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NOTES.

NEGLIGENCE—LIABILITY TO MINOR WHO PROCURES EMPLOYMENT BY MISREPRESENTING HIS AGE.—On the sixth day of July, 1910, in the case of St. Louis S. F. R. R. v. Brantley[1]; the Supreme Court of Alabama decided, that a railroad, whose negligence caused a minor employee injury, cannot escape its liability from the mere fact, that the minor, contrary to the company's age regulations, secured employment with the said road by misrepresenting his age. The minor in this case for the purpose of securing employment, falsely represented himself to be of age, and thereby secured employment, in violation of the company's regulation, which prohibited the employment of minors. Before he reached majority, he was injured by the negligence of the company, which he sued for damages. It is of interest to note that the dissenting Judge delivered the opinion for the court by devoting several pages to his own dissenting views and only some twenty words to the opinion of the majority.

[1] 53 So. 305 (1910).

To decide the question, it must be determined in what relation the minor stood to the company at the time of the injury and what duty the company owed to him.

Judge Sayre in his dissenting opinion presents a summary of one side of this question upon which the higher courts have reached opposite conclusions. This dissenting view he based upon a similar case of N. & W. R. R. v. Bondurrant,[2] which in turn is based upon Fitzmaurice v. R. R.[3] His contention is, *First:* "It would be a hard measure to hold a company responsible on the one hand for failing to prescribe rules and on the other to refuse to protect it from the the consequences of the violation of reasonable and proper rules, adopted and promulgated in discharge of the duty imposed by law." *Second:* That the minor would never have been in the company's employ and consequently never hurt but for his own fraud in securing his employment. *Third*: That there is a strong analogy between the case of Fitzmaurice v. R. R.[3], where a passenger secured a cheaper rate by fraudulently stating his age and the present case where the minor gains employment by fraud as to his age. In the former case the contract was held to be void, and the passenger a trespasser, who was entitled to compensation only in case the company's negligence was so gross that it amounted to wilful injury. He applies the same rule to the case of the employee as to the case of the passenger because the only relation existing between the minor and the company was induced by a material fraud, which he thinks rendered the contract void; therefore Judge Sayre would relieve the company of all liability.

The majority of the court decided, that fraud in a case of this kind does not affect the minor's claim for compensation, unless his immaturity immediately contributed to the accident. The justice of such a decision cannot be doubted for *First*: The company should be protected from the consequences of the violation of its rules and such protection is afforded the company, for the law allows it to sue the minor in an action for deceit, or it may set off any damages due to said deceit, in an action for wages, brought against it by the minor. The rule, however, suggested by Judge Sayre would not only protect the company from any violation of its rules but would free it from all liability for injuries caused solely by the company's own negligence and in no way by the minor's misstatements or immaturity. *Second*: While it is true the minor would never have been injured had he not entered the company's employ, still no injuries would have resulted but for the company's negligence. This negligence was the direct and proximate cause of the injury which was in no way attributable to the minor's misrepresentations or his youth. *Third*: There may be a slight analogy between the case of the fraudulent passenger as in Fitzmaurice v. R. R. [3] and the case of the minor. However, the former case is incorrect in holding the

[2] 59 S. E. 1091 (Va. 1907).
[3] 192 Mass. 159.

contract void and should have no bearing on the latter decision. The contract in both cases was not void but voidable. It was voidable, because the relation of master and servant existed by virtue of one party performing valuable services, which were accepted and paid for by the other.[4] The company could terminate the contract when the deception was discovered, but until one party or the other put an end to the relation, it would continue to exist. It is true the minor falsely stated his age, but a false statement to any other material matter would have had the same effect upon the contract and relation created between the minor and the company. The company might fixt the age limit at tweny-five years, and if so, a misssatement by a man of twenty-one years, regarding his age, would not make him a trespasser and wrongdoer on the properties of the company. If marriage were a requiement, a misstatement by an applicant for employment, that he was married when in reality he was single, would not render him a trespasser. The case is the same with a railroad as any corporation or person.[5] A farmer might state that he would employ no one under twenty-one, yet a farmhand who gained employment by falsely stating he was over twenty-one would not be a trespasser on the farmer's lands. Judge Sayre distinctly says the contract is void, and yet admits that had the minor continued in the employ of the company until after he had reached the age of twenty-one, he would no longer have been a trespasser, and by this admission he shows the fallacy of his entire argument, for the minor by continuing in the employment of the company after his majority, nevertheless is still working under the same contract that he obtained before his majority by his misrepresentations. This same contract exists both before and after his majority and is voidable at the option of the company but not void, for the only possible difference which can be created by his arrival at majority is that no injury could thereafter result to the company from his deception.

