

1-1968

## Restitution in Minors' Contracts in California

Robert K. Regan

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_law\\_journal](https://repository.uchastings.edu/hastings_law_journal)



Part of the [Law Commons](#)

---

### Recommended Citation

Robert K. Regan, *Restitution in Minors' Contracts in California*, 19 HASTINGS L.J. 1199 (1968).

Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol19/iss4/10](https://repository.uchastings.edu/hastings_law_journal/vol19/iss4/10)

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

## NOTES

### RESTITUTION IN MINORS' CONTRACTS IN CALIFORNIA

Perhaps the most outstanding characteristic of the law of minors' contracts is the general lack of any single, consistent principle underlying the decisions. Irreconcilable conflict has resulted from attempts to protect the minor on the one hand and to prevent injustice to persons dealing with the minor on the other.<sup>1</sup> The courts attempt to achieve a satisfactory balance between these two apparently conflicting principles in cases where the minor seeks to disaffirm his contract and recover the consideration he has paid. Should infancy be a defense against a claim for restitution, in addition to being a defense against binding the infant to the contract? A different balance may result depending upon whether the minor retains the consideration *in specie*, or has parted with it, or retains all or part of it in a used or damaged condition.<sup>2</sup>

The current patchwork of rules is at least partially the result of courts deciding cases without having first completed the logically antecedent step of adequately formulating the reason and purpose for giving special protection to minors.<sup>3</sup> "[W]e cannot know what kinds of rules to make until we know more clearly what the goal to be reached by the infancy doctrine is."<sup>4</sup>

In any transaction in which an infant has contracted with an adult, the likelihood that someone will be injured is great. Without legal protection, that person will almost invariably be the infant. But in its zeal to prevent this, the law has sometimes overcompensated and has shifted the entire injury to the perhaps equally faultless adult.<sup>5</sup> This note will attempt to show the application of the above

---

<sup>1</sup> *Petit v. Liston*, 97 Ore. 464, 465-67, 191 P. 660, 661 (1920); cf. *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 59 N.W. 992 (1894).

<sup>2</sup> Cf. *Edge, Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 255-56 (1967). "The present case law often gives conflicting, poorly reasoned, and generally unsatisfactory answers to many of these questions. This in great part is caused by the fact that judges either (1) do not properly analyze a problem because they have not really examined the goal to be fostered through the infancy doctrine, or (2) they see the rationale upon which the voidability concept is based to be so unrealistic when applied to modern economically sophisticated youth that they rebel against the assumption that the minor needs the protection." *Id.* at 256.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 255.

<sup>5</sup> *See, e.g., Greensboro Morris Plan Co. v. Palmer*, 185 N.C. 109, 116 S.E. 261 (1923), as an example of "over-protectionism" on the part of the courts. The dissent of Justice Stacy brings out this point:

"I recognize the force of the argument that the dominant purpose of the law in permitting infants to disaffirm their contracts is to protect children and those of tender years from their own improvidence, or want of discretion, and from the wiles of designing men. But when this right is used to relieve minors from their liability for torts and deliberate wrongs [fraud-

principles, especially with reference to California law; it will also suggest that they are not necessarily mutually exclusive and that an integration may be achieved by the application of general rules of law and equity.

### The Majority Rule

A great deal has been written on the general view of the courts toward infants' contracts and the rules which have developed under the common law, both in England and in the United States.<sup>6</sup> In order to provide some background and, more importantly, to indicate the basic rationale behind the American majority rule, this material will be reviewed very briefly.

When an infant disaffirms his contract, in the great majority of the states he need not return any of the consideration he received under the contract except for that which remains in his possession *in specie*,<sup>7</sup> i.e. he need not account for any property which he has lost, squandered or dissipated.<sup>8</sup> He has no obligation to put the other party in status quo,<sup>9</sup> nor to account for use, depreciation or damage to the property while in his possession.<sup>10</sup> Thus, in a case where the value of the use and depreciation of the property exceeded the amount actually paid by the minor, the infant was allowed to recover the full amount he paid without diminution.<sup>11</sup>

In those states following the majority rule, the courts consider the welfare of the infant to be of paramount importance<sup>12</sup>—even to the exclusion of doing equity to the other party.<sup>13</sup> They argue that the reason the law allows the infant the privilege of disaffirming is to protect him against the immaturity and improvidence which lead him into making unwise contracts.<sup>14</sup> This purpose would be

---

ulent misrepresentations of age], the very protection which was intended as a shield to them becomes a sword in their hands. Jealous as the law may be of the rights of infants, it seems to me that, in the case at bar, this solicitude has reached the stage of 'a vaulting ambition which o'erleaps itself and falls on t'other side.'" *Id.* at 119, 116 S.E. at 265-66.

<sup>6</sup> See, e.g., Hartwig, *Infants' Contracts in English Law with Commonwealth and European Comparisons*, 15 INT'L & COMP. L.Q. 780 (1966); Note, *Liability of the Infant in Contract*, 20 IOWA L. REV. 785 (1935); 43 C.J.S. *Infants* §§ 71-75 (1945); Annot., 124 A.L.R. 1368 (1940).

