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Duty of an Infant to Return Consideration as a Prerequisite to Disaffirmance

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to limit or overrule the doctrine that mere protests against the user are sufficient to prevent the acquisition of prescriptive easement, the decision is to be commended. However, the result reached would probably have been quite justified under the evidence had the point above discussed been disregarded, because the prescriptive right was probably complete before the gates were erected across the way. —J. W. S.

DUTY OF AN INFANT TO RETURN CONSIDERATION AS A PREREQUISITE TO DISAFFIRMANCE.—The natural incapacity and improvidence of an infant, due to his immature years, has caused the law to hedge him around with certain legal protections. Among the chief of these is the power to disaffirm his contracts. That the use of this extraordinary power, under any circumstances, contains the possibility of great hardship upon the adult who has ventured to contract with the infant is obvious. The law, therefore, should allow its exercise only to the minimum extent necessary to carry out the purpose of the law in granting it to him. In other words, the law should be careful to see that the adult who has contracted with him suffers no more harm than is requisite to protect the infant from indiscretions due to his unripe judgment. Approaching the question from this viewpoint the inquiry becomes this: In what cases is it essential to the protection of an infant that he be allowed to avoid his contract without, as a condition precedent, returning the consideration?

In discussing this point it has been common to draw a distinction between contracts wholly executed and those executed only on the part of the adult.[1] In the latter case it is said that return of the consideration is not a prerequisite to disaffirmance; in the former it may be. There seems to be no sound reason for such a distinction.[2] There is just as much hardship on the infant where he is prevented from getting back what he has given unless he disgorges what he has received as where he is compelled to hand over the same thing if he does not disgorge. The fact that he is not the acting party seems immaterial.

Assuming, then, that there is no difference between wholly ex-

[1] See Eureka *v.* Edwards, 71 Ala. 248, 249 (1881); Mustard *v.* Wohlford, 15 Gratt. 329, 343 (Va. 1859); Bedinger *v.* Wharton, 27 Gratt. 857, 871 (Va. 1876). See also PECK, DOMESTIC RELATIONS, 224. These cases do not apply the distinction where the infant no longer has the consideration.

[2] See Gillespie *v.* Bailey, 12 W. Va. 70, 92 (1877).

ecuted contracts and contracts executory on the infant's part, under what circumstances does his protection demand that he get out of his contract without first putting the adult in *statu quo?* It would seem clear that if the infant still has the consideration in specie he suffers no hardship if he is compelled to turn it over as a condition to getting back what he has given or as a defense to performance on his part.[3] Obviously the same should be true if he is compelled to hand over specific proceeds of the consideration which he still retains, though the law is *contra.*[4] Where, however, the infant has lost or squandered the consideration it is equally clear that if he is prevented from avoiding the obligation without first making good the amount he has received the law will fail to accomplish its object of protecting him from the consequence of his own irresponsibility.[5]

The cases which cause difficulty are those where the infant no longer has the consideration itself or any traceable proceeds of it, but nevertheless has had benefit from it in the form of purchased and consumed necessaries or goods, which though not necessaries, actually did benefit him. In the case of necessaries,[6] and perhaps in the case of beneficial goods not necessaries,[7] the infant ought to be liable for the fair value of the benefit conferred even though he does disaffirm. In other words the law desires to protect only to the amount of the difference between the price paid by the infant for the necessaries or other goods and the actual value of the goods. Since this is so, there is a plausible argument that the infant should have to return to the adult, as a prerequisite to dis-

[3] The cases support such a view, at least where the contract is wholly executed. See 3 PAGE, CONTRACTS, 2 ed., § 1617 and cases there cited. On the principle that "he who seeks equity must do equity" it has been held that courts of equity will not aid an infant unless he restores what he has received. Bedinger *v.* Wharton, *supra;* Wallace *v.* Leroy, 57 W. Va. 263, 267, 50 S. E. 243 (1905). See 2 WILLISTON, CONTRACTS, 461 and cases there cited.

It may be suggested that if the infant first has to return the consideration before he can recover what he gave he runs the risk of not being able to get anything from the adult. It is an elementary principle in the performance of contracts that if a party is not going to get, or has reasonable grounds to believe he is not going to get what he bargained for, he is excused from performing on his side. See 2 WILLISTON, CONTRACTS, § 812 *et seq.* The same equitable principle should apply here, and if the infant is not going to get back, or has reasonable grounds to believe he is not going to get back, what he has given, he, on his part, need not return what he has received.

[4] Leacox *v.* Griffith, 76 Ia. 89, 40 N. W. 109 (1888); Walsh *v.* Young, 110 Mass. 396 (1872); Yarborough *v.* Yarborough, 59 N. C. 209 (1861); White *v.* New Bedford Cotton Waste Corporation, 178 Mass. 20, 59 N. E. 642 (1901).

[5] Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788 (1905). See Bedinger *v.* Wharton, *supra;* Mustard *v.* Wohlford, *supra;* Gillespie *v.* Bailey, *supra.* See also PECK, DOMESTIC RELATIONS, § 94.

