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AGENCY: THE POWER OF AN INFANT TO APPOINT AN AGENT IN MONTANA

By the almost uniform common law rule today[1] an infant may appoint an agent to act for him just as can any other person, subject only to his power of disaffirmance. Authorities generally approve this rule.[2] R. C. M. 1935, Section 5678 casts some doubt on the infant's power to appoint in Montana, however. It reads: "A minor cannot give a delegation of power." It is submitted that this section, if harmonized properly with other pertinent CODE sections, cannot deny an infant's power to appoint.[3]

[1] It was often stated as a rule of early common law that an infant could not appoint an agent. Actually it was an uncharted statement in a huge body of dicta. In an attempt to rationally justify this supposed rule it has been said that the ". . . constituting of an attorney by one whose acts were in their nature voidable, is repugnant and impossible, for it is imparting a right which the principal does not possess, that of doing valid acts." 1 Am. Lead. Cases, 224.

"This reasoning is based upon the theory . . . that an act of an infant done through an agent must in any event be more binding than if done by the infant in person; and that the assumption is that the infant cannot do voidable acts through an agent as well as in person." 1 MECHEM, LAW OF AGENCY (2d ed. 1914) §141.

Such an argument is highly artificial and would appear unsound. Stripped of all the trappings with which the law has clothed him, an agent is a mere instrumentality through which another acts. When used in the subject of agency, the word " . . . denotes usually one human being who is used by another as a means of accomplishing some purpose of the latter." MECHEM, OUTLINES OF THE LAW OF AGENCY (3rd ed. 1923) §1. In all real agency questions where the principal is bound, he is so only because the law finds that it was his act expressed through the agent. The older authorities apparently felt that the transaction between the principal and agent and the other with the third party was an indivisible Siamese union. In truth they are not. While the third party must establish the agency in order to bind the principal, the facts raising the agency constitute a separate and distinct legal relationship as between the principal and the agent.

[2] Hastings v. Dollarhide (1864) 24 Cal. 195; Coursolle v. Weyerhauser (1897) 69 Minn. 557, 72 N. W. 697; Casey v. Kastel (1924) 237 N. Y. 305, 143 N. E. 671, 31 A. L. R. 995, 1001; RESTATEMENT, AGENCY, §20; 1 WILLISTON, CONTRACTS (Rev. ed. 1936) §227A.

[3] The tenor of two Montana decisions: Flaherty v. Butte Elec. Ry. (1910) 40 Mont. 454, 107 P. 406, 135 Am. St. Rep. 630; and Lazich v. Belanger (1940) —Mont.—, 105 P. (2d) 738, would indicate that, under §5678, an infant cannot appoint an agent for any object whatsoever. Both cases involved the question as to whether the negligence of a parent, in looking after the material and physical welfare of the child, could be imputed to it. The court answered in the negative. The Belanger case declared that, under the statute, ". . . an infant is incapable of appointing an agent for any purpose." The use of the statute for such a purpose is dangerous and misleading. In view of the facts, it is equivalent to saying that even a natural or legal guardian cannot do valid acts in behalf of the child. Even if the court had held the infant responsible for the negligence of its parents, it could have done so either by finding an agency by operation of law, attaching to it the ordinary con-

Section 7929 of the CODE provides: "Any person having the power to contract may appoint an agent. . . ." Section 5679 states: "*A minor may make a conveyance or other contract in the same manner as any other person,* subject only to his power of disaffirmance. . . ." If an infant has the power to contract he necessarily comes under Section 7929, and therefore has the power to appoint an agent. But at least one CODE section may be thought to deny his capacity to contract. Section 7469 states: "All persons are capable of contracting except a minor, . . ." But the section[4] immediately following declares that, "Minors . . . have only such capacity as is defined by Sections 5673 to 5687 of this Code." It is submitted that the CODE sections just referred to recognize a full capacity to contract as that phrase is generally understood.[5]

As stated above, Section 5679 says that an infant has the same contractual capacity as any other person, subject only to his power of disaffirmance. A power of disaffirmance should not be considered a limitation. Rather it is a privilege not possessed by adults—a personal defense. An adult assignee of a contract from an infant does not take the power to avoid, but is bound as if he had made the contract himself.[6] It is well set-

sequences of an agent's negligence; or, it is submitted, it could have justified its conclusions more correctly by treating it as an incident of the parent-child relationship rather than of real agency, even though, as to the infant's liability for loss of rights by the negligence of the parent, it might be similar to that arising from an ordinary agency. The Belanger case particularly, states other more ample and sound grounds for giving the infant an immunity to the parent's negligence than a supposed incapacity to appoint an agent.