<sup>7</sup> *Shutter v. Fudge*, 108 Conn. 528, 143 A. 896 (1928); *Snodderly v. Brotherton*, 173 Wash. 86, 21 P.2d 1036 (1933).

<sup>8</sup> *McGuckian v. Carpenter*, 43 R.I. 94, 110 A. 402 (1920).

<sup>9</sup> *Gillis v. Goodwin*, 180 Mass. 140, 61 N.E. 813 (1901).

<sup>10</sup> See, e.g., *id.* (use); *Freiburghaus v. Herman Body Co.*, 102 S.W.2d 743 (Mo. Ct. App. 1937) (depreciation); *Bowling v. Sperry*, 133 Ind. App. 692, 184 N.E.2d 901 (1962) (damage).

<sup>11</sup> *Whitcomb v. Joslyn*, 51 Vt. 79 (1878).

<sup>12</sup> See, e.g., *Snodderly v. Brotherton*, 173 Wash. 86, 21 P.2d 1036 (1933); cf. *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N.E. 796 (1909).

<sup>13</sup> *Snodderly v. Brotherton*, 173 Wash. 86, 21 P.2d 1036 (1933); *McGuckian v. Carpenter*, 43 R.I. 94, 110 A. 402 (1920): "[T]he right of an infant to avoid his contract is absolute and paramount to all equities." *Id.* at 97, 110 A. at 403.

<sup>14</sup> *McGuckian v. Carpenter*, 43 R.I. 94, 110 A. 402 (1920). *But cf.* Edge, *supra* note 2, which reviews historical evidence that casts doubt on the time-honored legal principle that the infancy doctrine arose for the purpose of pro-

undermined if the protection ended here and the infant were, nevertheless, required to account for property he may have lost, squandered or destroyed.<sup>15</sup>

The improvidence which the law contemplates is not simply the making of an unwise contract, but very often is the use or misuse to which the property is put after it is purchased. To deny the privilege or right of disaffirmance, when that improvidence or folly has become apparent, would permit the accomplishment of the very thing against which the law seeks to provide.<sup>16</sup>

Several other reasons have also been offered for the majority view. Among these are that requiring restitution would be permitting the other party to enforce the contract against the infant;<sup>17</sup> that use and depreciation are intangible and cannot be restored;<sup>18</sup> that use is not part of the property which passes under the contract;<sup>19</sup> and that if allowance were permitted for use, the minor might be charged with more than the full contract price.<sup>20</sup>

### California Law

In California, these matters are controlled by statute.<sup>21</sup> This note shall be primarily concerned with section 35 of the Civil Code.<sup>22</sup> As a result of this statute, and the judicial interpretation made of it, the California cases present a complete dichotomy as to the effect of disaffirmance, depending upon whether the minor was under or over the age of 18 at the time of making the contract.

---

protecting minors. The article suggests that this was more likely an afterthought to rationalize a policy developed out of less humanistic considerations. *Id.* at 219-22. It also advances reasons for doubting that the majority rule as presently applied "arises out of a real need of minors for the generous protection afforded them." *Id.* at 223-27.

<sup>15</sup> *Weathers v. Owen*, 78 Ga. App. 505, 51 S.E.2d 584 (1949).

"[T]his is nothing more than the law anticipates of him, and he cannot be required to repurchase the right of reclaiming his own by still further abstractions from his estate. Otherwise the rule would practically strike down the shield which the law, by reason of his inexperience and youth, throws around him." *Id.* at 508, 51 S.E.2d at 587.

<sup>16</sup> *Snodderly v. Brotherton*, 173 Wash. 86, 90-91, 21 P.2d 1036, 1037 (1933).

<sup>17</sup> *Utterstrom v. Myron D. Kidder, Inc.*, 124 Me. 10, 13, 124 A. 725, 726 (1924); *McCarthy v. Henderson*, 138 Mass. 310, 313 (1885).

<sup>18</sup> *Utterstrom v. Myron D. Kidder, Inc.*, 124 Me. 10, 13, 124 A. 725, 726 (1924).

<sup>19</sup> *Gannon v. Manning*, 42 App. D.C. 206, 209 (1914).

<sup>20</sup> *Creer v. Active Auto Exch.*, 99 Conn. 266, 280, 121 A. 888, 893 (1923).

<sup>21</sup> See generally CAL. CIV. CODE §§ 25-37.

<sup>22</sup> CAL. CIV. CODE § 35 reads as follows:

"In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent." (Enacted in 1872; amended in 1874 to read as above.)

