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Who Gets the Better Deal?: A Comparison of the U.S. and English Infancy Doctrines

By SIMON GOODFELLOW*

I. Introduction

In some American states, a 17-year-old can purchase an automobile from an adult for a reasonable price, drive it around—even crash it—and then return it to the seller for a full refund. Can an English minor do the same? In both the United States and England, rights and liabilities under contract law are different for minors than for adults. The general theory is that adults have the full power to bind themselves contractually, whereas minors do not.¹ Therefore, both countries allow minors to avoid contracts that they have made, with some exceptions.² This is known as the ‘infancy doctrine.’³ However, although U.S. law is based on and was once the same as English law, U.S. law has evolved such that the law in the majority of U.S. states is now different from English law.⁴ This Note seeks first to compare and contrast the current infancy doctrines of England and the United States.

Both legal systems are also aware that giving too much protection to minors may lead to situations where they may take advantage of adults who contract with them in good faith.⁵ The key differences between U.S. and

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1. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 420-21 (2d ed. 1998) (re U.S. law); SIR GUENTER TREITEL, THE LAW OF CONTRACT 539 (11th ed. 2003) (re English law).

2. FARNSWORTH, *supra* note 1, at 422 (re U.S. law); TREITEL, *supra* note 1, at 539 (re English law).

3. Halbman v. Lemke, 298 N.W.2d 562, 564 (Wis. 1980).

4. See Larry A. DiMatteo, *Deconstructing the Myth of the “Infancy Law Doctrine”*: From Incapacity to Accountability, 21 OHIO N.U. L. REV. 481, 525 n.4 (1994).

5. TREITEL, *supra* note 1, at 539 (re English law). See e.g., Dodson v. Shrader, 824

English law regard whether, and how, they seek to balance the often conflicting interests of the minor and the adult. Therefore, this Note seeks second to evaluate which country favors which party over the other and the repercussions of this choice.

The age of majority in England, and in most American states, has been reduced from 21 to 18 years of age.⁶ Because many of the difficult cases before this reduction involved an adult contracting with a minor who was between 18 and 21 years old, this has reduced the practical importance of the fact that minors are treated differently under contract law.⁷ However, the effect of this reduction has been offset somewhat by the increased activity of those under 18 in the marketplace. For example, in the United States, the average spending by teenagers is \$66 per week, and in 2002 teenagers in the United States spent a total of \$179 billion.⁸ Consequently, many would argue that because youths under the age of 18 today are more sophisticated, knowledgeable, and active in the marketplace, allowing them to avoid the consequences of their actions in that marketplace by avoiding their contracts is unfair and ignores reality.

II. English Law

The general rule in England is that a minor is not bound by his contracts.⁹ There are three exceptions to the general rule and minors' contracts can thus be divided into four categories as follows: contracts for necessities, beneficial service contracts, voidable contracts, and unenforceable contracts.¹⁰

A. *Contracts for Necessaries*

The doctrine of necessities can be traced back to 1765.¹¹ The doctrine holds that a minor must pay a reasonable price for necessities which have been supplied to him.¹² This rule was codified in 1979 in the Sales of

S.W.2d 545, 547 (Tenn. 1992) (re U.S. law).

6. Family Law Reform Act, 1969, c. 46, § 1 (Eng.) (reducing the age of majority in England from 21 to 18); FARNSWORTH, *supra* note 1, at 423 (re U.S. law).

7. TREITEL, *supra* note 1, at 539 (re English law); FARNSWORTH, *supra* note 1, at 423 (re U.S. law).

8. Kelly Konrad, *Minors and Money*, LANSING ST. J. (Jan. 30, 2004), available at <www.lsj.com/yourguide/personalfinance/ygf_040131_kidmoney.html>.

9. ANDREW BAINHAM, *CHILDREN: THE MODERN LAW* 522 (2d ed. 1998).

10. *Id.* at 523-25.

