

Master and Servant--Liability--Finding Mother Riding in Own Car Driven by Minor Daughter Retained Control Justified (Fuller v. Metcalf, 130 A. 875 (Me. 1925))

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INFANTS—MINOR'S LIABILITY WHEN FALSELY MISREPRESENTING AGE—LIABILITY FOR DEPRECIATION.—Where a minor has falsely represented himself to be of legal age and thus purchased an automobile (not a necessity), he is not estopped by such misrepresentation from setting up his infancy in avoidance of the contract, and where the seller takes possession of the automobile, the minor is entitled to recover the amount paid by him, without diminution either for the use of the automobile during the time he had possession of it or for damages accruing from depreciation and wear and tear on the same. *Summit Auto Co. v. Jenkins*, 20 Oh. App. 229, 153 N. E. 153 (1925).

It is held that an infant is not liable for torts arising out of contracts. *Moore v. Eastman*, 1 Hun. (N. Y.) 578 (4th Dept. 1874); *Raymond v. General Motorcycle Co.*, 230 Mass. 54, 119 N. E. 359 (1918). The theory being that the tort is inseparable from the contract. In *Miller v. St. Louis & S. F. R. Co.*, 188 Mo. App. 402, 174 S. W. 166 (1915), it was held, where an infant executed an instrument which recites that he is of age is not thereby estopped from relying on infancy though he reached the age of discretion.

In New York we find a modification to the rule stated. Here the rule is that where an infant misrepresents his age and the other party is injured in reliance thereon, the infant will be held for his tort. *Eckstein v. Frank*, 1 Daly (N. Y.) 334 (1863). A similar holding is found in other jurisdictions. Thus, in the case of *Thosath v. Transport Motor Co.*, 240 Pac. 921 Wash. (1925), it was held a minor could not recover payments made on a purchase of a second-hand automobile on the disaffirmance of his contract by him, where he declared that he stood silent when asked if he were of age and subsequently admitted that he may have said he was of age and in the written agreement to seller, he disclosed he was twenty-two years old, such statement constituting positive misrepresentation. New York went a step further than the Eckstein case in the case of *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275 (1899). This case directly opposes the Summit case as to without diminution either for use of the automobile, etc. The Rice case held that where an infant in an action to recover from the vendor the amount paid on the contract, upon disaffirmance of the contract he (infant) *must account* for the reasonable use of the bicycle or its deterioration in value.

The New York rule seems to be sounder than the Ohio adjudications on two grounds. It is more equitable and there is less opportunity afforded the infant to defraud innocent merchants.

MASTER AND SERVANT—LIABILITY—FINDING MOTHER RIDING IN OWN CAR DRIVEN BY MINOR DAUGHTER RETAINED CONTROL JUSTIFIED.—An automobile was driven by the minor daughter of the defendant who accompanied her daughter and was present at the time of the accident. This automobile was the property of the defendant and her husband. Through the negligence of the minor daughter a collision occurred. An action was brought against the parent on the theory of master and servant. Judgment was given to plaintiff and defendant appeals. *Held*, if the parent permits a minor child to drive an automobile under parent's direction for parents, the defendant parent is responsible for the negligent act of the daughter driving the automobile, even the minor is not receiving any pay and in the

eyes of the law the relation of master and servant is created. Judgment affirmed. *Fuller v. Metcalf*, 130 Atl. 875 (Sup. Ct. Me. 1925).

The authorities are unanimous in holding that a master is always liable for the negligence of his servant while in the course of the master's business. *Round v. Delaware Lana W. Ry. Co.*, 64 N. Y. 129, 21 Am. Rep. 597 (1876); 2 Cooley, Torts, 1925, sec. 3; *Cosgrove v. Ogden*, 49 N. Y. 255 (1872). The mere fact that the relation of parent and child is present should in no way affect the relation of principal and agent with consideration given to the fact that the minor receives no compensation for his services. *Johnson v. Newman*, 271 S. W. 705 (1925); *Daggy v. Miller*, 180 Ia. 1151, 162 N. W. 859 (1917); *Kelley v. Thbodeau*, 120 Me. 402, 115 Atl. 162 (1921). The payment of money is not necessary to create the relation of master and servant as long as there is some valuable consideration given in return. 2 Cooley, Torts 1007. There are some cases which hold that upon some facts as in principal case the parent would be classed as a mere guest and no liability can be attached to him. *Reiter v. Graber*, 173 Wis. 493, 181 N. W. 739 (1921); 18 A. L. R. 362. But the soundness of the above rule is questioned and is not considered the better of the two rules. Where an automobile is in the possession of a bailee there is without doubt no liability placed on the owner although he is present in the car. *Potts v. Pardee*, 220 N. Y. 431, 116 N. E. 78 (1917), 8 A. L. R. 785; *Pease v. Montgomery*, 111 Me. 582, 88 Atl. 973 (1913). But in the principal case the minor daughter was not a bailee of the automobile but was a servant of the defendant parent. A passenger who is also the owner (not a bailee) who accepts services rendered his right of control of automobile and every reason for the application of the doctrines of *respondet superior* is present.

CORPORATIONS—PRINCIPAL AND AGENT IN CONTRACT FOR LAND SALE WHERE PRINCIPAL IS A NON-EXISTENT CORPORATION—In an action for specific performance of a written contract for the sale and transfer of realty, the defendant herein fraudulently represented himself to be the agent of a non-existent corporation, alleged to be in the process of formation. The contract proceeds in the customary form employed in the sales of real property with the duly attested signatures of the plaintiffs and the corporation by the defendant as agent. The plaintiffs seek to hold the defendant as the real purchaser and demand judgment against him as the real vendee for specific performance of the contract. It is further alleged that defendant committed a fraud in representing to the plaintiffs that a certain corporation was then being effected by him and in process of incorporation under the laws of the State of New York. *Held*, in the Lower Court, the learned judge held that the grounds of the complaint were untenable and accordingly dismissed the case. This ruling was affirmed by the Appellate Division. "*Weiss et al. v. Baum*, 217 N. Y. Supp. 820 (App. Div. 2nd Dept. 1926).

The Court recognized that the proposition presented here appears not to have been decided in New York but the principles involving the personal liability of one assuming to act as agent for a non-existent principal or claiming a power of agency without authority, have been frequently set forth. *Plew v. Board*, 274 Ill. 232, 113 N. E. 603 (1916). Earlier decisions in New York supporting such liability have been regarded by the Courts as "substantially repudiated." *White v. Madison*,