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**EDITORIAL NOTES**

**Effect of Disaffirmance by an Infant of His Indorsement of Negotiable Paper.**—An infant payee of a negotiable promissory note, after having indorsed it apparently in blank, delivered the instrument to his attorney who promptly deposited it with the defendant bank as collateral security for his own note. Upon learning of his attorney's embezzlement, the infant, both before and after attaining his majority, repudiated the indorsement, and upon the refusal of the bank to return the note, brought suit for its recovery. The bank had taken the note in ignorance of the indorser's infancy. A decree in favor of the defendant was reversed on appeal. *Strothers v. Lynchburg Trust & Savings Bank.*

The relevant provision of the Negotiable Instruments Law does not foreclose the question. In providing that an infant's indorsement "passes the property" to the indorsee, Section 22 was clearly intended to codify the common law rule that an antecedent party may not plead an indorser's infancy in an action by the indorsee, but it leaves latent an ambiguity whether the title so passed is subject to disaffirmance. Unaided by explicit statutory provisions, the court was therefore obliged to resolve a clearly

1 156 S. E. 486 (Va. 1931).

2 Va. Code Ann. (Michie, 1930) § 5584. The section provides: "The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein notwithstanding that from want of capacity the corporation or infant may incur no liability."

Negotiation of bearer paper by delivery does not seem within the purview of this section, but there would seem no reason to discriminate between transfer and indorsement, save the obviously greater hardship of disaffirmance on remote parties in the former instance.

3 Grey v. Cooper, 3 Doug. 65 (1782); Taylor v. Croker, 4 Esp. 187 (1803); Frazier v. Massey, 14 Ind. 382 (1860); Blake v. Livingston County, 61 Barb. 149 (N. Y. 1871); Dulty v. Brownfield, 1 Pa. St. 497 (1845). This rule is rested on the ground that the infant's privilege is personal and cannot be availed of by others liable on the instrument. Where an infant is payee, it is also said that the maker, drawer and acceptor are estopped to gainsay his competency. See STORY, PROMISSORY NOTES (5 ed. 1859) § 80. The Negotiable Instruments Law so provides: *Neg. Inst. Law,* § § 60, 61, 62(2).


4 This did not escape the critical scrutiny of Dean Ames. In his famous critique of the then newly drafted Uniform Act, he pointed out this ambiguity and suggested that, if the provision operated to render the transfer of property irrevocable where the indorsee knew of the incapacity, it went "unnecessarily far". See Ames, *The Negotiable Instruments Law* (1900) 14 Harv. L. Rev. 341, 347; *The Negotiable Instruments Law—One Word More* (1901) 4bid. 442, 445. Both Judge Brewster and Professor McKeehan were convinced that Section 22 did not purport to affect the infant's powers at common law. See Brewster, *A Defense of the Negotiable Instruments Law* (1901) 10 Yale L. J. 94; McKeehan, *The Negotiable Instruments Law, A Review of the Ames-Brewster Controversy* (1902) 41 Am. L. Rev. 499. Arthur Cohen, Q. C., in a letter to Judge Brewster, expressed the opinion that the American provision was in substance similar to the corresponding section
Definite conflict of two social interests, both judicially sanctioned and both very real, however imponderable. In choosing to sacrifice the security of mercantile transactions to the protection of minors, the court followed the easier course. It relied on the venerable canon of construction that "a statute will not be construed as changing the common law beyond what is expressly stated or necessarily implied." The court took cognizance of, but only to reject, the view ably presented by Professor Chafee in his recent edition of Brannan that a statute evincing a broad legislative purpose should be construed in the light thereof, even at the price of limiting those common law rules which may be in conflict with that purpose.

Yet the common law itself exerts little compulsion toward the result reached in the Strothers case. The power of an infant to disaffirm his contractual liability as maker, drawer, or in--

of the British Bills of Exchange Act, of which Mr. Cohen was one of the framers. The British provision (45 & 46 Vict. c. 61, § 22 (2)), although by no means explicit, is more susceptible of the construction that the infant's power of disaffirmance remains unaffected thereby. See, for Mr. Cohen's observations, Brewster, The Negotiable Instruments Law—A Rejoinder to Dean Ames (1901) 15 Harv. L. Rev. 26, 38.

The utter dearth of information respecting the operation of most rules of law renders the evaluation of such competing interests extremely speculative, if not impossible. It is not difficult to couch a legal discussion in terms of "social interests" (see, e.g., Levitt, The Interests Secured by the Law Governing the Contracts of an Infant (1922) 94 Cent. L. J. 4), but the writer must here resign himself to the fact that to do so merely points a way of approach to the question at issue. Moreover, to translate to the realm of "social interests" a question so seldom litigated may seem an indulgence in hyperbole. It has, however, ramifications in other fields of commercial law. See note 28, infra.

See 156 S. E. at 428.

See ibid.