11. DiMatteo, *supra* note 4, at 488 (citing *Zouch v. Parsons*, (1765) 97 Eng. Rep. 1103 (K.B.)).

12. MICHAEL P. FURMSTON ET AL., *CHESHIRE, FIFOOT AND FURMSTON'S LAW OF*

Goods Act.¹³ Because the minor is liable for a reasonable price rather than the contract price, liability is based on quasi-contract, or an implied promise to pay, rather than enforcement of the actual contract.¹⁴

Under English common law, necessities were defined as “such articles as are fit to maintain the particular person in the state, station and degree . . . in which he is.”¹⁵ In 1979, necessary goods became statutorily defined as those “suitable to the condition in life of the minor . . . and to his actual requirements at the time of the sale and delivery.”¹⁶ The decision as to whether something is a necessary is therefore partly a subjective one.¹⁷ The court will first decide if the article is something that could, as a matter of law, be a necessary.¹⁸ Examples would include clothes, food and lodging.¹⁹ In *Ryder v. Wombwell*, the court held that, as a matter of law, a pair of jeweled solitaires and an antique goblet could not be considered necessities for a minor.²⁰ On the other hand, if the article could be a necessary as a matter of law, the question of whether it was a necessary to the particular minor is submitted to the jury.²¹ In *Peters v. Fleming*, the court held that a watch could, as a matter of law, be a necessary for a minor undergraduate, and therefore the issue of whether a gold watch chain was a necessary was submitted to the jury.²² Under English law, the important distinction is not simply between basic items and luxuries. Luxurious items of utility could be considered necessities depending on the particular minor and the circumstances.²³ In *Nash v. Inman*, a tailor sued a minor Cambridge undergraduate who had failed to pay for eleven “fancy waistcoats.”²⁴ The court ruled against the tailor, and the minor was thus allowed to keep the waistcoats without paying for them.²⁵ The court held that the waistcoats were not necessities—not because they were luxuries

CONTRACT 480 (14th ed. 2001).

13. Sales of Goods Act, 1979, c. 54, § 3 (Eng.).

14. *Nash v. Inman*, [1908] 2 K.B. 1 (Eng. C.A.).

15. *Peters v. Fleming*, (1840) 6 M. & W. 42, 46.

16. Sales of Goods Act, *supra* note 13, at c. 54, § 3.

17. BAINHAM, *supra* note 9, at 522.

18. TREITEL, *supra* note 1, at 540.

19. FURMSTON, *supra* note 12, at 479.

20. (1868) L.R. 4 Exch. 32, 38.

21. FURMSTON, *supra* note 12, at 479.

22. (1840) 6 M. & W. 42.

23. TREITEL, *supra* note 1, at 540.

24. FURMSTON, *supra* note 12, at 479.

25. *Id.* As will be seen later, although the law of necessities stated in this case is still good law today, under current law the minor would likely not have been able to keep the waistcoats and not pay for them.

but because the particular minor already had an ample supply of waistcoats.²⁶

B. Service Contracts

The second category under English law is that of beneficial service contracts.²⁷ If a service contract is on the whole beneficial to the minor, the minor is bound by that contract.²⁸ For example, in *Clements v. L & NW Ry*, a minor was hired by a railway company as a porter and joined the company's insurance plan.²⁹ The company's plan provided coverage for a greater range of accidents than the statutory plan, but the level of compensation was lower.³⁰ The court held that overall the agreement was beneficial to the minor and thus binding on him.³¹ In contrast, in *DeFrancesco v. Barnum*, the court held that overall the agreement in question was not beneficial to the minor.³² The minor entered into an apprenticeship contract with a master to be taught stage dancing for seven years.³³ The minor agreed not to accept professional engagements without the master's permission and not to marry during the apprenticeship.³⁴ The contract did not oblige the master to find engagements for the minor and he only had to pay the minor when she performed.³⁵ The court held that the contract was invalid and unenforceable since overall it was not beneficial to the minor.³⁶

C. Voidable Contracts

If a contract is not for necessities or for a beneficial service, then it falls into one of two remaining categories. The first is voidable contracts.³⁷ If a contract is one where the minor acquires an interest in some subject matter of a permanent nature, i.e., one involving continuous or recurring obligations, then the contract is voidable by the minor.³⁸ There are four

26. *Id.*

27. *Id.* at 481.

