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it the contemplated injury had actually occurred, and, we think, s quite competent for the plaintiff in this case to give dence of that injury, although it had not occurred prior to the titution of the suit, and, for that purpose, and in order to give e notice to the defendants of the fact, which it is intended to prove, plaint might properly be amended. It is not quite clear on what unds the Subordinate Judge reversed the decree of the Munsif l remanded the suit. He does not say that the view which Munsif took of the law was wrong, but merely that the intiff should be allowed to amend the plaint; in what way he s not say, and his order that the Munsif should allow the int to be amended in some undefined way is not a correct er. If he took the same view of the law which the Munsif , and intended that the plaint should be amended in order to the plaintiff a cause of action which did not before exist, his w is wrong. Nevertheless, we think that the order of remand ight, and that the plaintiff should be allowed to amend the int by inserting in it the nature and extent of the injury fered. That is not an amendment inconsistent with the provisions the Code. The act complained of occurred before the institu- n of the suit, and the injury, which was foreseen and which it s the object of the suit to avert, occurred after the institution of it.

The appeal fails and is dismissed with costs.

H. W. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

fore Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Pigot.

1890 *Sept.* 15.

[ANMULL (PLAINTIFF) *v.* RAM CHUNDER GHOSE (DEFENDANT).*

or—Representations as to age known to be false—Liability in equity—Action on the contract—Action framed in tort—Costs—Statements as to existence of relationship—Evidence Act (1 of 1872), section 32, sub-section (5).

Where an infant obtained a loan upon the representation (which he knew s false) that he was of age: *Held*, that no suit to recover the money l be maintained against him, there being no obligation binding upon the

* Original Civil Appeal No. 23 of 1890, against the decree of Mr. Justice is, dated the 9th of May 1890.

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infant which could be enforced upon the contract either at law or in equity, but that the defendant should not be allowed costs in either Court.

Case in which the plaint in a former suit verified by a deceased member of the family, and as such having special means of knowledge, was held admissible under section 32, *sub-section (5) of the Evidence Act (I of 1872)*, to prove the order in which certain persons were born and their ages.

THIS was a suit brought to recover the sum of Rs. 13,000, and interest due on a mortgage executed by the defendant on the 26th March 1886. The plaintiff alleged that the defendant at the time of execution represented himself to be of full age, and thereby induced the plaintiff to advance the mortgage money, and he contended that, in the event of the defendant establishing that he was a minor at the date of the mortgage, then his representations amounted to a fraud, and were wilfully made with a view to deceive the plaintiff, and that the plaintiff should in any event be held entitled to recover the money. The prayer of the plaint was for the usual mortgage decree and for a money decree. The defendant pleaded minority, and denied the alleged fraudulent representation.

The question of the defendant's age depended partly upon the statements of friends and relatives, and partly upon certain entries in a register of births kept under the system of registration in force in Calcutta (*Bengal Act VI of 1863*) at the time when the four youngest sons of Sumbo Nath Ghose, the defendant's father, were born. The names did not appear upon the register, so that it was not possible to ascertain from the register alone which of either of the entries had reference to the defendant.

It appeared from the entries that a son was born to Sumbo Nath Ghose on the 15th March 1886, another on the 6th June 1868, another on the 29th September 1870, and another on the 31st May 1872. The defendant alleged that he was born on the 6th June 1868, and that the entry under that date referred to his birth. As the mortgage was executed on the 26th March 1886, the defendant, if he could establish that he was one of the four whose names were registered, was not of age when he signed the deed, as (a guardian of his person and property having been appointed) he did not attain his majority until the completion of his twenty-first year.

It was argued on behalf of the plaintiff that the name of the

defendant and that of either Ackhoy Coomar Ghose, or Dhurandhur Ghose, his brothers, must have deen transposed for the purposes of this litigation; but this theory was rebutted by the fact that in March 1879 a suit was brought on behalf of the defendant and the other sons of Sumbo Nath Ghose other than Dhurandhur, against Dhurandhur, in which they sued as infants by their next friend Nursing Chunder Bose to take the property of their father out of the hands of their elder brother, who had at that time attained his majority; and afterwards Ackhoy Coomar Ghose, on the death of the guardian who had been appointed to bring the suit, was upon the report of the Registrar appointed guardian of his minor brothers, including the defendant. The statements in the plaint in this suit were tendered in evidence on the defendant's behalf under section 32, sub-section (5), of the Evidence Act (I of 1872).

The case was heard before Mr. Justice Norris who found that the plea of minority was proved, but that the defendant falsely pretended, and allowed other persons in his presence and on his behalf to state, to the plaintiff that he was of full age; that such statements were false to the knowledge of the defendant, and operated upon the plaintiff's mind, so as to induce him to advance the money. It was admitted at the Bar that if the plea of minority was established the plaintiff could not be entitled to a mortgage decree, but it was argued that if the case of false representations was made out, he was entitled to a money decree.