[4] R. C. M. 1935, §7470.

[5] "In the construction of a particular statute, all acts relating to the same subject or having the same general purpose should be read in connection with it, as together constituting one law, it being the duty of the courts to reconcile them, if possible, and make them operative." State v. Certain Intoxicating Liquors (1924) 71 Mont. 79, 227 P. 427. One should remember that all of the Code Sections discussed herein were originally enacted at the same time, in 1895, as an integral part of the FIELD CODE. Hence it is impossible to apply the doctrine of "implied repeal" by subsequent enactment to any of the Sections. And see R. C. M. 1935, §10520, which, in brief, says that the particular should be read over the general. It would seem that the language of §5679 is much more explicit than that of §5678. Furthermore, it would seem unlikely that the legislature would place inconsistent statutes in consecutive order.

[6] Riley v. Dillon (1906) 148 Ala. 283, 41 S. 768; Hill v. Weil (1918) 202 Ala. 400, 80 S. 536.

"The right of disaffirmance is confined to the infant himself or his legal representatives . . . heirs, or executives or administrators are (such), and probably guardians also." 1 WILLISTON, CONTRACTS (Rev. ed. 1936) §232 and cases cited. But see Levitt, *The Interests Secured by the Law Governing the Contracts of an Infant*, 94 CENT. L. JR. 4, 8 (1922).

tled that a contract does not have to be mutually enforceable in order to be a valid contract.[7] The power of an infant to enforce must be held to arise out of an existing contract. Section 7929 therefore clearly seems to authorize an infant to appoint an agent.[8] If the meaning of Section 5678 were clear and free from possible doubt, a reconciliation would be most difficult. Such, however, is not the case. The following discussion as to the meaning of the words "give", "delegation" and "power" will indicate that they may reasonably be given other meanings than those required if this section denies all capacity in an infant to appoint an agent.[9]

The mere fact that the word *"power"* is not limited or modified does not justify the conclusion that it is used necessarily in a generic sense so as to include the capacity to appoint an agent. It frequently is used in such universal terms even though the writer is referring only to something in the nature of a proprietary interest in land. Indeed, the only CODE section in which it seems to be defined describes it as an authority in relation to real property.[10] Furthermore our CODE declares that when a legal term is defined therein it has that meaning throughout unless the contrary clearly appears.[11]

[7] 1 WILLISTON, CONTRACTS (Rev. ed. 1936) §19.

[8] While no authority should be necessary for the proposition that an infant too young to reason is incapable of contracting, see 1 WILLISTON, CONTRACTS (Rev. ed. 1936) §227A, to that effect.

[9] In declaring that §5678 is ambiguous, this comment is not concerned in establishing its "proper" construction. The fact that it is ambiguous, however, simplifies the problem of harmonizing it with §7929. It becomes unnecessary even to consider the maxim of construction set forth in §10520: " . . . when a general and particular provision are inconsistent, the latter is paramount to the former . . .," Barth v. Ely (1929) 85 Mont. 310, 278 P. 1002. Even if it were decided that §5678 were inconsistent with §7929, the rule in §10520 would not help us, however, because §5678 is specific as to the person, and general as to the subject, while just the reverse is true in §7929. Then, the position of our Court as stated in City of Butte et al. v. Industrial Accident Board of Montana et al. (1916) 52 Mont. 75, 78, 156 P. 130, 131, is significant in this connection: "In Stadler v. City of Helena, 46 Mont. 128, 127 P. 454, we said:

'Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy'."

[10] R. C. M. 1935, §6788 defines 'power', under Chapter 63, as "... an authority to do some act in relation to real property, or the creation or revocation of any estate therein, or a charge thereon, which the owner granting or reserving might himself perform for any purpose."

[11] R. C. M. 1935, §8776: "Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intent plainly appears."

