is generally held that an infant may plead infancy despite his misrepresentations as to his age.[1] Nevertheless, in many jurisdictions the infant is held liable in tort for deceit.[2] There, to avoid circuity of action, the adult should be allowed to plead the damages from the misrepresentation as *pro tanto* defense to the infant's action.[3] Some jurisdictions, as in the instant case, allow rescission on the ground that the tort is so connected with the contract that to allow the defense would be to emasculate the rule protecting infants.[4] Other jurisdictions, disregarding the procedural question, have withheld relief on the basis of equitable estoppel.[5]

In the present case, it would seem that the better ruling would have been to have interposed the defense.[6] If an infant may be held liable in conversion for the wrongful use of property bailed to him [7] or for obtaining property with an intent not to pay for it,[8] then it is evident that the court, herein, actually allows an infant fraud-doer,

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[1] Myers v. Hurley, 273 U. S. 18, 47 Sup. Ct. 277 (1926), wherein defendant was allowed to retain part of purchase price although infant had returned the consideration. International Text Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722 (1912); see Green v. Green, 69 N. Y. 553 (1877). *Contra:* Damron v. Commonwealth, 22 Ky. Law Rep. 1717, 61 S. W. 459 (1901).

[2] Epstein v. Frank, 1 Daly 334 (N. Y. 1863); Falk v. MacMasters, 197 App. Div. 357, 188 N. Y. Supp. 795 (2d Dept. 1921); Rice v. Boyer, 108 Ind. 472, 9 N. E. 420 (1886); Smith v. Newark Shoe Co., — Ohio —, 182 N. E. 349 (1932).

[3] (1922) 22 COL. L. REV. 276.

[4] Instant case; Slayton v. Barry, 175 Mass. 513, 56 N. E. 574 (1900).

[5] County Board of Education v. Hinsley, 147 Ky. 441, 144 S. W. 63 (1912); Looney v. Elkhorn Land Improvement Co., 195 Ky. 198, 242 S. W. 27 (1922); Pemberton Bldg. & Loan Ass'n v. Adams, 53 N. J. Eq. 258 (1895); La Rosa v. Nichols, 92 N. J. L. 375, 105 Atl. 201 (1918); Grauman, Marx & Cline Co. v. Kreinitz, 142 Wis. 556, 126 N. W. 50 (1910).

[6] 1 WILLISTON, CONTRACTS (1921) §245; CLARKE, CONTRACTS (4th ed. 1931) §§117, 118.

[7] Collins v. Gifford, 203 N. Y. 465, 96 N. E. 721 (1911); Campbell v. Stakes, 2 Wend. 137 (N. Y. 1828); Lowery v. Cate, 108 Tenn. 54, 64 S. W. 1068 (1901).

[8] Wallace v. Morss, 5 Hill 391 (N. Y. 1843); Gaunt v. Taylor, 15 N. Y. Supp. 589 (1891).

although conceding that he is generally liable for his torts,[9] to protect himself under the plea of infancy.[10] However, the court recognizes the undue hardship on defendant but feels itself remediless. It points out that the relief must come through legislation and that in a number of states such remedial statutes have already been enacted.[11]

A. A. M.

SUBSTITUTED SERVICE OF SUMMONS ON NONRESIDENT—RESIDENCE AND DOMICILE CONSTRUED.—Defendant has his home, which he owns and in which his family dwells, in Virginia. He owns no property either real or personal in New York. The defendant was a frequent visitor of this city and while here lived in the same room in the same hotel, staying at times as long as three weeks. On July 8, 1933, plaintiff issued a summons against the defendant, while latter party was not in town but who did return for three days in August, commencing August 21st. On August 30, 1933, an order was signed for substituted service of summons, which service was duly made and defendant appears specially to set such service aside. *Held,* defendant not a resident within the contemplation of the statute authorizing issuance of an order for substituted service.[1] *Rawstorne* v. *Maguire,*[2] 240 App. Div. 1, 269 N. Y. Supp. 39 (1st Dept. 1934).

Substituted service of process has no effect in giving a court jurisdiction over the person of the defendant, unless the person is *domiciled* in the state wherein the order was procured.[3]

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[9] *Supra* note 2.

[10] *Ibid.;* 1 WILLISTON, CONTRACTS (1921) §245.

[11] Iowa, Kan., Utah, Wash.

[1] N. Y. CIVIL PRACTICE ACT (1920) §230. This section permits an order for substituted service to be issued, where defendant is "a natural person *residing* within the state" when satisfactory proof is given the plaintiff cannot be served within the state, due diligence being exercised.

[2] Martin, *J.,* dissents in opinion; Glennon, *J.,* concurs in dissent.

[3] De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996 (1890). The court states that a court may acquire jurisdiction by substituted service over both person and property of a person *domiciled* within its jurisdiction in the matter provided for in the *lex fori.* "But a court has no extra-territorial jurisdiction, and a person not domiciled in the state or country cannot be charged *in personam* by adjudication there, unless he is personally served with notice or process within it or voluntarily submits himself to the jurisdiction of its court by appearing in some manner in the action or proceeding sought to be instituted against him." 120 N. Y. at 495, 24 N. E. at 999. Huntley v. Baker, 33 Hun