28. BAINHAM, *supra* note 9, at 524.

29. TREITEL, *supra* note 1, at 543.

30. *Id.*

31. *Id.*

32. FURMSTON, *supra* note 12, at 482.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 483.

38. *Id.*

such subject matters: land, shares in a company, partnership agreements, and marriage settlements.³⁹ If the minor repudiates such a contract while still a minor, or reasonably soon after attaining majority, he is released from any future liabilities under the contract, but cannot recover money already paid unless there was a lack of consideration.⁴⁰ Thus, for example, a minor lessee can disaffirm the lease at any time on the ground that he was a minor when he entered into the contract and will not have to pay future rent, but he will not be able to claim a refund of the rent he has already paid.⁴¹

D. Unenforceable Contracts

In England, if a contract does not fall within one of the above three exceptions, it is unenforceable against the minor unless he ratifies it after attaining majority.⁴² Ratification may be express or implied from conduct.⁴³ Implied ratification may occur if the former minor acts as if the contract is binding on him.⁴⁴ In such a case, the minor may be considered to have ratified the contract, and it is enforceable against him.⁴⁵ The difference between this category and the voidable category is that in the latter, the contract is enforceable against the minor unless he voids it, and in the former, the contract is unenforceable against the minor unless he ratifies it. The fact that a contract is unenforceable does not mean it has no legal effect.⁴⁶ First, the adult remains bound by the contract.⁴⁷ Second, legal consequences for the minor may still flow from it, as will be seen below.⁴⁸

III. U.S. Law

Like English law, the general rule of U.S. law is that a minor lacks the capacity to bind himself to contracts.⁴⁹ However, whereas English law divides minors' contracts into four categories, U.S. law divides them into

39. TREITEL, *supra* note 1, at 545-47.

40. BAINHAM, *supra* note 9, at 525.

41. TREITEL, *supra* note 1, at 545.

42. *Id.* at 549.

43. *Id.*

44. *Id.*

45. *Id.*

46. See BAINHAM, *supra* note 9, at 524.

47. See *id.*

48. See *id.*

49. FARNSWORTH, *supra* note 1, at 422.

two—contracts for necessities and voidable contracts.

A. *Contracts for Necessaries*

As in England, a minor in the United States is liable for the reasonable price of necessities supplied to him.⁵⁰ The reasoning is that if adults refuse to contract with minors at all, because of the risk that they will disaffirm, minors would not even be able to purchase goods necessary for life and may starve.⁵¹ Courts used to refer to a generic list of necessities including board, room, clothing, medical needs and education.⁵² However, modern U.S. courts seem to place more emphasis on the facts of the case. For example, in *Valencia v. White*, a minor was engaged in a trucking business.⁵³ The court held that because the minor lived at home and received food, lodging and clothing from his parents, it was not necessary for him to engage in business.⁵⁴ Therefore, repairs to the minor's truck, which he used in his business, were not necessities for that particular minor.⁵⁵ Thus in both the United States and England, whether something is a necessary is a question of both law and fact.⁵⁶

As *Valencia* suggests, whereas English law treats necessities and beneficial service contracts as two separate categories, U.S. courts tend to evaluate service contracts under the necessities doctrine. For example, in *Ex parte Odem*, medical services rendered to a minor were held to be necessities.⁵⁷ In *Zelnick v. Adams*, the state supreme court held that legal services could be necessities as a matter of law and remanded for a determination of whether the legal services provided to the minor to protect his inheritance were necessary to the particular minor as a matter of fact.⁵⁸ Therefore, the overall effect is that the law in this area in both countries is basically the same.

B. *Voidable Contracts*

In the United States, all contracts that do not fall into the necessities

50. See, e.g., *Garay v. Overholtzer*, 631 A.2d 429, 443 (Md. 1993).

51. *Turner v. Gaither*, 83 N.C. 357, 364 (1880).

52. DiMatteo, *supra* note 4, at 489.

53. 654 P.2d 287, 289 (Ariz. Ct. App. 1982).

54. *Id.*

55. *Id.*

56. See also *Ex parte Odem*, 537 So. 2d 919, 920 (Ala. 1988).

57. *Id.*

58. 561 S.E.2d 711, 717-18 (2002).

category described above are voidable by the minor.⁵⁹ In other words, the minor may repudiate them at any time before reaching majority or within a reasonable time afterwards.⁶⁰ Upon attaining majority, the former minor may ratify a contract he made while a minor, thus ending his ability to void it, in one of three ways: express ratification, ratification by conduct, or failure to void it within a reasonable time after attaining majority.⁶¹ This allows the minor to secure the advantage of contracts which turn out to be advantageous and to be relieved of the effects of contracts which were injudicious.⁶² As was explained above, England has two categories for contracts that are not for necessities or beneficial service contracts—voidable contracts and unenforceable contracts. The United States could be said to have combined these two categories and has no separate category for contracts involving a subject matter of a permanent nature.