## Over Eighteen

If the minor was over the age of 18, he is required to restore the consideration<sup>23</sup> as a condition precedent<sup>24</sup> if he elects to disaffirm. He must restore the other party to the status quo<sup>25</sup>—hence, this position is known as the status quo doctrine.<sup>26</sup> If the minor no longer has the consideration he received under the contract so that he is unable to restore *in specie*, he is required to make restitution of the equivalent in value.<sup>27</sup> That he has lost or squandered what he has received will not prevent the court from requiring that he make restitution.<sup>28</sup> In California the older minor is governed in many respects by ordinary contract rules relating to rescission, and in an action to rescind the court is vested with broad discretion to see that equity is done.<sup>29</sup>

If the minor has damaged the property he received, the adult seller is entitled to a set-off against the recovery granted to the minor.<sup>30</sup> The California courts make no distinction in these cases between depreciation caused by normal wear and tear of an article on the one hand, and negligent damage to it on the other.<sup>31</sup> Either way, the minor over 18 must restore the property in as good condition as when delivered to him or pay its equivalent.<sup>32</sup>

These principles are well illustrated by the case of *Toon v. Mack International Motor Truck Corp.*<sup>33</sup> in which the minor plaintiff had purchased a truck for \$7500, making payments totalling \$1725. When the truck was repossessed 5 months later, it had depreciated \$2000 in value due to rough handling. Subsequently, the plaintiff disaffirmed the sale and demanded the return of his purchase money, claiming he had fully complied with the requirements of section 35 by merely returning the truck. The appellate court held that the minor must account for the reasonable use or deterioration in value,<sup>34</sup> and affirmed the award of judgment for the vendor in the amount of \$275—the difference between the depreciation and the amount paid by the minor.<sup>35</sup>

<sup>23</sup> Whyte v. Rosencrantz, 123 Cal. 634, 56 P. 436 (1899).

<sup>24</sup> Combs v. Hawes, 2 Cal. Unrep. 555, 8 P. 597 (Ct. App. 1885).

<sup>25</sup> Freitas v. Cordeiro, 122 Cal. App. 319, 9 P.2d 882 (1932).

<sup>26</sup> The status quo doctrine is also followed in several other states, including New York and Oregon. See, e.g., Rice v. Butler, 160 N.Y. 578, 55 N.E. 275 (1899); Gaither v. Wallingford, 101 Ore. 389, 200 P. 910 (1921).

<sup>27</sup> Whyte v. Rosencrantz, 123 Cal. 634, 56 P. 436 (1899); Spencer v. Collins, 156 Cal. 298, 104 P. 320 (1909).

<sup>28</sup> Whyte v. Rosencrantz, 123 Cal. 634, 641, 56 P. 436, 439 (1899).

<sup>29</sup> LeBaron v. Berryessa Cattle Co., 78 Cal. App. 536, 248 P. 779 (1926); cf. Freitas v. Cordeiro, 122 Cal. App. 319, 9 P.2d 882 (1932).

<sup>30</sup> Murdock v. Fisher Fin. Corp., 79 Cal. App. 787, 791, 251 P. 319, 320 (1926). The court, in support, cited cases dealing with actions in rescission between adult parties.

<sup>31</sup> *Id.* at 789-91, 251 P. at 319-20.

<sup>32</sup> *Id.* at 790, 251 P. at 320.

<sup>33</sup> 87 Cal. App. 151, 262 P. 51 (1927).

<sup>34</sup> *Id.* at 155, 262 P. at 52; accord, Murdock v. Fisher Fin. Corp., 79 Cal. App. 787, 251 P. 319 (1926). Both cases are noted in 2 S. CAL. L. REV. 71 (1928).

<sup>35</sup> This measure of the required restitution was adopted from the case of

Thus, the California rule requires that the older minor make full restitution of all consideration he has received by virtue of the contract.

### Under Eighteen

In the case of minors under the age of 18, however, the judicial treatment of California Civil Code section 35 leads to exactly the opposite result. Where a minor has made a contract while under 18 years old and subsequently elects to disaffirm, either before reaching his majority or within a reasonable time thereafter, he may do so and recover the full consideration with which he parted, apparently without an obligation on his part to make any restitution of the consideration he received.<sup>36</sup> The case of *Tracy v. Gaudin*<sup>37</sup> presented just such a situation. A 16-year-old minor had forged his guardian's signature on a withdrawal slip in order to obtain guardianship funds with which he purchased a used car from a dealer, paying in full. He traded this car a few days later to another person as part payment on a more expensive car. The minor died about a month later. The court allowed the guardian to recover the full amount paid to the dealer (on the basis of section 35) although neither the minor nor the guardian offered at any time to return the automobile, or its value, to the defendant. It was stated by the court:

The law is well settled in this state that . . . a contract of a minor under the age of eighteen years may be disaffirmed by the minor, or by his personal representatives, in case of death, without the return of the consideration received by the minor. . . .

In this case the minor had received and retained the benefits of his contract, and was not required to restore the consideration or its equivalent.<sup>38</sup>

In justification of this result, the court quoted the explanation given in the case of *Flittner v. Equitable Life Assurance Society*,<sup>39</sup> in which a minor plaintiff was allowed to recover in full premiums he had paid under an insurance contract entered into when he was 16 years old. In *Flittner*, the court reasoned that the overriding consideration on which section 35 was based was the protection of the immature, regardless of the injury to others that a rigid application of this standard might entail:

[T]he right of an infant to avoid his contracts is one conferred by law for his protection against his own improvidence and the designs of others; and though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain if, as a consequence of

---

Rice v. Butler, 160 N.Y. 578, 55 N.E. 275 (1899). The value of the use is presumed to include the deterioration in value; therefore the deterioration, or depreciation, of the property is a part of the consideration received by the minor and must be restored under CAL. CIV. CODE § 35.