It would therefore appear that the court was correct in holding that a minor who obtained employment by misstating his age, in violation of the rules formulated by his employer and was subsequently injured by his employer's negligence, either before or after reaching majority, is entitled to compensation if the said negligence was the direct and proximate cause of the injury and his own immaturity in no way contributed to the injury.

C. S. H.

UNCERTAIN DAMAGES.—Speculative, contingent, uncertain, conjectural, remote damages are terms loosely used to cover what may fairly be said to be really two questions. As the rule is different in each of these, the ambiguity is unfortunate. There would

[4] Luper v. A. T. S. Fe R. R., 81 Kans. 585.

[5] R. R. v. Baldwin, 19 Ohio C. C. 338.

be less apparent confusion in the cases if a terminology were used which distinguished between the two.

Speculative damages as a problem comprises the great middle ground between two well-defined limits. At the one extremity we have the cases where no damage has accrued whatsoever. At the other are those cases where there is no doubt of the existence of injury and the amount of the damages is quite certain, perhaps liquidated in advance, but at least capable of being ascertained by a merely mathematical process or by the application of definite standards. Between these two extremes is the field of uncertainty shading gradually from the one limit to the other. However, an analysis of the decisions shows them to be resolvable into two definite classes. For the uncertainty of damages may be of two kinds,—uncertainty as to the value of the benefit or gain that, it is claimed, would have been realized but for the tortious act or breach of contract charged against the defendant; and uncertainty whether any such gain or benefit would be derived at all. It might be argued that these are one and the same thing. Of course absence of damage is a definite, namely, zero quantity of damage. However, there is a sufficient difference for the distinction to be made between a variability in plus amounts of damage and an uncertainty between plus and zero damage.

That some damage has accrued in a given case may be certain, and yet a valuation of it in terms of money impossible. When this impossibility is found by closer scrutiny to have been only apparent, and the damage to be computable by investigation of market values, cost of transportation, price of labor and the like, then we have a case of ascertainable damages closely approaching the limit where they are absolutely demonstrated.[1] Such a case is really not within the realm of speculative damage. But there are many cases where the existence of some damage is apparent, but where its amount cannot be reduced to a certainty even by the exercise of careful investigation and mathematical computation. Where a variety of ways of computing it are offered, the court will adopt the mode which is the more definite and certain though it may be at the same time admittedly the less adequate.[2] So, rather than that the jury should guess at the possible profits that might have been made with money or goods or land, the court will allow a compensation for the use of it during the period, for example, interest, hire and rent, which are averages that have been found by extended observation. In these cases, loss of profits although dependable in amount upon circumstances is reasonably certain, because the contingencies in the case do not go so far as to render uncertain the possibility of some profit. So in the case of an established business of non-precarious character, the chances being that it will go on as before, past profits may be adduced as evidence for the purpose of allowing the jury to form

[1] Masterton v. The Mayor of Brooklyn (1845), 7 Hill 62.

[2] Griffin v. Colver (1858), 16 N. Y. 489.

an approximation of future profits, as some courts have put it[3], or of the present worth of the future expectation, as others would have it[4].