See Brannan's Negotiable Instruments Law (4 ed. 1926) 180, where Professor Chafee, in addition to warning against the "infantile paralysis" produced by exaggerated protection of minors in situations of this nature, cites authority sustaining his suggested approach to problems of statutory construction.

Cf. Holfeld, Fundamental Legal Conceptions (1923) 50 et seq. The complex alteration of the legal relationships between the infant and the other party to the transaction disaffirmed has been described in Holfeldian terminology by Professor Goble. See Goble, Infant's Contracts for the Sale of Chattels (1925) 20 Ill. L. Rev. 343.

Howard v. Simpkins, 70 Ga. 322 (1883); Ayers v. Burns, 87 Ind. 245 (1882); Des Moines Ins. Co. v. McIntire, 99 Ia. 50, 68 N. W. 565 (1896); Goodsell v. Myers, 3 Wond. 479 (N. Y. 1830).

Williamson v. Watts, 1 Camp. 552 (1808); In re Soltykoff [1891] 1 K. B. 413; cf. Gibbs v. Merrill, 3 Taunt. 307 (1810); Holmes v. Blagg, 5 Taunt. 35 (1817).

Williams v. Harrison, Carth. 160 (1690).
In Roach v. Woodhall, 91 Tenn. 206, 18 S. W. 407 (1891), the administrator of a deceased minor payee brought suit in equity to recover the note in the hands of a bona fide purchaser and to collect the proceeds from the makers. The court decreed in favor of the plaintiff on the ground that the payee’s indorsement was forged, but in a considered dictum stated that the minor might have recovered from the transferee on the ground that the transferee should be charged with notice of the indorser’s incapacity.

In Willis v. Twambly, 13 Mass. 204 (1816), a case in which the maker of a non-negotiable note was permitted to plead payment to the infant “indorser,” who had disaffirmed its transfer, the court expressly left open the question presented by negotiable notes.

Neither Chitty nor Bayley discusses the question. See CHITTY, BILLS (7th Am. ed. 1830) 16-17, 111; BAYLEY, BILLS (Am. ed. 1826) 34.
the claim of the indorsee."

The principal and one earlier case, Murray v. Thompson, decided under the Uniform Act, recognize this asserted power of avoidance. No case as yet has determined how the infant might "intercept payment" after suit had been brought on the instrument by a holder thereof, and the statement that notice of avoidance would furnish a defense to antecedent parties seems clearly erroneous. Nevertheless, Story's view has been adopted by later writers, apparently without critical scrutiny.

In both the Strothers and Murray cases, primary reliance is placed on the voidable nature of the infant's contractual undertakings. But here we are concerned not with contract but with conveyance. The distinction is not without importance in this connection. Viewed from the property standpoint, the decisions assimilate the transfer of a negotiable note to the transfer of chattel and real property interests. There may be no need for discrimination where the transfer attacked is confined to the very transaction between the infant and the adult. Narrowly con-

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29 In Roach v. Woodall, supra n. 14, a bill was brought by the payee's administrator, joining the indorsee and maker as parties defendant, but the indorsee had not begun suit. Once action has been brought, however, a maker cannot plead the indorser's incapacity (see note 3, supra) even after notice of the indorser's attempted disaffirmance (Taylor v. Croker, supra n. 15, criticized in Story, Bills of Exchange, § 85n.) But may not a maker interplead the parties, as has been suggested where an equity of ownership is asserted against an indorsee of overdue paper? See Chafee, Rights in Overdue Paper (1918) 31 Harv. L. Rev. 1104, 1141. Or may the infant join as party to the action? Cf. Warren v. Haight, 65 N. Y. 171, 178 (1875).

30 Taylor v. Croker, supra n. 15. Sections 60, 61 and 62 (2) of the Negotiable Instruments Law seem to preclude the maker, drawer, and acceptor respectively from setting up such a defense.


32 Thus the law wavered for a time between declaring the contractual undertakings of infants on negotiable paper void or voidable. Swasey v. Vanderheyden, 10 Johns. 35 (N. Y. 1813) (infant's note void); Goodsell v. Myers, 3 Wend. 479 (N. Y. 1830) (infant's note voidable). Yet no opinion seems to have intimated that the transfer of such an instrument was void. See Note, L. R. A. 1917B, 1174. Cf. Chafee, op. cit. supra n. 19, at 1109.

33 Dean Ames, Professor Chafee and Professor McKeehan seem desirous of protecting the "innocent" indorsee, even though he may have dealt directly with the infant. See Brannan's Negotiable Instrument Law (4th ed. 1926) 179-180; McKeehan, op. cit. supra n. 4, at 501. But ignorance of an infant's minority is not recognized as a defense for the adult; and an adult is no more deserving of judicial sympathy when he gets a note than when he gets a chattel. The immediate transferee although "innocent" does have a reasonable opportunity to protect himself; not so a remote party.
strued, the Murray case goes no farther. 24 Where, however, the rights of a remote party intervene, the analogy becomes delusive. That the infant's right rises superior to the third party's is well settled in the realty cases, 25 but only meagre authority sustains it as to chattels, 26 and this has been brushed aside by the Uniform Sales Act. 27 The Uniform Acts governing documents of title are less explicit and suggest interesting problems of interpretation. 28 To burden the vendee of realty with the risk of a prior grantor's infancy is not unfair; such transactions are, and should be, attended by investigation and deliberation. This is much less true of sales of chattels, 29 and with respect to negotiable instruments, there is the countervailing and dominant policy of the law merchant to free bona fide purchasers from the claims and defenses of parties with whom they have not dealt.