<sup>36</sup> Lee v. Hibernia Sav. & Loan Soc'y, 177 Cal. 656, 171 P. 677 (1918); cf. Burnand v. Irigoyen, 30 Cal. 2d 861, 186 P.2d 417 (1947).

<sup>37</sup> 104 Cal. App. 158, 285 P. 720 (1930).

<sup>38</sup> *Id.* at 160-61, 285 P. at 721.

<sup>39</sup> 30 Cal. App. 209, 157 P. 630 (1916).

their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant in exercising the right is guilty of fraud.<sup>40</sup>

One who deals with the younger minor in California is, thus, almost in the position of a wrongdoer, worthy of punishment. The result, as courts have frequently recited, is that one deals with infants at his peril<sup>41</sup>—and that peril may be considerable. The dangers are further increased by the fact that the California courts do not recognize fraudulent misrepresentations of age as a ground of estoppel against the minor invoking his privilege.<sup>42</sup>

While at first glance it may appear as though the California courts have interpreted this statute in the only way open to them, a closer examination will reveal this not to be the case. Section 35 gives the minor over 18 the right to disaffirm "upon restoring the consideration" but does not refer at all to the consideration in the case of the younger minor; it does not say he must restore it, but neither does it say that he is entitled to retain it.<sup>43</sup> Perhaps the significance of the additional requirement in the case of the older minor is only to make restoration a condition precedent to disaffirmance and not to endow the younger minor with possessory rights to property obtained under a contract which he repudiates.

It is interesting to note that this latter interpretation is made in several states which have statutes copied from the California model.<sup>44</sup>

<sup>40</sup> *Id.* at 216-17, 157 P. at 633-34.

<sup>41</sup> *Burnand v. Irigoyen*, 30 Cal. 2d 861, 866, 186 P.2d 417, 420 (1947).

<sup>42</sup> *Williams v. Leon T. Shettler Co.*, 98 Cal. App. 282, 276 P. 1065 (1929); cf. *Lee v. Hibernia Sav. & Loan Soc'y*, 177 Cal. 656, 171 P. 677 (1918); *Morgan v. Morgan*, 220 Cal. App. 2d 665, 34 Cal. Rptr. 82 (1963). "The doctrine of estoppel has no application to infants." *Lackman v. Wood*, 25 Cal. 147, 153 (1864).

<sup>43</sup> There is some controversy among the commentators on whether the minor in such cases is in fact entitled to retain the consideration. One writer commenting on *Tracy v. Gaudin*, 104 Cal. App. 158, 285 P. 720 (1930) (discussed in text following note 35 *supra*), suggests that the vendor could regain possession of the property if it remained in the minor's hands (or in his estate). B. ARMSTRONG, 2 CALIFORNIA FAMILY LAW 1427 (1953). Another commentator takes the same position, stating that "[a]lthough restoration of consideration is not a statutory condition of disaffirmance in the contract of a minor under 18, when the minor disaffirms, the consideration which the minor received and which remains in his hands becomes again the property of the other contracting party who can enforce restoration." R. Davis, *The Minor as Wage Earner and Property Owner*, in 1 THE CALIFORNIA FAMILY LAWYER 689, 698 (1961). While this rule undoubtedly obtains in many states, there is not the slightest suggestion in *Tracy v. Gaudin* or any other California case that such is true in California (nor do the above writers cite any California authorities in support of their suppositions). The cases rather indicate the contrary to be true, and this is the interpretation adopted by the editors of the *California Annotations to the Restatement of Restitution*: "To some extent, California must be considered *contra* to this section [section 139, that 'incapacity to enter into a contract . . . is not in itself a defense in an action for restitution'], since where the minor is under 18 there is no duty to restore; it follows that there could be no liability imposed on him in a direct action [citing *Tracy v. Gaudin* and other cases]." CALIFORNIA STATE BAR, CALIFORNIA ANNOTATIONS TO THE RESTATEMENT OF RESTITUTION § 139 (1940).

<sup>44</sup> IDAHO CODE § 32-103 (1963); N.D. CENT. CODE ANN. § 14-10-11 (1960);

For example, in *Gage v. Moore*,<sup>45</sup> an Oklahoma case, a 14-year-old boy purchased a motor bike from the defendant for cash and a few days later sought to get his money back. Relying on the Oklahoma statute, the court stated that the plaintiff,

[b]eing under the age of 18, . . . could disaffirm the contract and recover the purchase price paid. Whether or not there was a valid offer to return the consideration is of no effect. Of course, when he rescinds, the property that remains in his hands becomes again that of the defendant and restoration can be enforced.<sup>46</sup>

Thus, it appears that a statute such as California Civil Code section 35 does not compel the result reached by the California courts with respect to minors under the age of 18.<sup>47</sup> The interpretation given similar statutes in other states, as indicated above, permits recognition of equitable rights of the adult party and is the better view. Disaffirmance by a minor is a right in its nature similar to that of rescission in the case of an adult,<sup>48</sup> and it is desirable that the general doctrine of rescission be departed from no further than is necessary for the protection of the infant.<sup>49</sup> The infant is as fully protected as he needs to be if he can escape any obligations under the contract and recover all that he has paid in excess of the value he received; it is unnecessary and unjust to penalize the adult, who has fairly and innocently contracted with a minor, by denying him restitution.<sup>50</sup>