The learned Judge upon a full review of all the cases (*q. v. infra*) held that none of the cases cited went beyond supporting the limited liability which attached to an infant who is guilty of fraud, *viz.*, "that he may be compelled to make specific restitution, where that is possible, of anything he has obtained by deceit." (See Pollock on Torts, p. 48). In the present case the learned Judge found there was nothing to show that the defendant could make specific restitution, and dismissed the suit with costs.

The plaintiff appealed to the High Court.

Mr. *Woodroffe* and Mr. *T. A. Apcar* appeared for the appellant

Mr. *Pugh*, Mr. *Evans* and Mr. *Garth* appeared for the respondent.

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The following authorities were referred to in the arguments :— *Ex parte Unity Joint Stock Mutual Banking Association* (1), *Johnson* v. *Pie* (2), *Wright* v. *Leonard* (3), *Bartlett* v. *Wells* (4), *Ex parte Jones* (5), *Stikeman* v. *Dawson* (6), *Clarke* v. *Cobley* (7), *Nixon* v. *Stocker* (8), *Inman* v. *Inman* (9), *Lempriere* v. *Lange* (10), *Jennings* v. *Rundall* (11), *Wright* v. *Snowe* (12), Pollock on Torts, pp. 47, 48 ; Pollock on Contracts, Ed. 5, pp. 73 to 77.

On the question of evidence, *Bipin Behary Daw* v. *Sreedam Chunder Dey* (13), *Haines* v. *Guthrie* (14), and the cases there cited ; Evidence Act (I of 1872), section 32, sub-section (5), and section 115.

The following judgments were delivered by the Court (PETHERAM, C.J., and PRINSEP and PIGOT, JJ.) :—

PETHERAM, C.J. (after stating the facts).—These facts, in my opinion, show beyond all question that the defendant was one of the four younger sons of Sumbo Nath, whose births were registered, and consequently that he must have been a minor when he signed the deed. But besides all this the plaint in the suit of 1879 was put in ; that plaint was signed by Nurs Chunder Bose, the maternal grandfather of the defendant, a per who is since dead, and it is contended on behalf of the defendant t statements in it, as to the order in which Sumbo Nath's sons w born, and as to the dates of their births, are evidence ur section 32, sub-section (5) of the Evidence Act, and that, if they are conclusive. It was contended on the part of the plai on the authority of the English cases that, as the question at issue in this case did not relate to the existence of any relationship by blood, marriage, or adoption, the section did not apply, and the statements were excluded by the ordinary rules of evidence. I think that on this point the law in India under the Evidence Act is different from the law of England, and that the effect of the section

(1) 3 De G. & J., 63. (2) 1 Sid., 258 ; 1 Keb, 905, 913 ; 1 Lev., 169
(3) 11 C. B. N. S., 258. (4) 1 B. & S., 836.
(5) L. R., 18 Ch. D., 109 (120). (6) 1 De G. & Sm., 110 (113).
(7) 2 Cox. Eq. Ca., 173. (8) 4 De G. & J., 458.
(9) L. R., 15 Eq., 260. (10) L. R., 12 Ch. D., 675.
(11) 8 T. R., 335. (12) 2 De G. & Sm., 321.
(13) I. L. R., 13 Calc., 42. (14) L. R., 13 Q. B. D., 818.

is to make a statement, made by such a person, relating to the existence of such relationship, admissible to prove the facts contained in the statement on any issue, and that the plaint was admissible here to prove the order in which the sons of Sumbo Nath were born, and their ages, and when admitted, it to my mind satisfactorily proves that the defendant was the son who was born on the 6th June 1868.

The remaining questions are, whether the advance was obtained by a fraudulent misrepresentation by the defendant as to his age, and, if so, what is its effect on his liability? There can, I think, be no doubt that the advance was obtained by an elaborate and cleverly concocted fraud. The defendant applied to the plaintiff to make him an advance, which the plaintiff agreed to do if he were satisfied that the defendant was of age. The defendant assured him that he was, gave him the date of his birth, and referred him to Mr. Pittar, who, he said, had the documents necessary to prove the truth of his statements. The plaintiff saw Mr. Pittar, who showed him some documents, and in effect told him that he was himself satisfied by them that the defendant was of age, and that the plaintiff might safely advance the money. The statement as to the defendant's age was untrue, and some at least of the documents must have been forgeries, and this the defendant must have known.