The word *"delegation"* likewise adds to our confusion. It is used unqualifiedly in treatises on Agency to describe only the question of the power of an agent to act through a sub-agent.[12] Though that may not seem its most likely meaning in this section, at least the meaning is not clear on its face.

Again, the use of the word *"give"* raises some doubts as to the meaning of this section. In its most characteristic use it applies to a grant of power, donation or gift of property interests, rather than any legal incident involved in the simple appointment of an agent. Further these words used together have no more certain meaning than when examined separately. And finally, it may well be doubted whether the section considered as a whole means more than to affirm the generally recognized rule that an infant cannot act so as to bind himself irrevocably with reference to whatever acts are deemed to be covered by the word *"power."*[13]

With these ambiguities present, it seems that Section 5678 should, if possible, be interpreted so as to harmonize with the perfectly clear language of Section 7929. There seem to be no other CODE sections militating against this conclusion.[14] However, three cases annotated under the FIELD CODE[15] (apparently the original source of Section 5678) must be briefly considered before the meaning of this section is finally determined.

Bennett v. Davis[16] involved the ability of an infant to empower an attorney to make a confession of judgment against the infant. It is no authority for the proposition that an infant cannot appoint an agent. There has always been a general reluctance on the part of the courts to enforce agreements for the confessions of judgment even against adults. It is a well-established rule that all agreements of an infant, by their nature detrimental to him, are void.[17]

A second case, *Bool v. Mix*,[18] dealt with the ability of an infant to be a grantor of real property. There was no issue of

[12]MECHEM, OUTLINES OF THE LAW OF AGENCY (3rd ed. 1923) §§165-182; 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW (3rd ed. 1922) 182.

[13]Even if §5678 be interpreted as including the appointing of an agent by an infant, it might not unreasonably be construed as simply declaratory of the general rule that such infant cannot absolutely *bind* himself by such appointment. In somewhat the same manner, courts often talk about the acts of an infant being *void* when it is clear that they really intended to declare such acts only *voidable*. 1 WILLISTON, CONTRACTS (Rev. ed. 1936) P. 677.

[14]See R. C. M. 1935, §10520, also notes 5 and 9, *supra*.

[15]FIELD CODE §15.

[16](1826) 6 Cowin (N. Y.) 392.

[17]Askey v. Williams (1889) 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

[18](1837) 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

agency involved. The only reference to an infant's power to appoint was in the following statement:

> "The rule seems to be universal, that all deeds or instruments under seal, executed by an infant, are voidable only, with the single exception of those which delegate a naked authority; which are void."

Furthermore, the court cites approvingly the reluctance of the Massachusetts case of *Whitney v. Dutch*[19] to countenance any rule denying the capacity of an infant to appoint an agent.

The latter case, which is the third one given in the annotations to the FIELD CODE, states:

> "Perhaps it can't be contended against the current of authority, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void; although no satisfactory reason can be assigned for such a position."

This case is not authority for the proposition that all appointments by an infant are void, but only as to instruments of authority required to be under seal. Even as to these the quotation is mere dictum. The court went on to hold that an infant might appoint an agent to do an act which was to his advantage, such act being voidable rather than void.

Thus considered, the exact rule that these cases were supposed to reveal is not altogether clear. Suffice it, that they are not very persuasive one way or the other as to the proper interpretation of Section 5678.

If certain cases from other CODE states were thought to control the meaning of this section the conclusion that an infant can appoint an agent in Montana would be hard to justify. All such cases interpreting sections corresponding to our Section 5678 are distinguishable however. California, Oklahoma and Territory of Dakota (now the states of North and South Dakota) have substantially this provision:

> "A minor cannot give a delegation of power, nor make any contract relating to real property, or any interest therein, or to personal property not in his immediate possession or control."[20]

It should be noted at the outset that the Section in these CODES differs substantially from Montana's, in that it explicitly

[19](1817) 14 Mass. 457, 7 Am. Dec. 229.
[20]CAL. CIV. CODE (Kerr) 1921 §33; COMP. STATS. OKLA. (1931) §4976; COMP. LAWS, S. D. (1929) §81.

denies that an infant has any capacity to contract with reference to certain transactions. This is vital to an adequate explanation of the pertinent cases because in each one the transaction involved came within one of the expressly prohibited classes set forth.

