THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. LIII MARCH 1975 MARS NO. 1

# THE PRESENT LAW OF INFANTS' CONTRACTS

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## I. *General Introduction.*

The law of infants' contracts in Canada has received surprisingly little attention, despite its considerable practical importance. The rules applicable across the country, except of course in Quebec, are basically those of the common law, though their development since the late nineteenth century has been largely independent, as a major statutory reform in 1874 in England rendered inapplicable many English cases after that date.[1] Statutory intervention in the law of infants' contracts in Canada on the contrary has been sporadic and has dealt mainly with incidental points.

In recent years the reduction of the age of majority in many provinces from twenty-one to eighteen years perhaps lessened the need for an urgent examination of this area of law. This change of course had no direct effect on the law of infants' contracts, but indirectly it did mitigate some of its worst abuses by removing a large and affluent group from a highly privileged legal position. Nevertheless the complex rules governing infants contracts, which were developed in the mid-nineteenth century, are still of considerable commercial importance and it is necessary to inquire whether they remain appropriate in the present day.

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[1] Except in B.C., where the English Infants' Relief Act has been substantially re-enacted with a provision enabling a guardian to make a binding contract on the infant's behalf with court approval: R.S.B.C., 1960, c. 193, ss 2, 3, 17; as am., 1966, c. 45, s. 9; 1971, c. 27.

Accordingly the purpose of this article is to examine the current state of the law of infants' contracts in Canada and to investigate whether there is now a need for reform.

## II. *The Present State of the Law.*

### A. *Introduction.*

It has been pointed out that the law of infants' contracts has been developed over the centuries on the basis of two conflicting principles.[2] Primarily the law has been most concerned to protect the infant against the consequences of his own inexperience in business transactions, but at the same time the courts have shown some inclination to avoid undue hardship on the part of an adult who deals with an infant in the course of business.

As a result of the conflict between these two principles, the present state of the law is somewhat confused. The law does recognize certain limited classes of infants' contracts as quite valid, but generally the infant is not bound by his contracts because they are voidable or utterly void. Each of these different categories of infants' contracts will be discussed in turn, together with a number of special problems related to an infant's liability for torts connected with a contract, agency and the introduction of an adult party into the infant's transaction.

### B. *Binding Contracts.*

#### 1) *Contracts for Necessaries.*

##### *(i). General Principles.*

It has been long established that an infant can be made liable to pay for any "necessaries" which he purchases. The notion of "necessaries" extends not only to the bare necessities of life, but also to articles required to maintain the infant in his ordinary social position.[3] As a result the classification of a necessary will vary with the particular infant according to his age, background and especially his marital status. In a British Columbia case[4] for example, the purchase of a house by an infant married couple with one child was held to be a necessary; it is quite likely that a similar purchase by an unmarried infant would be unenforceable on the grounds that it would not be necessary to the same extent.

The vagueness of the test as to which goods can constitute necessaries renders it extremely difficult to predict when the courts will find contracts binding on this ground. A few illustra-

[2] Treitel, The Law of Contract (3rd ed., 1970), p. 468.

[3] *Peters* v. *Fleming* (1840), 6 M. & W. 42, at p. 46, 151 E.R. 314, at p. 315 (Ex.).

[4] *Soon* v. *Watson* (1962), 33 D.L.R. (2d) 428 (B.C.S.C.).

tions can give some guidance as to judicial attitudes, but it must be emphasized that they are not definitive of future problems simply because each case, by the very nature of the test for necessaries, must depend on its own particular facts.

It seems fairly settled that an infant's contract to purchase a means of transportation for use in going to and from his place of work will be binding.[5] Of course this does not imply that any contract for the purchase of a car will be binding, for that determination depends upon the use to which the vehicle will be put. Indeed whenever this issue has arisen, Canadian courts have uniformly refused to regard a car as a necessary[6] and American courts, despite some conflict in the decisions, have generally taken a similar view.[7]

In contrast, courts in both England and Canada have rarely regarded any kind of trading contract as binding an infant, on the theory that he has insufficient discretion to carry on trade and accordingly should not be liable for goods supplied to further his business activities. This rule is so well established that it applies even where the goods are absolutely necessary to the continuance of the infant's occupation. For example, in *Pyett* v. *Lampman*,[8] a contract for the purchase of a car by an infant in the business of selling fish was held not to be a necessary, even though it was essential to the continued existence of his business. The presence of a substantial trading element in a contract therefore considerably reduces the likelihood of it being considered a contract for necessaries.