When the contingencies present in a case are so increased and extend the limits of variability so far that there may be no loss at all, then there is the second kind of uncertainty, true contingent damages, where no recovery is allowed. For the question on the whole is how great and how many are the contingencies. The cases of crops allow recovery according to two different rules, because in some cases so many of the contingencies have been eliminated that uncertainty remains merely as to the amount of loss. A crop is grown of an inferior quality because of the defendant's breach. There the contingencies of the fertility of the land, of weather and season have been disposed of, the crop having been brought to maturity.[5]

In a recent English case[6], the contingencies upon which the alleged loss of profits depended were carefully enumerated. It was an action for the breach of a contract for the service of a celebrated stallion. Although the plaintiff could show the actual profits made on foals previously begotten of that sire, his recovery was nevertheless limited to nominal damages. While it was proven that the plaintiff's mare had been served by a less celebrated sire, there seems to have been in the case no evidence that she had foaled to him a healthy foal. If this had been shown the contingencies of the fertility or non-fertility of the mare would have been eliminated, and the case would have been in line with the crop cases above-mentioned. However, since it appeared absolutely uncertain whether there would have been a colt born of the union contracted for, the court correctly held that the case was not one of an "estimate of damages based on probabilities" but a "claim for damages of a totally problematical character."

In so far as it is based on the idea of contingencies, in line with the cases of the chance of winning a prize,[7] the decision is satisfactory. Less convincing is the applicability of passages quoted from Mayne on Damages.[8] That passage which would apportion the defendant's liability to the benefit he is to receive from the performance of the contract, is limited in application to the normal sale of commodities and is at best doubtful. Nor is there greater merit in the other suggeston, at least where it is obvious as here that the entire object of the contract, to obtain a profit out of the transaction, must

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[3] Allison v. Chandler (1863), 11 Mich. 542.

[4] Goodhart v. R. R. (1896), 177 Pa. 1.

[5] Compare Wolcott v. Mount (1873), 36 N. J. L. 262, with Chicago v. Huenerbein (1877), 85 Ill. 594.

[6] Sapwell v. Bass (1910), 2 K. B. 486.

[7] Erle, J. (Patteson, J., *contra*), in Watson v. Ambergate, etc., Ry., 15 Jur. 448. See accord Adams Express Co. v. Egbert (1860), 36 Pa. 360.

[8] Mayne on Damages, 8th Ed., p. 11 and p. 70.

have been equally within the defendant's contemplation as within the plaintiff's. The problem is really a more elemental one than any application of the rule of Hadley v. Baxendale.[9] It rather concerns the fundamental burden placed upon the plaintiff of proving damage which is precedent to his right of recovery of more than nominal damages.

S. L. H.

PARTNERSHIP—RIGHTS OF CREDITORS IN SEPARATE PROPERTY USED AS PROPERTY OF A PARTNERSHIP BY HOLDING OUT.—A discussion of this question is suggested by a case recently decided by the Supreme Court of Appeals of Virginia, Johnson v. Williams, *et al.*[1] Should the firm creditors have a priority in the property used as firm property is the issue presented. This involves the application of the rule finally settled in England by Lord Eldon, that the joint fund should first be distributed among the joint creditors, the separate property first among the separate creditors, each class having a right in any surplus of the other. Some courts have decided it in the negative, others in the affirmative. A Massachusetts decision, Broadway National Bank v. Wood,[2] is illustrative of the former, and a Wisconsin case, Thayer v. Humphrey,[3] of the latter. We will consider the argument for each separately.

The reasons for denying a priority to firm creditors in separate property used as firm property by an ostensible firm may be briefly stated as follows: This priority exists only by virtue of the equity existing between partners, *inter se*. That is, each partner has a right to insist that firm assets shall be used to pay firm debts. This arises from the agreement of partnership. Parsons,[4] in his work on partnership denies this and insists that it arises from the separate liability incurred as a result of being a partner. The cases do not bear him out in this view, and we can dismiss it without further notice. In the case of an ostensible partnership there is no agreement, and hence nothing out of which an equity can flow. The firm creditors have no claim to priority of their own strength, and if they have no derivative claim for want of a partner's equity, they can have no priority. There are no cases which attack this reasoning. Its strength lies in its simplicity. One other point is taken up, estoppel. The Virginia court says, while the person held out is estopped to deny his liability to creditors as a partner, between the partners themselves there is no such estoppel. To quote the language of Judge Buchanan, "There can be no equitable estoppel between parties where neither has been

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[9] 9 Ex. 341.