IV. The Liability of a Minor upon Disaffirming a Contract

As described above, in both the United States and England, it is possible for a minor to enter into a contract and later avoid it. However, both countries have had to deal with the question of what happens when the minor seeks to avoid the contract. Does the adult have to give the minor a full refund even if the minor has nothing left? Does the minor have to give the adult only what is left of the consideration he received? Or should the minor have to account for any depreciation to the consideration or, in other words, restore the adult to *status quo ante*? It is in the response to these questions that the laws of the two countries have shown most divergence. This Note will next examine two scenarios where these questions come into play.

In the first, a mature-looking minor purchases an automobile for cash from an adult merchant who has no knowledge that the purchaser is a minor. The minor then uses the automobile, thus reducing its value, and may even crash it. The minor then demands the return of the purchase price upon tendering the remains, arguing that because he was a minor when he bought the automobile he is lawfully permitted to disaffirm the contract.

In the second, the same mature-looking minor buys an automobile on credit. He uses the car, thus reducing its value, and later refuses to pay

59. FARNSWORTH, *supra* note 1, at 424.

60. *Id.* at 425.

61. *Id.*

62. *Human v. Hartsell*, 148 S.W.2d 634, 636 (Tenn. Ct. App. 1940).

what he owes. When the adult merchant sues, the minor seeks to use his minority at the time of the contract as a defense. The minor thus refuses to either return the automobile or pay for it.

This Note will compare and contrast the law in England and the United States in these two scenarios. Consequently, this Note will seek to discover if one country favors the minor more than the other.

A. The English Minor's Liability When He Seeks to Disaffirm a Cash Purchase of an Automobile

In England, the right to avoid is based on two principles.⁶³ The first, and more important, principle is to protect a minor from his own improvidence and from adults who might seek to take advantage of his inexperience.⁶⁴ The second is to minimize unnecessary hardship to adult merchants who deal with minors in good faith.⁶⁵ Thus it has long been settled under English common law that "where an infant ha[s] received something for which he ha[s] given consideration, if he [i]s unable to return that for which the consideration . . . passed he [can]not recover the consideration."⁶⁶ In other words, "he [i]s not to be allowed to recover money paid for what he ha[s] consumed or used."⁶⁷ Thus if a minor in England buys an automobile for cash and uses it such that it depreciates in value, he is allowed to disaffirm the contract and return the car, but the adult need only refund the present value of the automobile.

B. The American Minor's Liability When He Seeks to Disaffirm a Cash Purchase of an Automobile

In the United States, there is a jurisdictional split on this issue. This split was apparent as far back as 1894:

Many—perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it . . . to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if

63. TREITEL, *supra* note 1, at 539.

64. *Id.*

65. *Id.*

66. *Valentini v. Canali*, [1886-1890] All ER. Rep. 883 (Q.B.D.). *See also* *Johnson v. Northwestern Mutual Life Ins. Co.*, 59 N.W. 992, 994 (Minn. 1894) (stating that this area of English law was "well-settled," citing *Valentini*, and indicating that the *Valentini* court, in stating this law, had been approving the earlier case of *Holmes v. Blogg*, (1818) 8 Taunt. 508).

67. *Id.*

the infant had spent or parted with what he had received, or if the benefits of it were such that they could not be restored, still he might recover back what he had paid.⁶⁸

Thus the majority of American states base their rule on only the first of the two principles recognized by English law, i.e., that minors need protection from their own inexperience in the marketplace which might otherwise lead them to “squander[] their wealth through improvident contracts [with] crafty adults who would take advantage of them”⁶⁹ Thus the majority of states do not seek to protect adult merchants acting in good faith. After the minor has made use of what he purchased, and even if he has nothing left to return, the minor can disaffirm the contract on the ground that he was a minor at the time of the purchase and receive a full refund of what he paid the adult.⁷⁰ For example, in *Halbman v. Lemke*, a minor purchased a car from an adult and drove it around to the point where it broke down.⁷¹ The court held that the minor should receive a full refund despite the depreciation in value.⁷²

Even courts applying the American rule⁷³ have acknowledged its apparent injustice.⁷⁴ In *Harwell Motor Company v. Cunningham*, the court held that a minor who had purchased an automobile and used it for two years could disaffirm the contract and recover back the full amount paid.⁷⁵ The court stated that although this conclusion went “against the grain to some extent[,] . . . it is the law that a minor can disaffirm a . . . contract not for necessities[.]”⁷⁶

Other courts applying the American rule have viewed it as the just thing to do, and not just a matter of precedent. The *Halbman* court, for example, held that “to require a disaffirming minor to make restitution for diminished value is, in effect, to bind the minor to a part of the obligation which by law he is privileged to avoid.”⁷⁷ In other words, the law seeks to

68. *Johnson*, 59 N.W. at 993.