The provision of services to an infant can also be considered a necessary if the services satisfy the same tests as those applicable to the supply of goods. On this basis, contracts for the provision of medical and legal advice have been held to be

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[5] *Barber* v. *Vincent* (1680), Freem. K.B. 531, 89 E.R. 397; *Clyde Cycle Co.* v. *Hargreaves* (1898), 78 L.T.R. 296 (Q.B.); but see *First Charter Financial Corp'n.* v. *Musclow* (1975), 49 D.L.R. (3d) 138 (B.C.S.C.).

[6] *Coull* v. *Kolbuc* (1968), 78 W.W.R. 76, at p. 78 (Alta D.C.); *Fannon* v. *Dobranski* (1970), 73 W.W.R. 371 (Alta D.C.); *Noble's Ltd.* v. *Bellefleur* (1963), 37 D.L.R. (2d) 519 (N.B.C.A.).

[7] *Harris* v. *Raughton* (1954), 23 So. 2d 921 (Ala. C.A.); *Ehrsam* v. *Borgen* (1959), 347 P. 2d 260 (Kan. S.C.).

[8] [1923] 1 D.L.R. 249 (Ont. C.A.); see also *R.* v. *Rash* (1923), 53 O.L.R. 245 (Ont. C.A.). In the English case of *Mercantile Union Guarantee Corpn.* v. *Ball*, [1937] 2 K.B. 498, the purchase of a truck by an infant in the trucking business was held not to be a necessary. One decision contrary to this trend of authority is *McGee* v. *Cusack*, [1936] 1 D.L.R. 157, though the basis of this decision appears to be wrong and its source was merely a County Court in Prince Edward Island.

binding.[9] Similarly contracts for certain types of education can be viewed as contracts for necessaries, although this determination depends upon the nature of the educational course in question. A basic education is obviously regarded as a necessity, but more specialized commercial educational programmes may well not fit into this category. For example, in *International Accountants Society* v. *Montgomery*[10], a contract for a correspondence course in accounting was held not to be enforceable on the ground, amongst others, that it was not a necessary. No direct authority exists as to whether a college or university education constitutes a necessary and this question would have to be answered as a matter of fact in the ordinary way. Interestingly, a number of older American decisions[11] suggest that it does not, although almost certainly these cases would not be relevant to current social conditions in Canada.

The courts have also regarded loans extended to infants for the purchase of necessary goods or for the provision of necessary services as creating in the infant an obligation of repayment. An illustration of this principle is provided by the Saskatchewan case of *Wong* v. *Kim Yee*[12], in which the defendant, while still an infant, borrowed money for car repairs, payment of a life insurance premium, a school transfer fee, daily use, school books and a jacket. Of this list only the school transfer fee, the school books and the jacket were considered necessaries and as a result the loans for the other purposes were not considered to create a legal obligation to repay.[13]

However some risk still faces a person who lends money for necessaries because, in addition to the requirement that the money must be lent to the infant for the purpose of purchasing necessaries, the law demands that it must in fact be spent for that purpose before the infant will be required to repay.[14] The rationale

[9] *Higgins* v. *Wiseman* (1690), Carth. 110, 90 E.R. 669. See also *Cole* v. *Wagner* (1929), 150 S.E. 339 (N.C.S.C.). For legal advice, see: *Helps* v. *Clayton* (1864), 17 C.B.N.S. 553. See also Ann. 13 A.L.R. (3d) 1251, at pp. 1256-1259 where the U.S. position appears to be the same as that at common law.

[10] [1935] O.W.N. 364 (C.A.).

[11] *Moskow* v. *Marshall* (1930), 171 N.E. 477 (Mass. S.C.); *La Salle Extension University* v. *Campbell* (1944), 36 A. 2d 397 (N.J.S.C.); *Middlebury College* v. *Chandler* (1844), 16 Vt 683 (Vt S.C.).

[12] (1961), 34 W.W.R. 506 (Sask. D.C.).

[13] Although the Insurance Acts of most provinces empower an infant over the age of 16 to make a binding contract of insurance (*e.g.*, Insurance Act, R.S.A., 1970, c. 187, s. 259), it does not follow that such a contract is one for necessaries. In this case, life insurance was not deemed necessary for an unmarried infant.