The reasons which cause incapacity to make contracts . . . do not apply to actions for restitution which are based on unjust enrichment. It is fair that . . . infants, even if they are not required to perform their promises, . . . should be required to return benefits which they have received, at least if they are still in possession of the subject matter or its proceeds.<sup>51</sup>

### Toward a Restitution Theory: The Provident-Contract Rule

A minority of the states have adopted the "provident-contract" or "benefit" rule. This view overcomes many of the difficulties inherent in both the majority rule and the status quo doctrine. It has the advantage of being more logically consistent than the majority rule as well as recognizing that both parties to the contract may have rights which deserve protection. While agreeing that the minor does not possess the discretion and experience of adults and must therefore be protected against his own contractual follies,<sup>52</sup> the courts advocating the so-called "provident-contract rule" go on to acknowledge that a fair and honest contract may well be to the minor's

---

15 OKLA. ST. ANN. § 19 (1966); S.D. CODE § 43.0105 (1939).

<sup>45</sup> 200 Okla. 623, 198 P.2d 395 (1948).

<sup>46</sup> *Id.* at 625, 198 P.2d at 396.

<sup>47</sup> See also *Commercial Credit Co. v. Mizer*, 50 Idaho 388, 296 P. 580 (1931); *Gruba v. Chapman*, 36 S.D. 119, 153 N.W. 929 (1915).

<sup>48</sup> *LeBaron v. Berryessa Cattle Co.*, 78 Cal. App. 536, 248 P. 779 (1926).

<sup>49</sup> *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N.E. 476 (1888).

<sup>50</sup> See *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 59 N.W. 992 (1894); *Bartlett v. Bailey*, 59 N.H. 408 (1879). See also Note, 81 U. PA. L. REV. 731 (1935).

<sup>51</sup> RESTATEMENT OF RESTITUTION § 139, comment *a* at 559 (1940).

<sup>52</sup> *Porter v. Wilson*, 106 N.H. 270, 209 A.2d 730 (1965).

benefit<sup>53</sup> and, if so, should be viewed favorably by the law.<sup>54</sup> All jurisdictions agree that minors' contracts for necessities are enforceable by the other party,<sup>55</sup> and it is argued that this position represents but a special application of a broader principle:

The right to recover for necessities is given, because the infant has derived a benefit therefrom. It is upon no other ground. If the benefit is the foundation of the right, why should it be limited to necessities? It cannot be said that the infant, if engaged in trade or business, may not derive a benefit therefrom. If benefit obtained by the infant is the test in one case, why not make it the test in all cases? . . . The true rule is, that the contract of an infant . . . , whether executed or executory, cannot be rescinded or avoided without restoring to the other party the consideration received, or allowing him to recover compensation for all the benefit conferred upon the party seeking to avoid the contract.<sup>56</sup>

In operation the principle requires the party dealing with the infant to have acted fairly and in good faith. Where the adult has been guilty of fraud or overreaching he is not entitled to recover the property he parted with under the contract, except for that which the infant still retains *in specie*;<sup>57</sup> and the burden is on the other party to show he dealt fairly with the minor.<sup>58</sup>

As a further prerequisite to allowing recovery to the adult, the court must find the contract to be a reasonable and provident one for the minor.<sup>59</sup> This requisite may in fact be somewhat superfluous. Since the minor is only liable—not on the contract, but in restitution<sup>60</sup>—for the benefits he received under the contract, he will not have received benefits commensurate with his consideration unless the contract is reasonable and provident from his standpoint, *i.e.* one which does not waste his estate, but is advantageous to him.<sup>61</sup>

Under the provident-contract rule, once the court has made these determinations, the minor may be permitted to rescind if that is the reasonable thing for him to do,<sup>62</sup> *i.e.* if the contract was not wholly to his benefit and enforcing it would waste his estate.<sup>63</sup> Where the infant either has parted with the consideration he received, or has received intangible benefits which are incapable of restoration to the

<sup>53</sup> Hall v. Butterfield, 59 N.H. 354, 357-59 (1879).

<sup>54</sup> *Id.* at 357-59; cf. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 230-32 (1967).

<sup>55</sup> 43 C.J.S. *Infants* § 78 (1945). As this section indicates, however, there is not complete agreement as to what items are to be classified as necessities.

<sup>56</sup> Hall v. Butterfield, 59 N.H. 354, 359 (1879); accord Porter v. Wilson, 106 N.H. 270, 209 A.2d 730 (1965).

<sup>57</sup> Gislason v. Henry L. Doherty & Co., 194 Minn. 476, 479, 260 N.W. 883, 884 (1935).

<sup>58</sup> *Id.* at 478, 260 N.W. at 884; Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, 377, 59 N.W. 992, 994 (1894).

<sup>59</sup> Kochendorfer v. McKercher, 116 Minn. 536, 133 N.W. 1133 (1911).