69. DiMatteo, *supra* note 4, at 487 (re U.S. law); TREITEL, *supra* note 1, at 539 (re English law).

70. DiMatteo, *supra* note 4, at 486.

71. 298 N.W.2d 562, 563 (Wis. 1980).

72. *Id.*

73. I am calling this rule the “American rule” rather than the “majority rule” since using the “majority rule” may cause confusion considering the article is about minors and mentions the age of majority.

74. DiMatteo, *supra* note 4, at 489.

75. 337 S.W.2d 765, 769 (Tenn. Ct. App. 1959).

76. *Id.* (emphasis added).

77. *Halbman v. Lemke*, 298 N.W.2d 562, 567 (Wis. 1980).

protect minors from their inexperience in the marketplace, and reducing their recovery in any way when they disaffirm eviscerates this protection.

An argument can be made that the American rule does not leave adult merchants completely unprotected if they take steps to protect themselves, i.e., ask the age of those to whom they sell. If the adult does so and the minor affirmatively lies about his age, then the adult may have two possible defenses if the minor later seeks to assert the infancy doctrine and disaffirm. First, some states allow the adult to assert equitable estoppel.⁷⁸ The minor is estopped from asserting that he was a minor because at the time of the purchase he affirmatively claimed he was not. Second, the majority of states see the misrepresentation as a fraud.⁷⁹ In these states, a minor who misrepresented his age at the time of the purchase may still disaffirm the contract, but he may be liable in tort to the merchant.⁸⁰

i. Arguments against the American Rule

Several courts and commentators have made the argument that the American rule favors minors too much and that the infancy doctrine has become a sword, when it was supposed to be a shield.⁸¹ They argue that there has been a divergence between the theoretical reasons for the infancy doctrine and the reality today where many minors are sophisticated and experienced enough to, and actually do, regularly operate in the marketplace.⁸² Because the doctrine's end is to protect infants, when it is used by an infant who needs no protection, an injustice is done on the adult merchant. Since the end of the 19th century, some states have moved away from the American rule and adopted alternative rules.⁸³

There are several rationales for this trend.⁸⁴ One is to protect the innocent adult who enters into a fair and reasonable contract in good faith with a minor who appears to be over 18.⁸⁵ There are minors who are

78. See, e.g., *Tuck v. Payne*, 17 S.W.2d 8, 9 (Tenn. 1929).

79. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 8.7, 297-98 (5th ed. 2003).

80. *Id.*

81. See, e.g., DiMatteo, *supra* note 4, at 525 n. 20 (quoting Lord Mansfield in *Zouch v. Parsons*, (1765) 97 Eng. Rep. 1103 (K.B.), who wrote that the ability to disaffirm was "given as a shield and not as a sword, [and] it [shall never] be turned into an offensive weapon of fraud or injustice").

82. DiMatteo, *supra* note 4, at 481.

83. *Dodson v. Shrader*, 824 S.W.2d 545, 547 (Tenn. 1992). The *Dodson* court called this a modern trend. However, the benefit rule was used at least as early as 1879 in *Hall v. Butterfield*, 59 N.H. 354, 359 (1879).

84. DiMatteo, *supra* note 4, at 487.

85. *Id.*

experienced and sophisticated enough in the marketplace that it would seem to be unjust to allow them the benefit of the American rule at the expense of such adults.⁸⁶ A second rationale flows from this first one. In an American rule-state, adult merchants might reasonably decide to refuse to contract with minors for fear that a minor will later invoke the infancy doctrine and demand a full refund.⁸⁷ This may work to the detriment of those minors who are experienced and sophisticated enough to operate in the marketplace and have no intention of harming the adult, by effectively excluding them from the marketplace. A third rationale is that the American rule “does not appear consistent with . . . proper moral influence upon young people[.]”⁸⁸ Rather than “encourag[ing] honesty and integrity,” it “can only lead to the corruption of principles and encourage young people in habits of trickery and dishonesty.”⁸⁹