[14] *Marlow* v. *Pitfeild* (1719), 1 P. Wms 558, 24 E.R. 516; *Darby* v. *Boucher* (1694), 1 Salk. 279, 91 E.R. 244.

of this is that historically the lender's rights were purely equitable, arising only by way of subrogation to the position of the supplier of the goods. The possibility that the money lent to the infant may be misapplied thus renders the position of the lender somewhat precarious, although the practical importance of this is mitigated by the devices currently employed by lending institutions to create primary liability in an adult third party when money is lent to an infant.[15]

In most provinces student loans are governed by specific statutes. In Alberta, for example, student loans are declared by the Student Loans Guarantee Act[16] to be binding upon the student as if he were of full age at the time the contractual liability arose. The provisions of this Act apply only to courses at various public educational institutions specified in the Students Assistance Act,[17] so that the validity of an educational loan for a course at an institution outside the scope of that Act depends upon the ordinary principles set out above.

Because the test for determining what amounts to a necessary depends so much upon the facts of each individual case, the concept is rather uncertain in application and capable of causing difficulty for both suppliers and infants, who may find it extremely difficult to assess their legal position. The manner in which the law allocates the burden of proof in these situations perhaps makes it less likely that the goods and services in question will be considered necessaries, for it requires the supplier to prove affirmatively that they fall within the legal definition.[18] Even if the supplier shows that the goods are of the general class considered necessaries, he must go further and prove that the infant did not already have an adequate supply of them.[19] This places a heavy onus on the supplier, for he is required to prove a negative on the basis of facts which are peculiarly within the knowledge of the other party.

If the infant at the time of contracting is living with a parent or guardian who is capable of supplying him with necessaries, and in fact does so as a matter of course, then it will be more difficult for the supplier to prove the necessity of the goods he sold. Indeed some cases have even gone so far as to speak of a presumption that the infant is adequately supplied with necessaries when he is living with his parents, because the provision of such

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[15] See text, *infra*.

[16] R.S.A., 1970, c. 354, s. 6. Similar provisions exist in most provinces. See *e.g.*, Department of Education Act, R.S.O., 1970, c. 111, s. 12(2).

[17] R.S.A., 1970, c. 353, s. 8.

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

[19] *Barnes & Co.* v. *Toye* (1884), 13 Q.B.D. 410; *Johnstone* v. *Marks* (1887), 19 Q.B.D. 509.

goods is normally a matter of parental discretion with which the courts will be reluctant to interfere.[20]

At common law the plaintiff was required to prove that the goods were necessary to the infant at the time of delivery. However the Sale of Goods Act appears to have added a technical requirement that the goods must be necessary also at the time of sale, for it defines necessaries in the following terms:[21]

> Necessaries in this section means goods suitable to the condition of life of the infant . . . and to his actual requirements at the time of the sale and delivery.

The first step then in establishing liability on the part of the infant is to prove that the goods were necessaries. After this stage it must be shown in addition that the contract as a whole is for the infant's benefit.[22] For example, in *Fawcett* v. *Smethurst*,[23] it was considered that a contract for the rental of a car, even if it could be described as a necessary, would cease to bind the infant because of the presence of a harsh or onerous term. The alleged term in that case imposed on the infant an absolute responsibility for all risks in respect of the car, even if it were damaged through no fault of his own. This would have been sufficient to prevent the transaction from being in the infant's best interests and to defeat his normal liability under a contract for necessaries.

*(ii). Nature of the Infant's Liability.*

It remains to consider the much disputed question of the nature and extent of an infant's liability under a contract for necessaries. His liability is clearly less than that of an adult of full contractual capacity and it is evident that his contracts, even for necessaries, are binding on him only in a limited sense. The substance of the controversy is whether the infant's liability to pay for necessary goods or services is contractual, resulting from his agreement, or quasi-contractual, resulting from the benefit he has enjoyed though the delivery of the goods or services.

The issue is of practical importance in relation to the problem of whether an infant is liable on an executory contract for necessaries. If his liability is contractual in nature, then clearly he will be bound by a contract for necessary goods or services to be delivered at a later date; however if his liability is founded in quasi-contract, he will not be bound until the goods have been delivered. There appears to be no directly controlling authority

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[20] *Bainbridge* v. *Pickering* (1779), 96 E.R. 776; *Mauldin* v. *Southern Shorthand Univ.* (1906), 55 S.E. 922 (Ga S.C.).

[21] R.S.A., 1970, c. 327, s. 4(3). See text, *infra*.

[22] *Roberts* v. *Gray*, [1913] 1 K.B. 520, at pp. 528, 530 (C.A.).

[23] (1915), 84 L.J.K.B. 473.

on this debate and the most important arguments for each view must be considered in turn.