Though no question of agency was involved, the California case of *Hakes Investment Co. v. Lyons*[21] declared in dictum that it was the intent of their legislature to change the rule of an earlier state decision[22] which had decided that an infant had the power to convey real property and to do so through an agent. The Lyons case involved a deed direct from infant to grantee.

Carlisle v. National Oil Development Co.[23] and *Wambole v. Foot*[24] are the only two cases which might be said actually to construe the statutory provision: "A minor cannot give a delegation of power." The cases involved conveyances of real property by an infant through an agent. Although it may be argued that they were decided under the first clause in the statute, it is significant that neither of the courts even considered the effect of their CODE sections similar to Section 7929. Had they done so the result would have been unchanged because, under the provisions of their statute, an infant clearly lacked the capacity to contract under the facts involved. Hence these cases should not be considered as even persuasive in Montana where Sections 5678 and 7929 must be harmonized.

It has always been the policy of the law to allow an infant to avail himself, if possible, of any benefit which is opportune. If it is concluded from Section 5678 that an infant cannot appoint an agent for any purpose it will prevent him from taking advantage of those transactions which are beneficial to him. It makes it impossible for an infant to ratify the act after he comes of age.[25]

> "The better view appears to be that an infant's appointment of an agent or attorney, and the acts of the latter, are not absolutely void, but are merely voidable, there being no distinction in this regard between an appointment and other acts or contracts of an infant."[26]

The Montana Supreme Court never has had to directly decide the issue at hand. It is within the province of the court,

[21] (1913) 166 Cal. 557, 137 P. 911.
[22] Hastings v. Dollarhide (1864) 24 Cal. 195.
[23] (1921) 83 Okla. 217, 201 P. 377.
[24] (1879) 2 Dak. 1, 2 N. W. 239.
[25] 31 A. L. R. 1001.
[26] 31 A. L. R. 1001, 1002.

should the question come before it, to reach a decision compatible with the better reasoned principles of modern authority. The decisions of other CODE jurisdictions[21] may be easily distinguished as governed by provisions not in our CODE. In any event they are not controlling and the question is left open to the court.[22]

—J. Chandice Ettien

CONFLICT OF LAWS: DOES R. C. M. 1935, SECTION 7537 REQUIRE THE CONCLUSION THAT THE "PLACE OF PERFORMANCE" GOVERNS THE ESSENTIAL VALIDITY OF A CONTRACT?

It is quite generally conceded that the weight of authority[1] throughout the United States is that where a contract is made in one state either to be performed there or elsewhere the law of the state where the contract was entered into governs its validity; i. e., whether any legal rights or duties arise from the contract against either party in favor of the other.[2] Surprisingly enough the Montana Supreme Court has never as yet

[21] *Supra*, Notes 21, 23 and 24.

[22] In the event that the court does not see its way clear to accept the conclusions of this comment it is submitted that the Montana legislature should repeal the statute. The rule, as apparently reached in the jurisdictions of Dakota and Oklahoma, has no foundation in reason. Slight inquiry will show that it is contrary to the usual practice. Minors often act through agents in the ordinary course of their transactions.

It was suggested in 2 CALIF. L. REV. 312 (1914) that Section 33 of the California Code (corresponding to §5678 of the Montana Code) be amended to read: "A minor under the age of eighteen cannot directly or by a delegation of power make contracts relating to real property or personal property not in his immediate possession. . . ." If such an amendment were enacted, the section would become merely a limitation on the infant's personal capacity. Further, it would involve difficulties of interpretation. What does the commentator mean by the words "immediate possession"? Does he mean a present vested interest or actual physical possession?

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[1] RESTATEMENT, CONFLICT OF LAWS §332, 2 BEALE, CONFLICT OF LAWS (1935) §332.4, p. 1090, GOODRICH, CONFLICT OF LAWS (2d ed. 1938) §107, p. 273. Some writers disliking the generally prevailing rule cite the result of Beale's 1910 survey which shows a plurality of states favoring the rule that the place of performance governs the essential validity of a contract. See STUMBERG, CONFLICT OF LAWS (1937) p. 207.

[2] Historically, at least, three possibilities have been recognized: First, apply the law that the parties intend should apply; Second, apply the law of the place of performance; Third, the accepted weight of authority rule, apply the law of the place of contracting.