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Contributory Negligence of Young Children

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The deed must therefore be held void if construed as a grant *in praesenti*: it will be held valid if construed as a grant *in futuro*. Where alternative constructions are possible—one of which will render the deed void—and the other of which will render the deed valid—that construction will be adopted which will render it valid.¹² In other words the grantor is presumed to have intended to make a valid deed. There could be no question of the intent of the grantors and therefore of the validity of the deed, if, after the grant, they had added the words “the same to take effect and vest in possession on the death of C. C. Hickel,” or “the grantors reserve an estate in the land herein conveyed during the life of C. C. Hickel.” Such conveyances have without exception been held valid in West Virginia.¹³ Yet it is difficult to understand how the addition of the words suggested would add anything to the deed. The “heirs” of C. C. Hickel would not be determined until his death and the estate could not vest until they were determined as a class. It is submitted that the construction of the word “heirs” in its technical sense compels the conclusion that the grant was of an estate to commence *in futuro*. This construction validates the deed, is in accord with the apparent intent of the grantors, and is, it is submitted, in harmony with the remedial provision of the West Virginia statute.

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CONTRIBUTORY NEGLIGENCE OF YOUNG CHILDREN.—Although a few early decisions held a child to the same rigid rule applied to an adult in determining whether he had exercised due care to avoid danger,¹ it has long been settled that the conduct of a child should be measured by a different standard, generally stated to be the care which is ordinarily exercised by children of the same age, capacity, discretion, knowledge and experience, under the same or similar circumstances.² If such considerations as these measure the care which is required of a child, there must be an age at which the doctrine of contributory negligence can have no application.

¹² *Higgins v. Coal & Coke Co.*, 63 W. Va. 218, 59 S. E. 1064 (1907).

¹³ *Hurst v. Hurst*, 7 W. Va. 289 (1874); *Lauck v. Logan*, *supra*.

¹ *Neal v. Gillett*, 23 Conn. 437; *Burke v. Broadway etc. R. Co.*, 49 Barb. 529 (N. Y. 1867).

² *Birmingham etc. R. Co. v. Mattison*, 166 Ala. 602, 52 So. 49 (1909); *Marius v. Motor Delivery Co.*, 146 App. Div. 608, 131 N. Y. Supp. 357 (N. Y. 1911); *Thomas v. Oregon Short Line R. Co.*, 47 Utah 394, 154 Pac. 777 (1916).

Accordingly, the rule has been laid down that children below a certain age are conclusively presumed to be incapable of contributory negligence.³ Some jurisdictions have fixed this age at six,⁴ others at seven,⁵ and a very few have placed it lower, at five⁶ or four.⁷ Between the ages of seven and fourteen the presumption of incapacity continues in some jurisdictions but it ceases to be conclusive and the jury may or may not find the child guilty of contributory negligence.⁸ The courts of most of the states, however, have not recognized the *prima facie* presumption of incapacity between the ages of seven and fourteen, and this seems the sounder doctrine.⁹ After fourteen, the universal rule is that presumption of incapacity ceases.¹⁰

In the recent case of *Prunty v. Tyler Traction Co.*,¹¹ a child three years and four months old was struck and injured by a freight car which was being backed down the tracks of defendant company. The trial court told the jury that the plaintiff could not be guilty of contributory negligence. The Supreme Court of Appeals of West Virginia, while deciding that this was not prejudicial error because "under the circumstances which resulted in the accident producing the injury, in this case the jury could not be allowed to find that he was so guilty," declared its belief in no uncertain terms that a child three years and four months old may be guilty of contributory negligence, and that ordinarily it would be better to submit the question to the jury.¹²

The opinion thus expressed, while in accord with a few decisions¹³ and with the view of at least one commentator,¹⁴ does not appear to be supported generally and would seem to be a decided departure from previous decisions of the West Virginia court. In the

³ *Erie R. Co. v. Swiderski*, 117 C. C. A. 17, 197 Fed. 521 (1912); *Government R. Co. v. Hanlon*, 53 Ala. 70; *Chicago R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997 (1902); *Reichle v. Transit Co.*, 241 Pa. St. 1, 88 Atl. 79 (1913); *Dodd v. Gas Co.*, 95 S. C. 9, 78 S. E. 525 (1913). And see numerous cases cited in L. R. A. 1917 F. 43.

⁴ *Pascagoula etc. Co. v. Brondum*, 96 Miss. 28, 50 So. 97 (1909).

⁵ *Richardson v. Nelson*, 221 Ill. 254, 77 N. E. 583 (1906).

⁶ *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64 (1902).