Three major arguments can be made in favour of classifying the infant's liability as purely quasi-contractual. Firstly, it is well settled that under a contract for necessaries an infant is obliged to pay only a reasonable price for the goods[24] and clearly this may be less than the price stipulated in the contract. This suggests that the basis of the infant's liability is not truly contractual for, if it were, he would be bound by the price he agreed to pay. However it has been pointed out that the law's interference with just one of the terms of a contract does not necessarily deprive the entire transaction of its contractual character,[25] especially in view of the fact that such interference may well be regarded as an extension of the rule discussed above that contracts for necessaries must not contain onerous terms.

Secondly, it is argued from section 4 of the Sale of Goods Act that the infant's obligation to pay for necessaries is quasi-contractual, because it does not arise until the goods are actually delivered. In addition, as mentioned above, a reading of section 4 suggests that goods cannot be considered to be necessaries before delivery takes place.[26]

This argument is not however entirely convincing. The section applies only to the obligation of infants to pay for necessaries sold and delivered and the definition of necessaries is limited for the purpose of the section.[27] It does not purport to extend to the situation where the goods have been sold, but not yet delivered, and its provisions are not inconsistent with the view that an infant may still be liable at common law on an executory contract for necessaries.[28]

Thirdly, it has been suggested that because an infant, just as a lunatic, is incapable of making a contract, his obligation to pay for necessaries cannot be contractual but only the result of an imposition by the general law in the interest of fairness. This view was taken by Fletcher Moulton L.J. in the case of *Nash* v.

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[24] See the comments of Scrutton L.J. in *Pontypridd Union* v. *Drew*, [1927] 1 K.B. 214, at p. 220 (C.A.).

[25] Treitel, *op cit.*, footnote 2, p. 473.

[26] See text, *supra*. This section appears to have persuaded Dean Edwards that the infant's liability is quasi-contractual. See Edwards, Infants' Liability in Contract, Isaac Pitblado Lectures (1970), p. 8; Wright, Note (1935), 13 Can. Bar Rev. 319, at pp. 320-322.

[27] Treitel, *op. cit., ibid.*

[28] Goff and Jones, The Law of Restitution (1966), p. 310.

*Inman*,[29] but it appears to be rather unsatisfactory. In some circumstances even a lunatic has the capacity to make a valid contract[30] and in any event the analogy is weak because in many cases a young person may well be capable of giving consent, knowing full well the implications of his action. The same can hardly be said of a lunatic who, for the purposes of the law of contract, is one who does not understand what he is doing.[31]

Therefore it may be concluded that, although there is some authority suggesting that an infant's obligation to pay for necessaries is founded in quasi-contract, the arguments for this view are not overwhelming. Indeed on the contrary there are some cases which suggest that the source of the infant's liability is contractual and consequently that an executory contract for necessaries is binding.[32] It is well settled, for example, that contracts relating to instruction and education and contracts of service, which are commonly regarded as a particular category of contracts for necessaries, are enforceable even though executory. In the well-known case of *Roberts* v. *Gray*,[33] an infant plaintiff was held liable for substantial damages when he wrongfully refused to go on tour with a world-famous billiard player, in violation of a contract for teaching, instruction and employment. In reaching this conclusion, Hamilton L.J. commented that he was unable to appreciate "why a contract which is in itself binding, because it is a contract for necessaries, . . . can cease to be binding merely because it is still executory".[34]

Although this line of authority currently applies only to contracts in this small group and not to all contracts for necessaries, it is nevertheless difficult to see why in policy terms executory contracts should be binding for some kinds of necessaries but not for others. For this reason, Cheshire and Fifoot suggest that cases like *Roberts* v. *Gray*, involving contracts for education, should be severed from the category of necessaries and considered along with contracts for service which, as will be discussed later, have often been treated separately.[35] However

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[29] *Supra*, footnote 18; the approach of Fletcher Moulton L.J. has been approved in Canada by Rose J. in *R.* v. *Rash, supra*, footnote 8, at p. 256.

[30] *Imperial Loan Co.* v. *Stone*, [1892] 1 Q.B. 599 (C.A.).

[31] *Ibid.*

[32] Sir John Miles, however, could find no decided cases where an infant had been held liable on an executory contract for necessary goods; Miles, The Infant's Liability for Necessaries (1927), 43 L.Q. Rev. 389.

[33] *Supra*, footnote 22; see also *McLaughlin* v. *Darcy* (1918), 18 S.R. (N.S.W.) 585.

[34] *Ibid.*, at p. 530.