ii. Current Alternatives to the American Rule

As a result of these rationales, at least two alternative rules have developed under which the adult is required to refund less than the full consideration paid if the minor disaffirms.⁹⁰ The first of these alternative rules is the benefit rule.⁹¹ It can be argued that this rule is an extension of the necessities doctrine.⁹² In *Hall v. Butterfield*, a New Hampshire court reasoned that the basis for a minor’s liability for the value of necessities he has received is that such goods and services provided a benefit to the minor.⁹³ The court then asked, “If the benefit is the foundation of the right, why should it be limited to necessities?”⁹⁴ The court concluded that if a minor disaffirms a contract, whether for necessities or not, he is still liable to the adult for the value of the benefit he received.⁹⁵ Minnesota⁹⁶ and Arizona⁹⁷ have also adopted the benefit rule. It has been argued that it offers “a flexible rule which will prevent imposition upon the infant and also tend to prevent the infant from imposing to any serious degree upon

86. *Id.*, at 487-88.

87. *Dodson*, 824 S.W.2d at 550.

88. *Id.*

89. *Id.*

90. *Id.*

91. DiMatteo, *supra* note 4, at 490.

92. *Id.*

93. 59 N.H. 354, 359 (1879).

94. *Id.*

95. *Id.*

96. *See, e.g., Kelly v. Furlong*, 261 N.W. 460 (Minn. 1935).

97. *See, e.g., Valencia v. White*, 654 P.2d 287 (Ariz. Ct. App. 1982).

others.”⁹⁸ However, a criticism of the rule is that it requires a subjective evaluation of the monetary value of the benefit to the particular minor.⁹⁹ The difficulty of such an evaluation is shown in *Valencia v. White* where the court, having stated that it was applying the benefit rule, proceeded to hold the minor liable for the reasonable value of the repairs made to the minor’s truck, almost \$20,000, even though the truck had again broken down soon after it was returned to the minor.¹⁰⁰

The second alternative rule is the depreciation rule.¹⁰¹ Under this rule, when a minor disaffirms a contract, his recovery of the purchase price is reduced by the amount of depreciation of the consideration he received.¹⁰² In other words, when the minor returns his consideration for a refund, the adult merchant must only refund to the minor what that consideration is now worth. As was described above, this is effectively the rule in England, although it is not called the depreciation rule there. In *Dodson v. Shrader*, a 16-year-old boy bought a truck from an adult who thought the boy was 18 or 19.¹⁰³ The minor paid \$4,900 in cash, which he had borrowed from his girlfriend’s grandmother.¹⁰⁴ When a problem developed, the minor could not afford the repairs.¹⁰⁵ He nevertheless kept driving the truck and within a year of the purchase the engine blew up and the truck’s value dropped to \$500.¹⁰⁶ The minor then sought to return the truck to the adult merchant for a full refund.¹⁰⁷ The seller refused to accept the tender of the truck or to refund the minor’s money, and the minor sued.¹⁰⁸ The Tennessee Supreme Court decided to adopt the depreciation rule as follows:

[W]here the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the minor has actually paid money on the purchase price, and taken and used the article purchased, that he ought not to be permitted to recover the amount actually paid, without allowing the vender of the

98. 2 WILLISTON ON CONTRACTS § 238, at 43 (3d ed. 1959).

99. DiMatteo, *supra* note 4, at 492.

100. *Valencia*, 654 P.2d at 291. The court stated that the trial court had found that it was the minor’s fault that the truck broke down a second time, and that this fact was binding on appeal. However, even if this was true, one could still question whether the minor received a benefit worth almost \$20,000 to that particular minor.

101. *Dodson*, 824 S.W.2d at 548.

102. *Id.*

103. *Id.* at 546.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

goods reasonable compensation for the use of, depreciation, and willful or negligent damage to the article purchased, while in his hands.¹⁰⁹

One could argue that the depreciation rule is a fair compromise balancing the interests of the minor and the adult while avoiding the benefit rule's problem of having to make a subjective evaluation of the monetary value of the benefit received by a particular minor. However, there are two problems with the depreciation rule. As mentioned above, the infancy doctrine was created to protect minors from their own improvidence. Under the depreciation rule, a minor could enter into a contract which, while fair in its terms, is an unwise decision caused by the minor's inexperience. The injustice to a few unlucky adults was supposed to be a price worth paying in order to protect minors from their inexperience. One can argue that the depreciation rule may "force the minor to bear the cost of the very improvidence from which the infancy doctrine is supposed to protect him . . ." ¹¹⁰ A second problem arises if the minor in a depreciation rule-state makes a purchase on credit. As will be explained below, if Dodson had purchased the truck on credit, and by the time its value had decreased to \$500 he had paid \$500, he could return the truck without having to pay extra for the depreciation. In other words, Dodson was worse off for having paid the full price in cash.