⁷ *Hamilton v. Morgan etc. S. S. Co.*, 42 Va. Ann. 324, 8 So. 586 (1890).

⁸ *Birmingham R. Light etc. Co. v. Landrum*, 153 Ala. 192, 45 So. 198 (1907); *Virginia-Carolina R. Co. v. Clawson*, 111 Va. 313, 68 S. E. 1003 (1910); *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 200 (1909).

⁹ *Wabash Ry. Co. v. Jones*, 121 Ill. App. 390 (1905); *Berdos v. Tremont etc. Mills*, 209 Mass. 489, 95 N. E. 876 (1911).

¹⁰ *Fortune v. Hall*, 122 App. Div. 250, 106 N. Y. Supp. 787 (N. Y. 1907).

¹¹ 110 S. E. 570 (W. Va. 1922).

¹² *Id.*, 573.

¹³ *Dowd v. Tighe*, 209 Mass. 464, 95 N. E. 853 (1911); *United R. & Electric Co. v. Carneal*, 110 Md. 211, 72 Atl. 771 (1909).

¹⁴ See note entitled "Contributory Negligence of Children," 21 Col. L. Rev. 697.

case of *Ewing v. Lanark Fuel Co.*,¹⁵ the court says:¹⁶ "Lack of capacity is never conclusively presumed from infancy unless the infant is under seven years of age;" and in *Gunn v. Ohio River R. Co.*,¹⁷ where a child nearly five years of age while sitting on a railroad trestle was struck by a train, it is said:¹⁸ "But a child of the tender years of this child is not chargeable with contributory negligence, for want of judgment, discretion and presence of mind to know and avoid danger." In other West Virginia cases similar expressions will be found.¹⁹ Recent cases from other jurisdictions show no inclination on the part of the courts to depart from the rule above laid down.²⁰ Only one case has been found where the question of the contributory negligence of a child of three was left to a jury,²¹ and only one in which this rule was applied to a child of four.²² A few courts have recognized the possibility of negligence after five.²³

Having fixed upon the "psychological age"²⁴ of the child as the standard by which to judge him, it is not surprising that some courts should undertake to apply this standard to children of all ages, losing sight, apparently, of the fact that a standard based on experience, judgment and discretion can have no application where these factors are non-existent. It has been urged in support of this doctrine that we "reach a logically correct conclusion by admitting the fact that children at various ages up to seven do respond in a definite fashion according to their experience. If the plaintiff doesn't, we can charge him with contributory negligence. Clearly it would be exceedingly difficult to establish this, for very little discretion can be required from minors of tender

¹⁵ 65 W. Va. 726, 65 S. E. 200 (1909).

¹⁶ *Id.*, 732.

¹⁷ 42 W. Va. 676, 26 S. E. 546 (1896).

¹⁸ *Id.*, 680.

¹⁹ *Gibson v. City of Huntington*, 38 W. Va. 177, 18 S. E. 447 (1893); *Dicken v. Coal Co.*, 41 W. Va. 511, 23 S. E. 582 (1895); *Parrish v. City of Huntington*, 57 W. Va. 286, 50 S. E. 416 (1905).

²⁰ *McDonald v. City of Spring Valley*, 285 Ill. 52, 120 N. E. 476 (1918); *Brownell v. Village of Antioch*, 215 Ill. App. 404 (1920); *Terre Haute etc., Traction Co. v. Stevenson*, 126 N. E. 34 (Ind. App. 1920); *Ryan v. Louisiana Rv. etc. Co.*, 146 La. 40, 83 So. 371 (1919); *Beno v. Kolka*, 211 Mich. 116, 178 N. W. 646 (1920); *Nichol v. Bell Telephone Co.*, 266 Pa. 463, 109 Atl. 649 (1920); *Sexton v. Noll Construction Co.*, 108 S. C. 516, 95 S. E. 129 (1918). In *McDonald v. City of Spring Valley*, *supra*, the court says: "From time immemorial the law has recognized that up to the age of seven a child is incapable of contributory negligence."

²¹ *United R. & Electric Co. v. Carneal*, *supra*, note 13.

²² *Dowd v. Tighe*, *supra*, note 13.

²³ *Serano v. New York Central etc. R. Co.*, 188 N. Y. 156, 80 N. E. 1025 (1907); *Van Salvellergh v. Green Bay Traction Co.*, 132 Wis. 166, 111 N. W. 1120 (1907).