[35] Cheshire and Fifoot, The Law of Contract (8th ed., 1972), p. 394.

this approach cannot be reconciled readily with the court's reasoning in *Roberts* v. *Gray* and in any case the distinction between contracts for necessaries and contracts of service is more formal than substantive.

Further support for the view that an infant's liability for necessaries is contractual in nature is provided by Buckley L.J. who, in *Nash* v. *Inman*, adopted a position directly contrary to that taken by Fletcher Moulton L.J. in the same case. In that case, Buckley L.J. stated: "The plaintiff, when he sues the defendant for goods supplied during infancy, is suing him in contract on the footing that the contract was such as the infant, notwithstanding infancy, could make. The defendant, although he was an infant, had a limited capacity to contract."[36]

In conclusion it appears that the nature of the infant's liability to pay for necessaries is at the moment completely unsettled.[37] In policy terms, it may well be in the interests of both the infant and the adult if the infant is enabled to make a binding executory contract for necessaries. The infant is already well protected both by the definition of the term "necessaries" and by the fact that he will not be bound if onerous terms exist in the contract. In addition obvious hardship may result to the supplier of goods if the infant is permitted to cancel arbitrarily an order for necessaries, as the quasi-contractual theory would allow.

2) *Contracts of Service.*

In addition to contracts for necessaries, it is clear that an infant may be bound by a class of contracts generally described as contracts of service, which permit him to earn his livelihood or to be trained for some trade or profession. As indicated earlier, such contracts appear to be only a species of contracts for necessaries, the only significant difference being that they clearly bind the infant regardless of whether they are executory or executed.

As with contracts for necessaries, contracts of service bind the infant only if, on construction of the whole contract, they are beneficial in the opinion of the court.[38] Because of the wide scope of this test, it is settled that the contract does not cease to be binding merely because some clauses are not to the

[36] *Supra*, footnote 18, at p. 12.

[37] A conclusion also reached by Winfield in The Law of Quasi-Contracts (1952) and in Necessaries under the Sale of Goods Act (1942), 58 L.Q. Rev. 82.

[38] Some provinces have passed legislation permitting an infant over 16, who has no parent or guardian, or who does not reside with his parent or guardian, to enter into binding contracts of service. See, *e.g.*, Infants Act, R.S.B.C., 1960, c. 193, s. 4; Child Welfare Act, R.S.M., 1970, c. C-80, s. 105.

infant's benefit. For example in *Clements* v. *L.N.W.R.*,[39] an infant who accepted employment with the defendant railway was required to join a compensation scheme, which in part improved his position in law and in other respects reduced his legal rights in the event that he was injured in the course of his employment. The insurance scheme was to the infant's advantage in that he could be compensated without proving negligence on the part of the company or his superiors, but prejudicial to his interests in that he might well recover less by way of compensation than he would under the general law if the accident was caused by negligence. On balance however the court held that the contract was for the infant's benefit and consequently binding, although each individual clause was not necessarily to his advantage.

In contrast, in the well-known case of *De Francesco* v. *Barnum*[40], a contract, under which the infant plaintiff was apprenticed to a dancing instructor for a period of seven years to learn the art of stage dancing, was held to be against the best interests of the infant when a number of clauses gave her master too much power and too few obligations. Among the clauses leading to this conclusion were ones which prohibited the infant from marrying during the contract period, prevented her from accepting dancing engagements without her master's permission, permitted her to be paid only if the master found engagements for her and made the whole arrangement terminable at the master's option at any time during the contract period. Construing the contract as a whole, the court decided it was not for the infant's benefit.

The test of whether a particular contract is beneficial appears to be basically pecuniary, as in the *Clements* case. Occasionally the courts will adopt a wider, more paternalistic test of what is in the infant's best interests. In a more recent case, which involved the son of Charlie Chaplin selling his rather lurid memoirs to a publisher, Lord Denning M.R., in dissent, held that despite the obvious financial benefits of the arrangement, the contract was not beneficial in a broader sense because "it is not good that he should exploit his discreditable conduct for money, no matter how much he is paid for it".[41] The majority of the court however employed a more pragmatic test and considered the contract beneficial because of the financial gains accruing to the infant. This test appears to be the one more commonly

[39] [1894] 2 Q.B. 482 (C.A.). For a similar case where the contract was held not to be for the infant's benefit, see *Miller* v. *Smith & Co.*, [1925] 2 W.W.R. 360 (Sask. C.A.).

[40] (1890), 45 Ch.D. 430 (C.A.).