These considerations suggest that a court, solicitous for the

24 Here the infant's father indorsed the note with his son's consent to the defendant who believed the father to be the payee. Thus, although the "innocence" of the deceived endorsee was beyond question, he could not claim to be a remote party.

25 Mustard v. Wohlford's Heirs, 15 Gratt. 329 (Va. 1859), is a leading case. Ten other decisions to a similar effect are collected in 1 Williston, Sales (2d ed. 1924) § 14 n. 39.

26 Hill v. Anderson, 13 Miss. 216 (1845); Upshaw v. Gibson, 53 Miss. 341 (1876); Downing v. Stone, 47 Mo. App. 144 (1891) are the only decisions found by the writer. In the Downing case, the court remarks, at p. 151: "We see no reason in principle why a different rule should apply when the subject of contract is personal rather than real property." Substitute "practice" for "principle," and the statement loses its axiomatic flavor.

27 The Uniform Sales Act, § 24, provides that any seller having a voidable title may transfer good title to a bona fide purchaser at any time before avoidance.

28 One negotiating such a document may create in a bona fide purchaser greater rights than the former possessed, but the Acts do not preclude an interpretation that such rights are subject to defeasance by an infant's disaffirmance. The rights of the purchaser are measured in terms of the title of the negotiator and of the original parties to the bill in the goods. Therefore, where the Uniform Sales Act governs that title, the infant's power of disaffirmance would be cut off. Relevant sections of these Acts include the following, Uniform Bills of Lading Act, §§ 31, 32, 38, 39; Uniform Warehouse Receipts Act, §§ 41, 47, 48; Federal Bills of Lading Act, 49 U. S. C. A. §§ 110, 111, 117, 118 (1926).

The Uniform Stock Transfer Act, § 2, expressly states that it shall not be construed to enlarge the powers of an infant "to make a valid indorsement". Yet the transfer of a certificate wrongfully procured or without authority may not, under Section 3, be rescinded against a bona fide purchaser from the transferee. The purchaser obtains "an indefeasible right". Language of the New York Court of Appeals is open to the construction that the Act gives a purchaser from an infant's transferee such a right. Casey v. Kastel, 237 N. Y. 303, 313, 142 N. E. 671, 673, 31 A. L. R. 995, 998-999 (1924).

29 Professor Williston observes, "It is desirable that at some time the title to goods bought from an infant or lunatic should be perfected, and the advantage to trade and the stability of titles just 'les the diminution in the privilege of infants and lunatics." 1 Williston, Sales, 827.
minor and yet aware of the mercantile interests at stake, might well adopt an intermediate position which would grant to the infant the privilege of disaffirmance only against his immediate transferee or one taking from the latter with notice or without giving value. To do so would not leave the infant "at the mercy of the avaricious and unscrupulous". The infant has a remedy against the person from whom he has secured the instrument, and the latter’s lot, although unenviable, is no more so than that of a seller who must restore the consideration paid by the infant for a chattel which he has subsequently destroyed. Nor is the infant debarred from proceeding against his immediate transferee merely because the latter no longer holds the note itself. The infant has, therefore, two weapons in his arsenal. Why must the law add a third, which can be employed only against persons who are, to all practical intents, unable to safeguard themselves?

—DAVID F. CAVERS.

20 Strothers v. Lynchburg Trust & Savings Bank, supra n. 1, at 428. Although the defendant indorsee was a remote party, the court invokes the perils involved in permitting adults "to deal at arm's length with infants".

21 Thus, although a maker may be held liable twice, he parted with no value in the original transaction since he gave only his note.

22 Casey v. Kastel, supra n. 28. In that case, the property transferred consisted of shares of stock, and the defendants held liable were the infant’s agent and his brokers. The action sounded in trover, and the court found the conversion in the failure of the defendants to make restitution on demand. But if the infant’s right to restitution were recognized as quasi-contractual, the necessity for this somewhat labored theory would disappear.

23 In Murray v. Thompson, supra n. 18, the court suggests that indorsees should be "chargeable with notice" of the indorser's incapacity. Except where inquiry is practicable—and this is not true of remote parties—this formula merely states a result, not a reason. It is obviously unfair where the infant has merely transferred bearer paper by delivery. Moreover, the cases cited by the court, two dealing with notes made by lunatics and one with a married woman’s indorsement, present different considerations of policy which render them of little assistance. It is significant that Section 22 of the Uniform Act does not purport to affect their transactions.