²⁴ This term has been suggested by the writer of a recent note in the *COL. L. REV.*, *supra*, note 14, and its meaning can be explained best in his own words. He says, on page 699: "The problem in each case is how would a child of the plaintiff's age usually act? But the term 'age' is used psychologically rather than chronologically. The child's physical condition, his training, his experience, his discretion, are considered."

years, but even that little may be lacking, and the opportunity of establishing it should be given."²⁵ The difficulty referred to is more apparent than the reason why we should create it. The soundness of the premise, too, may well be questioned. There must be some age "up to seven" at which children do not "respond in a definite fashion," and below that age there certainly can be nothing for a jury's determination.

Apparently the West Virginia court is unwilling to go to this extreme. While it says:²⁶ "It will hardly do to lay down any arbitrary rule to the effect that a child under a certain age cannot under any circumstances be guilty of contributory negligence," it also says ²⁷ "whether or not in a particular case the court is justified in submitting the question to the jury depends not only upon the age of the infant and his intelligence, but in a large measure upon the nature of the danger from which the accident resulted." In other words, the court may find as a matter of law that plaintiff is not guilty of contributory negligence; but if it thinks, in view of all the circumstances, that he may not have used the care of the average child of his age and intelligence, the question may be submitted to the jury. A similar position is taken by the Michigan Supreme Court in the case of *Johnson v. Bay City*:²⁸ "There comes a time in the life of every child when the doing of an act which results in injury to itself may be negligent as a matter of law, and there is a period between that time and extreme youth when the question of whether or not the child had sufficient intelligence to appreciate the dangerous consequences liable to follow from the act becomes one for the jury. We believe, however, that all reasonable minds would agree that an infant but little more than five years of age could not have sufficient intelligence either as a matter of law or as a matter of fact. It may be difficult, perhaps impossible, to point out the exact age at which the question becomes one for the jury; but it is, we think, clear that it has not arrived at five years and four months."

In theory, this solution of the problem seems sound. But when the court says, as it does in the Prunty Case,²⁹ that there may be cases in which children of the tender age of the plaintiff might possibly be guilty of contributory negligence, doubts arise as to

²⁵ *Id.*, 698.

²⁶ *Prunty v. Tyler Traction Co.*, *supra*, note 11, at p. 572.

²⁷ *Id.*, 572.

²⁸ 164 Mich. 251, 129 N. W. 29 (1910).

²⁹ *Prunty v. Tyler Traction Co.*, *supra*, note 11, at p. 572.

whether it would lead to correct results in practice. Its difficulties and uncertainties are obvious and they raise a question as to whether it should displace the more certain, if less logical, doctrine which arbitrarily fixes an age below which no responsibility is recognized. Each jurisdiction fixes this age for itself and can put it low enough to meet any situation which may be presented.

It is not unlikely that in fixing the minimum age as to capacity for contributory negligence, the courts have been influenced by a similar rule in criminal law, where children under seven are deemed incapable of committing crimes,³⁰ or that the courts are following the Roman theory of conclusive presumption of incapacity below seven years.³¹ But the real reason would seem to be the conviction that a child under the age of seven, is a "creature of instinct and impulse,"³² lacking that judgment and discretion and that appreciation of the probability and extent of the danger which are essential elements in determining whether a child has exercised due care. As one court puts it:³³ "The rule which denies relief to one who is guilty of negligence contributing to the injury is based more upon considerations of public policy, which require that everyone should guard his person against injury, than upon what is just to the defendant. It is quite clear that a rule which has its foundation in such considerations cannot with any propriety, apply in the case of an infant of such tender years as not to have reached the age of discretion." When we give due regard to the fact that before there can be a recovery for an injury defendant's negligence must be established, there seems no injustice in protecting every child of six years from the application of the harsh doctrine of contributory negligence.

—E. C. D.

MAY THE QUESTION WHETHER AN AMENDED DECLARATION INTRODUCES A NEW CAUSE OF ACTION BE CERTIFIED TO THE SUPREME COURT FOR DECISION?—In a recently decided West Virginia case,¹ an amended declaration was demurred to on the ground that it introduced a new cause of action, and hence constituted a departure from the cause declared upon in the original declaration. In accord with previous West Virginia cases cited, the Supreme Court

³⁰ In *Sexton v. Noll Construction Co.*, *supra*, note 20, the South Carolina court says: "The rule of the common law that a child under seven years of age is conclusively presumed incapable of committing crime prevails as the test for determining his capacity to be guilty of contributory negligence."

³¹ MOYLE'S INSTITUTE, book III, title 19, sec. 10.

³² *Government Street R. Co. v. Hanlon*, 53 Ala. 70 (1875).

³³ *Walters v. Chicago, Rock Island etc. R. Co.*, 41 Iowa 71 (1875).

¹ *McMechen v. Baltimore & Ohio R. Co.*, 110 S. E. 474 (W. Va. 1922).