iii. Suggested Alternatives to the American Rule

One commentator has suggested an alternative to the American rule which he claims would avoid the difficulties of the current alternative rules. In his 1995 article, Larry A. DiMatteo proposed the replacement of an arbitrary age of majority with a case by case evaluation of whether the person entering into the contract was mature enough to be held to its terms.¹¹¹ DiMatteo argues that such a case by case analysis is performed for the other classes of persons thought not to have the capacity to enter into contracts, i.e., the mentally ill and those under the influence of drugs or alcohol.¹¹² However, one might argue that it would be much easier to evaluate the capacity of a mentally ill person (based on medical history and expert witnesses, for example) or the capacity of an inebriated person (based on what and how much was consumed, for example) than to evaluate the maturity of a particular 17-year-old. DiMatteo also points out

109. *Id.* at 549.

110. *Halbman*, 298 N.W.2d at 567.

111. DiMatteo, *supra* note 4, at 508.

112. *Id.*

that the law holds minors liable for their torts and responsible for their crimes and argues that it is strange that they can still escape their contractual liability.¹¹³

One way of agreeing with DiMatteo's theory as an improvement on current law, while dealing with the arguments against it, would be to take a leaf out of Scotland's book. In Scotland, contracts entered into by minors under 16 years old are void, but with an important exception.¹¹⁴ A minor has the capacity to enter into a contract of a type which someone of his age commonly enters into.¹¹⁵ For example, a five-year-old's candy purchase is binding and a fifteen-year-old's movie ticket purchase is binding.¹¹⁶ In Scotland, contracts entered into by 16 and 17-year-olds have a rebuttable presumption of validity.¹¹⁷ Their contracts are binding unless they can convince a court before reaching the age of 21 that the contract caused, or was likely to cause, the minor substantial prejudice and the contract was not of a kind which a reasonably prudent person under the same circumstances would have entered into.¹¹⁸ The Scottish rule thus takes into account the reality of the increase of minors' experience and activity in the marketplace while still protecting them from adults who might take advantage of inexperienced or improvident minors.

C. The English Minor's Liability When He Refuses to Pay for or Return an Automobile He Purchased on Credit

Under the common law before 1987, if a minor acquired something on credit, he could refuse to pay for it, keep it, and use his minority as a defense to any suit for recovery by the seller.¹¹⁹ The Minors' Contract Act of 1987 was in part aimed at this situation and gave the court discretionary power to order restitution to the seller.¹²⁰ The Act provides:

(1) Where-

(a) a person ("the plaintiff") has after the commencement of this Act entered into a contract with another ("the defendant"), and

(b) the contract is unenforceable against the defendant (or he repudiates

113. *Id.*

114. BAINHAM, *supra* note 9, at 527.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. FURMSTON, *supra* note 12, at 489.

120. *Id.*

it) because he was a minor when the contract was made,

the court may, if it is just and equitable to do so, require the defendant to transfer to the plaintiff any property acquired by the defendant under the contract, or any property representing it.

(2) Nothing in this section shall be taken to prejudice any other remedy available to the plaintiff.¹²¹

As the language of the law indicates, the adult is not entitled to restitution as of right.¹²² The court has discretion.¹²³ Two main factors will likely affect the court's decision.¹²⁴ The first is whether the minor still possesses the property or any property representing it.¹²⁵ Therefore, if the minor bought an automobile on credit and still has it, the court may simply order the minor to return it to the seller. If the minor has traded the car for a truck of the same value, for example, the court may order the minor to give the truck to the seller. This may lead to difficult tracing issues for the court.¹²⁶ However, the reason that the law limits the court to these two options is that to order the minor to pay for the car out of his wider assets would be to enforce indirectly an unenforceable contract.¹²⁷ The second factor which will likely affect the court's decision is the fairness of the original contract.¹²⁸ If the court determines that the price agreed to by the minor was excessive, the court might order the minor to return the property unless he pays a reasonable price fixed by the court.¹²⁹

Subsection 2 of the Minors' Contracts Act preserves for the seller any other legal remedy that would have been available before 1987.¹³⁰ Therefore, under the common law equitable doctrine of restitution, a minor who has obtained goods by fraud (for example, by lying about his age at the time of the purchase) may be ordered to return them to the seller if they are still in his possession.¹³¹ If the minor has already disposed of the goods, this remedy is not available.¹³² Since the statutory remedy allows

121. Minors' Contracts Act, 1987, c. 13, § 3 (Eng.).

122. TREITEL, *supra* note 1, at 553.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. BAINHAM, *supra* note 9, at 526.