The fact is that the plaintiff was induced to part with his money by a fraud to which the defendant was a party, and the question which now arises is whether such fraud prevents the defendant from successfully setting up the plea of infancy as a defence to the present action. In my opinion it does not. No case has been cited before us, nor are we aware of the existence of any, in which a person has been held personally liable to pay a debt contracted by him during his infancy, on the ground that he obtained the credit by fraudulent misrepresentations as to his age. The case which was most pressed upon us is that of *Ex parte Unity Joint Stock Mutual Banking Association* (1). The head note correctly sums up the decision in that case as follows: Where an infant had obtained a loan, on a representation which he knew to be false that he was of age, held, that a proof for the loan was properly admitted in bankruptcy. The Lords Justices Knight-

(1) 3 De G. & J., 63.

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Bruce and Turner refused to expunge the proof, but except that they said that they were bound by authority they gave no reasons for their decision.

This was a proof in bankruptcy, and I am not aware of any case in which an action at law or suit in equity against the borrower has been held to be maintainable. On the other hand, there are numerous cases by which it appears that there is no obligation binding on the infant which can be enforced by action upon the contract either at law or in equity. *Johnson* v. *Pie* (1), *Wright* v. *Leonard* (2), *Bartlett* v. *Wells* (3), *Ex parte Jones* (4).

There appears then to be no authority for the proposition contended for by the plaintiff, and I agree with the learned Judge that on principle the suit must be dismissed. Inasmuch, however, as the loan was obtained by a misrepresentation by the defendant as to his age, I think the plaintiff was entitled to test the truth of his present assertion by suit and by this appeal, and that the decree should be so far varied that, although the suit will be dismissed, the defendant will not get costs in either Court.

PRINSEP, J.—I am of the same opinion.

PIGOT, J.—I fully agree with the conclusion at which the Chief Justice has arrived. I think it clearly established that the defendant was under age when he entered into this contract; that the evidence referred to by him was admissible on that point; and that the plaintiff was induced to enter into the contract with him by misrepresentation as to his age, deliberately and skilfully made by the defendant, with the aid of persons as skilful and unscrupulous as himself.

I think the suit must fail, quite apart from anything in the exact form of the plaint, and allowing it the most liberal construction. Assuming it to be framed in tort, "an infant," as Sir F. Pollock accurately says, "could not be made liable for what was in truth a breach of contract by framing the action *ex delicto*. 'You cannot convert a contract into a tort to enable you to sue an infant'" (5). *Stikeman* v. *Dawson* (6) was very fully cited before us: what the Vice-Chancellor says there, p. 113, is no doubt in condemnation

(1) 1 Sid., 258; 1 Keb., 905, 913; 1 Lev., 169.
(2) 11 C. B. (N. S.), 258.
(3) 1 B. & S., 836.
(4) L. R., 18 Ch. D., 109 (120).
(5) Pollock on Torts, pp. 47, 48.
(6) 1 De G. & Sm., 110 (113).

of the proposition, that a minor is, without any misrepresentation, in equity, answerable after his majority to a person who has contracted with him, having no notice that at the time of the contract he was a minor. But in dealing with this, he cites with complete approval the case of *Johnson* v. *Pie* (1). In that case "Winnington prayed judgment in an action upon the case on communication of lending £300, and that the defendant was therefore to mortgage certain lands; and the defendant affirmed himself to be of full age, and so intending to deceive the plaintiff, and being in appearance a man, and avers he was twenty-and-a-half; the defendant pleads not guilty, and there is a verdict for the plaintiff, Pasch, 16 Car., 2, Rot., 401. * * * * Keeling said, such torts that must punish an infant must be *vi et armis*, or notoriously against the public; but here the plaintiff's own credulity hath betrayed him; also by Windham, the commands of an infant are void; and for such he shall never be attainted a disseisor, much less shall he be punished for a bare affirmation, which Twisden agreed, and that there must be a fact joined to it, as cheating with false dice, &c. Also by this means all the pleas of infancy would be taken away, for such affirmations are in every contract. The Court awarded on the plaintiff's prayer a *Nil capit per Billam*." 1 Keble, p. 913, as well as Siderfin.

I do not think that any of the equity cases cited apply to the present case, which is, in the most favourable view of it that can be taken for the plaintiff, an action of deceit; precisely in truth the same case as *Johnson* v. *Pie* (1). No doubt an infant will not be allowed to take advantage of his own fraud, and may be compelled to make specific restitution, when that is possible, of anything he has obtained by deceit. But this case does not come within either principle. If we as a Court of equity, as well as of law, were to allow the plaintiff to recover in this suit, it would amount to restraining a defendant from setting up the plea of infancy in an action on a contract by reason of his having made a fraudulent misrepresentation *dans locum contractui*; and in no case has this ever been done. *Appeal dismissed.*

Attorney for the appellant: Mr. *H. C. Chick.*

Attorney for the respondent: Babu *B. M. Dass.*

A. A. C.

(1) 1 Sid., 258; 1 Keb. 905, 913; 1 Lev., 169.