<sup>60</sup> Porter v. Wilson, 106 N.H. 270, 209 A.2d 730 (1965); cf. Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, 59 N.W. 992 (1894).

<sup>61</sup> Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N.W. 191 (1916).

<sup>62</sup> Wooldridge v. Lavoie, 79 N.H. 21, 104 A. 346 (1918).

<sup>63</sup> Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, 59 N.W. 992 (1894).

other party, his recovery on disaffirmance is limited to payments he may have made in excess of the actual benefit he received.<sup>64</sup> Where he can return the property received under the contract, the minor is again liable for the value of the benefits he received,<sup>65</sup> including the use and depreciation of the property while in his possession.<sup>66</sup>

Suppose, for example, a 16-year-old contracts to buy a used car from a dealer for \$800, with a \$200 down payment and installments of \$100 per month. He uses it both for pleasure-riding and for transportation to and from his part-time job. After 3 months, having made two additional payments of \$100, he decides to disaffirm and demands the return of his money. The car during the period it was in the minor's possession depreciated in the amount of \$125.

In this situation the court could find that using a car for pleasure-riding was of no real benefit to a 16-year-old boy, but that using it to travel between his home and job was a benefit to the extent of \$20 per month. Consequently, the court would order the car returned to the vendor, who in turn would be required to refund all but \$60 of the purchase money.

If, on the other hand, the court should conclude that the dealer had taken unfair advantage of an unsophisticated infant by selling him a car fairly worth only \$500, the court would order restoration of the full purchase price and the dealer would be entitled only to a return of the car in its then existing condition.

In all such cases, benefit is measured by the value to the minor according to his "station in life,"<sup>67</sup> considering all the circumstances.<sup>68</sup> This value is to be determined by the court<sup>69</sup> and is not necessarily the same as the market value or contract price of the property<sup>70</sup>

<sup>64</sup> *Id.* (life insurance). Under the usual status quo doctrine, the minor need not make restitution for intangible benefits. See, e.g., *Icovino v. Haymes*, 191 Misc. 311, 77 N.Y.S.2d 316 (N.Y. Mun. Ct. 1948) (music lessons). The California rule, however, is to the contrary. *Spencer v. Collins*, 156 Cal. 298, 104 P. 320 (1909) (legal services).

<sup>65</sup> *Wooldridge v. Lavoie*, 79 N.H. 21, 104 A. 346 (1918) (automobile).

<sup>66</sup> *Id.* "Depreciation" is a somewhat misleading term when used in this connection since it is measured by the value of the minor's use, rather than by decrease in market value; it is, therefore, a sort of "subjective" depreciation. Thus, damages caused by the minor to the other's property are not part of the benefit he receives, and he is not required to make restitution for such losses. *Stack v. Cavanaugh*, 67 N.H. 149, 30 A. 350 (1892). The rule under the status quo doctrine is, of course, otherwise. See text accompanying notes 21-33 *supra*.

<sup>67</sup> *Wooldridge v. Lavoie*, 79 N.H. 21, 22, 104 A. 346, 347 (1918).

<sup>68</sup> *Hall v. Butterfield*, 59 N.H. 354 (1879).

"The question whether the infant has received a benefit,—like the question of what are necessities, and what sum the infant ought to pay for them, . . . and other similar questions,—is one of mixed law and fact. No uniform rule can be established. A contract, which under some circumstances to one person might be beneficial, under others and to another might be injurious. In no two cases are we likely to find the same facts; and it must always be for the trier to apply the law to the facts, and determine whether the infant has been benefited, and to what extent." *Id.* at 359.

<sup>69</sup> *Porter v. Wilson*, 106 N.H. 270, 209 A.2d 730 (1965).

<sup>70</sup> *Wooldridge v. Lavoie*, 79 N.H. 21, 104 A. 346 (1918).

"While it is true . . . that the pleasure derived from the use of a car

or services.<sup>71</sup> The value to the minor will vary according to the use to which he puts the contract property, e.g. he receives more benefit from an automobile when he employs it in his job than when he uses it solely for pleasure.<sup>72</sup>

Misrepresentations of age by the minor will not estop him from avoiding his contracts under this view.<sup>73</sup> They may, however, entitle the vendor to recover damages for depreciation of the property while in the hands of the infant notwithstanding the fact that the contract was not a provident one from the standpoint of the minor.<sup>74</sup>

The minority view has received the support of many writers who have considered the question.<sup>75</sup> The Oregon Supreme Court, considering such a case<sup>76</sup> on first impression, commended the minority view as being "best adapted to modern conditions,"<sup>77</sup> and one which "will fully and fairly protect the minor against injustice or imposition, and at the same time will be fair to the businessman who has dealt with such minor in good faith."<sup>78</sup> Not only did the superior logic and justice of the minority rule appeal strongly to the court, but also it considered of great importance the individual and social consequences which might result from the failure to adopt such principles.<sup>79</sup>

---

may be a benefit to a minor within the meaning of this rule, whether [the minor] was benefited by using this car in the way he did depends on whether using it in that way was the reasonable thing for a boy in his station in life to do . . . ." *Id.* at 22, 104 A. at 347. "[The minor] was obliged to account for the benefits received from the use of the goods. This would be the benefits received by him, not necessarily the market value of such use or the rental value of the goods." *Berglund v. American Multigraph Sales Co.*, 135 Minn. 67, 72, 160 N.W. 191, 193 (1916).

