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LIFE INSURANCE CONTRACT AS AFFECTED BY MISSTATEMENTS OF INFANT APPLICANT—FRAUD AND AGENCY AS DEFENCE.—In *O'Rourke* v. *John Hancock Mutual Life Ins. Co.*, 50 Atl. Rptr. 834 (1902), Supreme Court of R. I., the defendant company had issued a life insurance policy to the plaintiff's son, a boy of fifteen years of age, in favor of the plaintiff, his mother. The insured died and action was brought by plaintiff as beneficiary for the amount due under the policy. It appeared that the insured, in making the application, had fraudulently answered some of the questions and the defence was that this fraud vitiated the contract. On the ground that an infant was not liable for his warranties nor for fraud arising out of contract, judgment was rendered for plaintiff. On appeal judgment for plaintiff was affirmed.

It is well settled that ordinarily such fraudulent warranties would be fatal to the contract, but in this case there was the further element of infancy and the question was whether an

infant is liable for his fraud in making a contract. It is true that an infant is liable for his torts, but the right of action always arises where an action *ex delicto* is maintainable and such an action cannot be maintained where its basis sounds in contract. *Jennings* v. *Rundall*, 8 D. and E. 335 (1797); *Penrose* v. *Curren*, 3 Rawle, 351 (1832). Therefore, it appears that an infant is not liable for a tort rising out of contract or on which a contract is based, and that infancy is a perfect defence to such an action regardless of any further element of tort. But is an infant's contract with the element of fraud on the part of the infant voidable or void? If voidable then it is a defence for the infant only, and the infant can both defend and enforce the contract, but if the contract is void then the infant can only defend it and it cannot be enforced by either party thereto.

Story on Contracts, § 111 (fifth ed.), says that while an infant is not liable on such contracts, yet "if the infant have been guilty of positive fraud, and thereby impose upon the other party to his injury, he cannot set his infancy as a defence to an action for the consideration, although the matter be in contract; for by his fraud he has put himself without the pale of his privilege, and is responsible to the same extent, as if he were an adult. Fraud renders the contract void *ab initio*, and not voidable; and therefore, if the infant, by fraudulent misrepresentations, deceive the other party, and thereby induce him to part with his goods, such an agreement will be utterly void, and the infant will be liable to an action of trover for conversion. He cannot thereby take advantage of his own wrong." Also see *Clarke* v. *Cobley*, 2 Cox 174 (1789).

On this ground the infant or his assigns could not enforce the contract, for being void there was no contract to enforce, unless the contract, subsequent to the fraud being discovered, was ratified by the party defrauded or he was guilty of conduct inconsistent with his intention to disaffirm and which amounted to a ratification.

Moncrieff on Fraud, p. 202, states that while certain contracts of infants are valid, yet these contracts may be avoided by the infant or the other contracting party on the ground of fraud and misrepresentation and they are not voidable but absolutely void.

Pollock on Contracts (sixth ed.), p. 53, says that the decisions appear to establish in infants' contracts only that the contract cannot be enforced against the infant, or some other collateral point equally consistent with its being only voidable, except where they show distinctly that the contract is voidable and not void. He further says, however, that an infant who has misrepresented himself as of full age is liable to restore any advantage he has obtained by such representation. This is consistent with the idea of the contract being void and not voidable, but it

is to be noted that Pollock does not treat directly of infants' contracts which are affected by fraud as an additional element.

Regardless of the law in Rhode Island and the facts which were present in the case of *O'Rourke* v. *John Hancock Mutual Life Ins. Co.*, it would appear that an infant cannot profit by his own wrong any more than an adult. And further that the contract being void *ab initio*, a beneficiary under the contract would have no ground of action.

In the case under discussion it also appeared that the agent of the defendant insurance company wrote out the application for the applicant and that the applicant's mother, the plaintiff, stated to said agent that the applicant had been previously rejected by this company, but she did not know what he wrote. It is well established that a principal is bound by the knowledge of his agent while acting in the scope of his employment. *Williard* v. *Buckingham*, 36 Conn. 395 (1870). It is also held that the principal is bound by the knowledge of the agent, which was acquired by the agent when not acting in the scope of his employment. *Dresser* v. *Norwood*, 17 C. B. N. S. 466 (1864). The question then is whether the agent in this case was the agent at all of the insurance company or whether he was the agent of the applicant in order to determine whether the defendant company was actually defrauded.

In *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519 (1885), the applicant made correct statements to an agent authorized to solicit applications and the agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which answers were signed by the applicant without having read them. The agent transmitted the application to the company and the company thereupon assumed the risk. Held that the assured was presumed to have read such answers before signing them and the policy was void.

In *Insurance Co.* v. *Wilkinson*, 13 Wallace, 222 (1871), the correct answers were given but the agent wrote down false answers. His conduct was a gross violation of duty, in fraud of his principal, and in the interest of the other party. Held that when an agent is apparently acting for his principal, but is really acting for himself or third persons, and against his principal, there is no agency in respect to that transaction; that the fraud could not be perpetrated alone; the aid of the insured, either as an accomplice or as an instrument, was essential. And if the assured participated in the fraud, then the contract is void.

In *Lewis* v. *The Phœnix Mutual Life Ins. Co.*, 39 Conn. 100 (1872), the applicant negligently signed the application without reading it or having it read to her. Held that this was inexcusable negligence. That the applicant was bound to know what she signed. That the law requires that the insured shall not only, in good faith, answer all the interrogatories correctly, but shall use

reasonable diligence to see that the answers are correctly written. That the insured had it in her power to prevent this species of fraud and the insurer had not.

These cases show that the company is not bound by the acts of its agent, and that the fraud having resulted either from the ignorance or the negligence of the applicant, it is none the less his act and he is responsible. It seems that on these principles where the fraud was not caused by ignorance or negligence and not by the agent, but was the willful act of the applicant himself, as in the case under discussion, there can be no doubt of the applicant's responsibility for the fraud.

Also in *Athenaeum Life Insurance* v. *Pooley,* 3 Deg. & J. 294, it was held that if a director make a contract in fraud of the company, with a person cognizant of the fraud, such a contract is void even in the hands of an assign for value who is totally innocent of the fraud.

The Rhode Island decisions recognize the solicitor as being the agent of the applicant. This was laid down in *Wilson* v. *Ins. Co.,* 4 R. I. 141 (1856). And on this ground it cannot be said that the company was not defrauded. But it is not recognized that the infant's wrong makes the contract void. It is claimed that it is voidable only, and for this proposition the court depends upon the case of *Derocher* v. *Continental Mills,* 58 Me. 217 (1870), which case distinctly says that where the contract is avoided the parties stand in exactly the same position as though no contract ever existed and the infant may recover the actual consideration. It does not say that the contract may be enforced by the infant, but that the infant has his rights and remedies as if there had been no contract at all. See also *Vent* v. *Osgood,* 19 Pick. 572 (1837).

Therefore, it would seem that according to the general rule and even the cases relied upon in *O'Rourke* v. *The John Hancock Mutual Ins. Co.,* the plaintiff should recover the premiums paid, but should not be permitted to enforce the contract. Thereby justice would be meted out to both parties, and they would be placed in *statu quo.*

J. B. T.