128. TREITEL, *supra* note 1, at 553.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

limited tracing and is not dependent on proof of fraud, it is much more likely nowadays that a seller would rely on the statutory remedy.¹³³

D. The American Minor's Liability When He Refuses to Pay for or Return an Automobile He Purchased on Credit¹³⁴

In the case of a credit purchase, if the minor refuses to pay what he owes, the adult vendor sues, and the minor uses his minority as a defense, the minor is disaffirming the contract. Whether the state uses the American rule, the depreciation rule, or the benefit rule, when the minor disaffirms a purchase, he is under an enforceable duty to return as much of the consideration as he has left in his possession.¹³⁵ "The infancy doctrine is designed to protect the minor, sometimes at the expense of an innocent vendor, but it is not to be used to bilk merchants out of property as well as proceeds of the sale."¹³⁶

Once the minor returns whatever he has left, if anything, the financial outcome will once again depend on the rule of the particular state. In an American rule state, it is clear that the adult must return to the minor whatever money the minor has paid up to that point. The outcome is less clear under the depreciation and benefit rules.

As was mentioned above, when the *Dodson* court stated the depreciation rule, it held that it only applied if the minor had made a cash purchase. In such a case, the minor's refund would be less any depreciation to the automobile. Thus it would seem that if a minor purchases an automobile on credit in a state applying the *Dodson* court's depreciation rule, whether the adult is returned to *status quo ante* will depend on how much the minor has already paid. If he has thus far paid the adult less than the amount of depreciation, the minor need not make any extra payment from his wider assets, and the adult will have suffered a loss. If he has thus far paid the adult more than the amount of depreciation, perhaps the adult would only have to return to the minor what he has paid thus far minus the depreciation. In such a case, the adult would be returned to *status quo ante*.

Interestingly, the New Hampshire cases stating the benefit rule did not specifically state that it only applied to cash purchases. Therefore, it is not

133. *Id.* at 551.

134. It should be noted that there are few, if any, cases directly on point for this scenario. Perhaps merchants take more care over to whom they sell when the purchase is on credit, and often refuse to sell on credit to minors.

135. *Halbman*, 298 N.W.2d at 566.

136. *Id.* at 248-49.

clear that a minor in a benefit rule state would not be required to use his wider assets to pay for the difference between the amount he has paid thus far and the benefit he has received.

Thus there are two main differences between U.S. and English law in this situation. First, when an English minor refuses to pay for something he bought on credit and the adult sues, the court has discretion as to whether the minor must return what he purchased to the adult. This decision will be based on what is just and equitable. In the United States, the minor is under an affirmative duty to return what he purchased before he may escape further payments. In this respect, it seems that English law is more favorable to the minor than U.S. law. On the other hand, the second major difference here is that the English court is permitted to do some, albeit limited, tracing in cases where the minor is no longer in possession of the purchased item. U.S. law does not allow any such tracing. This is therefore another area where American law is more favorable to minors than English law.

V. Conclusion

This Note set out to compare the English and U.S. infancy doctrines and then to compare what happens in each country when a minor seeks to disaffirm a contract. It seems fairly clear that the majority of American states give far greater protection to the interests of the minor in such situations. Any detriment to adult merchants who deal with minors in good faith is considered a reasonable price worth paying for this protection. English law seeks to recognize the interests of both groups. The result is that both English minors and American minors living in the majority of American states may disaffirm contracts that are not for necessities, but when English minors return their consideration the adult must only refund to them what that consideration is now worth, whereas the American adult must give a full refund. Some American states have instituted rules similar to the English one. However, even the English rule and the rules of this minority of American states sometimes fail to protect minors who make improvident contracts due to their inexperience. Perhaps both countries should look to Scotland, which has taken logical, common sense steps to protect both groups while recognizing the reality of today's marketplace and the increased activity of minors there.