<sup>71</sup> *Porter v. Wilson*, 106 N.H. 270, 209 A.2d 730 (1965).

<sup>72</sup> *Cf. Woodbridge v. Lavoie*, 79 N.H. 21, 104 A. 346 (1918).

<sup>73</sup> *Conrad v. Lane*, 26 Minn. 389, 4 N.W. 695 (1880).

<sup>74</sup> *Steigerwalt v. Woodhead Co.*, 186 Minn. 558, 244 N.W. 412 (1932). The test becomes in such instances one of "objective" depreciation (see note 65 *supra*), i.e. the same utilized under the status quo doctrine. See text accompanying notes 21-33 *supra*.

<sup>75</sup> See, e.g., 2 S. WILLISTON, *CONTRACTS* § 238, at 43 (3d ed. W. Jaeger 1959): "This seems to offer a flexible rule which will prevent imposition upon the infant and also tend to prevent the infant from imposing to any serious degree upon others." J. MADDEN, *PERSONS AND DOMESTIC RELATIONS* 592 (1931): "The doctrine of 'benefits' has good possibilities for the solution of this difficult question and deserves wider adoption."

<sup>76</sup> *Petit v. Liston*, 97 Ore. 464, 191 P. 660 (1920).

<sup>77</sup> *Id.* at 470, 191 P. at 662.

<sup>78</sup> *Id.* Unfortunately the Oregon Supreme Court, while claiming to adopt the benefit doctrine, misapplied it and measured benefit by the market value of the damage to the motorcycle while in plaintiff's hands. This is actually the status quo doctrine of California (for minors over 18) and New York which the court does not distinguish from the benefit or provident-contract doctrine of New Hampshire and Minnesota. The court's rationale, nevertheless, is sound.

<sup>79</sup> *Id.* at 470-71, 191 P. at 662. "[I]t will not exert any good moral influence upon boys and young men, and will not tend to encourage honesty and integrity, or lead them to a good and useful business future, if they are taught that they can make purchases with their own money, for their benefit, and after paying for them in this way, and using them until they are worn

## Conclusion

What evaluation can be made of the existing techniques used for dealing with disaffirmance of minors' contracts? Of the three methods currently employed, the benefits doctrine seems generally superior. It offers the most individualized treatment of the infant's contractual capacity, determined by careful personal attention on the part of the court rather than by legislative fiat. This very factor, however, creates perhaps the major drawback of the benefits doctrine. The degree of restitution to be required of the minor is determined by the court from its investigation into the personal circumstances of the minor. It is just this information that the adult must know, therefore, in order to deal confidently with the minor. But such information is generally lacking. The adult cannot know whether the particular minor will benefit from the contract in the opinion of the court; he generally does not know the minor's "station in life," nor his special needs for the property in question. Thus, uncertainty is present in any dealings with minors.

This drawback, however, is not sufficient to outweigh the manifest advantages of the benefits doctrine over the other two theories. With the exercise of reasonable judgment by the merchant, these problems should not be serious; the major concern of the courts should be to insure that the transaction is free from those elements of overreaching and fraud that should be fairly obvious to anyone. And while it is true that the benefits doctrine reduces the degree of protection afforded infants under the majority rule, it does so only to the extent necessary to prevent their unjust enrichment at the expense of the other party.

The weakness of the alternative status quo doctrine is that it practically eliminates the protection given to the infant; in effect he is held liable in quasi-contract for the value of the consideration received on all his contracts, whether provident or not. If the argument that the infant needs protection against his own immaturity is correct, it must be admitted that this approach fails to provide such protection. This doctrine, however, is interesting in revealing the attempts made to avoid the obvious injustice of the majority rule.

It must be conceded that in certain instances the status quo doctrine does achieve desirable results. These situations involve contracts made by older minors who are mature in appearance and conduct.<sup>80</sup> Under such circumstances in some jurisdictions, such minors are held to be bound absolutely by their contracts.<sup>81</sup> This suggests one needed

---

out and destroyed, go back and compel the business man to return to them what they have paid upon the purchase price. Such a doctrine, as it seems to us, can only lead to the corruption of young men's principles and encourage them in habits of trickery and dishonesty." *Id.* See also *Robertson v. King*, 225 Ark. 276, 282, 280 S.W.2d 402, 406 (1955) (dissenting opinion): "Obviously, justice, common honesty and decency require all to pay their just obligations. Courts should therefore exhaust every means available to force slackers, including infants, to honor their contracts."

<sup>80</sup> See text accompanying notes 21-33 *supra*.