[6] If F buys necessaries directly from A and consumes them he is liable nevertheless for their value. See 2 WILLISTON, CONTRACTS, § 240. If, instead of F buying necessaries directly from A, he uses the consideration received from A under a contract with A to purchase necessaries from X, even though F is allowed to disaffirm the contract he should be liable to A up to an amount equal to the value of the necessaries purchased.

affirmance, an amount equal to the benefit he has derived from the use of the consideration. The answer is conclusive. The law does intend that the infant under all circumstances shall be protected to the amount of the difference between the contract price he has paid or agreed to pay and the actual benefit received by him from his use of the consideration. Under the rule proposed, if he did not have assets equal to the value of the benefit he has enjoyed he could not comply with the condition, and thus he would be deprived of the protection the law wishes him to have.

The question remains whether in these last considered situations the infant should have an unconditional right of avoidance. In a recent Virginia case[8] an infant who had received $300 for the release of a tort claim was allowed to disaffirm without first giving back this amount, but the court held he must give the defendant credit for it against the damages which the jury found he had sustained.[9] The court was of the opinion that this was a special rule, restricted to this particular type of case. There appears no good reason why it should not be applied to the cases where no proceeds of the consideration remain in possession of the infant but he has had a consumed benefit from its use. The infant should be allowed to disaffirm the contract without restriction, but if he is attempting to recover what he has parted with, such recovery should be limited to the difference between the value of the benefit he has received, either in the form of necessaries or otherwise, and what he has given; or if he is defending an action against him by the adult, his defense should be limited to the same amount.[10] Such a rule reaches a result just to both parties. It affords to the infant all

[7] It has been held in a couple of jurisdictions that an infant may be liable to the other party to a transaction up to the amount of benefit actually derived from what he has received under the transaction. Hall *v.* Butterfield, 59 N. H. 354 (1879); Bergland *v.* Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191 (1916). In a jurisdiction where such a doctrine is followed the reasoning in note 6, *supra*, would apply.

[8] Clinchfield Coal Corporation *v.* Couch, 104 S. E. 802 (Va. 1920). A West Virginia case in accord with the principal case is Young *v.* West Virginia C. & P. R. Co., 42 W. Va. 112, 24 S. E. 615 (1896). *Cf.* Britton *v.* South Penn Oil Co., 73 W. Va. 792, 81 S. E. 525 (1914).

[9] A problem in the application of this principle might arise where the infant disaffirms his release and sues on his original claim but is awarded only $200 by the jury. He has received $300 for the release. In such a case the court should be allowed to do one of two things: it could deny to the infant any recovery, leaving the adult to bring a separate action to recover the surplus of $100 due him; or, preferably, it could enter judgment against the infant in favor of the adult in the same suit for $100.

[10] Those cases which hold that if the contract is fair the court will enforce it against the infant are reaching substantially this result. In such cases, if the more accurate test here suggested is applied it will be found that the difference between the value of the benefit received and the price the infant paid for it is *nil*, or so nearly so that the court does not think the infant is being deprived of any needed protection. For examples of such cases, see PECK, DOMESTIC RELATIONS, 225 n. 60.

the protection the law intends him to have, and at the same time it prevents any unnecessary hardship on the adult.

—G. E. O.

RECENT CASES

DEDICATION—EFFECT OF—REVOCABILITY OF DEDICATION.—A landowner laid off a tract of land into lots with streets and alleys running through it, recorded a plat thereof, and sold lots with reference to the plat. The plaintiff improved one or two of the principal streets shown on the plat. One corner of the tract farthest from the town being on low ground and cut by several ravines, later was replatted and the defendant became the purchaser of one of the lots indicated on the second plat. Part of the defendant's lot included land that was indicated on the first plat as an alley, but the alley had not been improved by the plaintiff. The plaintiff brought this action to open the alley as shown on the original plat. Two questions are involved: (1) Whether acceptance by the municipality of the streets shown on the first plat was necessary in order to make the dedication irrevocable; (2) Whether an acceptance of part of the dedication is an acceptance of the whole. *Held,* the plaintiff cannot open the alley. *City of Point Pleasant* v. *Caldwell,* 104 S. E. 610 (W. Va. 1920).

When a landowner lays off his land into town lots intersected by streets and alleys, and sells lots with reference to such plat, some courts say the streets *etc.*, are thereby irrevocably dedicated to the public, and that no acceptance is necessary. *City of Florence* v. *Florence etc. Co.,* 85 So. 516 (Ala.); *Bozarth* v. *Egg Harbor City,* 103 Atl. 405 (N. J.). See 2 TIFFANY, REAL PROPERTY, 2 ed., 1868; 1 ELLIOTT, ROADS AND STREETS, 3 ed., 128. This rule seems to be unjust, especially when applied to quite a large tract of which only one lot has been sold. See *Wittson* v. *Dowling,* 179 N. C. 542, 103 S. E. 18. See also 2 TIFFANY, REAL PROPERTY, 2 ed., 1321, 1870. The better rule seems to be that by selling lots with reference to such plat the landowner does not thereby irrevocably dedicate to the public the public places indicated thereon, but merely offers them, and that they must be accepted before the dedication, so far as the rights of the general public are concerned, is irrevocable. *Stillman* v. *City of Olean,* 161 N. Y. Supp. 591; s. c. 228 N. Y. 322, 127 N. E. 267; *Rose* v. *Village of Eliza-*