[1] 68 S. E. 410 (Va. 1910).

[2] 165 Mass. 312 (1896).

[3] 91 Wis. 276 (1895).

[4] Parsons, Jas., on Partnership (2nd edition 1899), §109, at page 511.

misled by the conduct of the other. To hold, as some courts do, that they or either of the members of the ostensible partnership are estopped to deny that the property in the possession and use of the ostensible firm is partnership property, is to ignore, as it seems to us, the principles upon which the doctrine of equitable estoppel is based and to declare equities between the ostensible partners which have no existence in fact."

The cases which favor a priority have not the niceties of reasoning exhibited by the other cases. The courts seem to have decided on abstract justice and then seized on the doctrine of equitable estoppel to substantiate their views. In New York,[5] where the question seems to have been first presented, the court expressly admitted that no right to priority could be derived through the nominal partners. The rights of the attaching creditors must rest upon the legal inability of the separate owner, who allowed the ostensible firm to use the property as firm assets, to deny that the firm creditors could not assert it was firm property. The soundness of this doctrine depends on the presence of all the elements of an equitable estoppel. Bigelow,[6] in his treatise says in order to constitute an estoppel by conduct there must be (1) a false representation or a concealment of material fact; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant actually and permissibly of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; (5) the other party must have been induced to act upon it. These requirements are satisfied with the possible exception of the fourth. Intention is a difficult thing to get at, but on the theory that a man must intend the natural and probable consequences of his act, we can say the intention was present.

A difficulty arises when we consider who is bound by the estoppel. As Hillman v. Moore,[7] points out, in Kelly v. Scott, *supra,* the contest was between the assignee of the separate owner and the firm creditors, and an estoppel is binding upon the parties and their privies; but when separate creditors enter the dispute as is usual, how can you bind them? Probably the leading case advocating an estoppel is Thayer v. Humphrey,[8] mentioned above. Marshall, J., in his opinion says the estoppel should exist "to prevent fraud and promote justice between man and man in the administration of human affairs." To show what ought to be the law is the law, he cites two English decisions: *In re* Rowland and Crankshaw,[9] and *ex parte* Hayman.[10] These cases apparently support this view. Burdick,[11] in his works on partnership contends, that they are decided

[5] Kelly v. Scott, 49 N. Y. Appeals 595 (1872).

[6] Bigelow on Estoppel (4th edition 1886), ch. 18, at page 552.

[7] 3 Tenn. Ch. 454 (1877).

[8] 91 Wis. 276 (1895).

[9] L. R. 1 Ch. App. 421 (1866).

[10] 8 Ch. Div. 11 (1878).

[11] Burdick on Partnership (2nd Ed.) ph. 2, p. 76.

under an English statute, creating the doctrine of reputed ownership. This is somewhat doubtful since one case expressly denies that the decision has anything to do with reputed ownership, and the other case insists that the foundation of the judgment was really the doctrine in question. There is no attempt to discredit the objection of Hillman v. Moore, *supra,* that the estoppel cannot bind the separate creditors. Furthermore, it is asserted that the ostensible member of such partnership can avail himself of the estoppel. The argument in the principal case shows the fallacy of that by pointing out, that he has not been misled and there is no ground for an estoppel.

The doctrine denying priority, which, as we have pointed out, is based on better reasoning, has met with more general approval in this country. The courts in Pennsylvania have expressly approved of it in Scull's Appeal,[12] and Bixler v. Kresge.[13] The question of estoppel is not taken up in these cases, so there is no ruling on that point. In Scull's Appeal the court expresses a doubt as to whether there was any holding out. If there was none, the case is useless for our purposes. As before noted, Massachusetts and Tennessee take this view. Virginia is the most recent acquisition. On the other hand the Wisconsin view of Thayer v. Humphrey, *supra,* has been followed in Michigan in the case of Van Kleeck v. McCabe.[14]

E. S. McK.

[12] 115 Pa. 141 (1886).
[13] 169 Pa. 405 (1895).
[14] 87 Mich. 599 (1891).