<sup>81</sup> See, e.g., *First State Bank v. Edwards*, 245 S.W. 478 (Tex. Civ. App. 1922).

and often recommended change:<sup>82</sup> the lowering of the age level at which a minor can disaffirm his contracts to perhaps 18 years.<sup>83</sup> This change would help considerably since the older infant more often contracts than does the younger and also infants under 18 are more easily recognized. The modern sophisticated youth should be treated in a manner more in keeping with his present emancipated status which to a large extent has removed the necessity of keeping him a special charge of the law.

Arguments advanced by those courts denying the adult the right to invoke estoppel against a minor who has misrepresented his age surely miss the point. First, estoppel does not "make the contract good," as has been suggested,<sup>84</sup> since it is good unless avoided; estoppel only operates to keep it good by preventing disaffirmance.<sup>85</sup> The second point is superficially more persuasive: it is claimed that the defense of immaturity presupposes the infant's incapacity to act prudently—not only to make a contract but also to act so as to estop himself from avoiding it.<sup>86</sup> Here the full context of the situation must be kept in mind. If one is sufficiently mature in appearance and action to *reasonably* mislead an adult into believing that he is capable of contracting, it seems fair to charge him with the responsibility for his deception and treat him as an adult.<sup>87</sup> Of course the court must ultimately decide whether the adult was reasonably deceived under the circumstances.

---

<sup>82</sup> See, e.g., Mehler, *Infant Contractual Responsibility: A Time for Re-appraisal and Realistic Adjustment?*, 11 KAN. L. REV. 361, 373 (1963); Note, *The Status of Infancy as a Defense to Contracts*, 34 VA. L. REV. 829, 833 (1948).

<sup>83</sup> See generally Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205 (1967). "This decision should be made only after a realistic and intelligent consideration of who actually needs protection; and such a determination would require more studies about the child's capacities, especially in regard to his engaging in various kinds of economic transactions." *Id.* at 232.

A bill recently introduced in the California Senate would lower to 18 years the age at which a minor may disaffirm his contracts, by deleting from California Civil Code sections 35-37 all references to disaffirmance by minors over 18. Section 35, *supra* note 22, would be amended by deleting the final clause following the word "representatives." S.B. 333 (1968). While a desirable step, this change could compound the uncertainty as to the measure of restitution to be required from the minor under 18. Since the deleted segment of section 35 contains the only reference to restoration of consideration by the minor, passage of the amendment would eliminate the statutory basis of the status quo doctrine in California.

<sup>84</sup> *Tobin v. Spann*, 85 Ark. 556, 559, 109 S.W. 534, 535 (1908); *Keen v. Coleman*, 39 Pa. 299, 302 (1866).

<sup>85</sup> Miller, *Fraudulent Misrepresentations of Age as Affecting the Infant's Contract—A Comparative Study*, 15 U. PRR. L. REV. 73, 80, 89 (1953).

<sup>86</sup> See, e.g., *International Text Book Co. v. Connelly*, 206 N.Y. 188, 197, 99 N.E. 722, 726 (1912); *Tobin v. Spann*, 85 Ark. 556, 559, 109 S.W. 534, 535 (1908).

<sup>87</sup> *New Domain Oil & Gas Co. v. McKinney*, 188 Ky. 183, 190-91, 221 S.W. 245, 249 (1920); Note, *The Status of Infancy as a Defense to Contracts*, 34 VA. L. REV. 829, 832 (1948); cf. *First State Bank v. Edwards*, 245 S.W. 478 (Tex. Civ. App. 1922), where the minor was estopped by his appearance alone without any verbal misstatements by him.

A few states recognize estoppel by statute.<sup>88</sup> Several others permit the adult to maintain a separate action in tort for fraud.<sup>89</sup> This may be a somewhat less severe remedy than that of estoppel since damages are limited to the injury caused by the fraud.<sup>90</sup> Any of these solutions seem acceptable and all are unquestionably preferable to the present California rule on the subject.<sup>91</sup>

The minor should be liable in restitution for the value of the use of the property, but not for damage he may have caused to it since this is not part of the benefit he received. Furthermore, it would otherwise make it more advantageous from the vendor's standpoint to sell to an obviously immature minor who would be likely to totally destroy the property.

In all cases involving minors' contracts, the courts should take care to perceive the full context of the problem. If they overlook the facts of the particular situation, an equitable principle developed to meet a specific need may harden into rigid legalism. "The end of the privilege is to protect infants. To that object, therefore, all the rules and their exceptions must be directed."<sup>92</sup>

Robert K. Regan\*

---

<sup>88</sup> See, e.g., IOWA CODE § 599.3 (1966); REV. WASH. CODE ANN. § 26.28.040 (1961). These statutes prevent disaffirmance of any contract where from the minor's own misrepresentations of his age or from his having engaged in business the other party had good reason to believe him to be capable of contracting.

<sup>89</sup> See Annot., 67 A.L.R. 1264 (1930).

<sup>90</sup> Note, *Liability of the Infant in Contract*, 20 IOWA L. REV. 785, 791-93 (1935).

<sup>91</sup> See note 40 and accompanying text *supra*.

<sup>92</sup> *Zouch v. Parsons*, 96 Eng. Rep. 332, 333 (K.B. 1765), quoted in *Hall v. Butterfield*, 59 N.H. 354, 357 (1879).

\* Member, Second Year Class.