[41] *Chaplin* v. *Leslie Frewin Ltd.*, [1966] Ch. 71, at p. 88 (C.A.).

used in relation to contracts of service, though the concept of "benefit" appears to be wide enough to permit other approaches, such as that adopted by Lord Denning.

It must be emphasized that the courts do not accept the general principle that a contract is binding simply because it is for the infant's benefit. The contract will be considered as creating a legal obligation only if, in addition to being beneficial, it falls into one of the categories of contracts for necessaries or contracts of service. However some contracts, which are not strictly contracts of service or education, have been held to be sufficiently analogous to them to be considered binding, provided of course that they are for the infant's benefit. In *Doyle* v. *White City Stadium*,[42] for example, an infant professional boxer was required to obtain a licence on certain terms before he could pursue his career. The contract under which he received his licence was held to be binding on the ground that he could not earn his living as a boxer without entering into such an agreement. Other similar contracts involving infant professional entertainers have also been held binding on the basis that they are analogous to contracts of service.[43]

Contracts of apprenticeship are considered to be a branch of contracts of service and are governed by the same principles, though often with additional statutory safeguards. In Alberta, for example, the Apprenticeship Act seeks to protect the infant apprentice by specifying the form of the apprenticeship document and the procedures to be followed in making the contract. However the Act expressly does not guarantee the validity of the apprenticeship agreement,[44] which presumably must be decided in the same way as other service contracts.

Beneficial contracts of service must be contrasted with trading contracts entered into by an infant which, as discussed above,[45] are not binding. The line between these two types of contracts can be difficult to draw, as is shown by the case of *Chaplin* v. *Leslie Frewin Ltd.*,[46] which was mentioned earlier. In this case the infant plaintiff and his wife contracted with a publishing company for the publication of the story of the infant's life, which was to be "ghost-written", and received considerable

[42] [1935] 1 K.B. 110 (C.A.). See Wright, *op. cit.*, footnote 26.

[43] *Denmark Productions Ltd.* v. *Boscobel Productions Ltd.* (1967), 111 S.J. 715 (Q.B.).

[44] R.S.A., 1970, c. 20, s. 18. Contrast the Ontario Apprenticeship and Tradesmen's Qualification Act, R.S.O., 1970, c. 24, s. 15, which seeks to make the contract of apprenticeship as binding upon the minor as if he were of full age.

[45] See text, *supra*.

[46] *Supra*, footnote 41.

advance payments. Following completion of the book, the infant had a change of heart and sought to prevent its publication on the ground that the contract by which he had assigned copyright to the publisher was voidable because of his infancy. In denying the infant's claim, Danckwerts L.J. held that the contract was binding on the ground that it enabled him "to make a start as an author and thus earn money to keep himself and his wife".[47] With respect however, it is difficult to see how a ghost-written book could enable the infant to make a start as an author and to say simply that the contract enabled him to earn a living is clearly insufficient, for the same could be said of many infants' trading contracts which are clearly not binding.[48] This case must therefore be considered to be close to the borderline between service contracts and trading contracts and to illustrate the difficulty of making a clear distinction between the two categories. One test which has been suggested for this purpose involves asking whether the infant's capital has been risked in the venture,[49] for that is said to be the essence of a trading contract. However, there appears to be no direct judicial support for this theory.

The rules discussed above relating to contracts for necessaries and beneficial contracts of service are fairly well settled. However in this context the law requires an all or nothing approach, for if a court finds that an infant's contract does not fall within the definition of necessaries or beneficial contracts of service, it will be voidable at his option according to the principles discussed in the following section of this article. As is demonstrated by the fine distinction between trading contracts and contracts of service, it is often difficult to assess when the courts will hold that an infant's contract is binding on one of these two grounds. The law in this area accordingly may be criticized for attaching imporant practical consequences to what might be a rather arbitrary classification of the facts in each case.

C. *Voidable Contracts.*

1) *The Meaning of "Voidable".*

At common law infants' contracts which did not involve necessary goods or beneficial service were classed as voidable or, in certain narrow circumstances to be discussed later,[50] void. However the term "voidable" in this context is extremely confusing, for it is employed by the courts to describe two very different types of contracts. On the one hand the word is used

[47] *Ibid.*, at p. 95.

[48] See, *e.g.*, *Pyett* v. *Lampman*, discussed *supra*, at footnote 8.

[49] Treitel, *op. cit.*, footnote 2, p. 678.

[50] See text, *infra*.

in its normal sense, where the infant is deemed to have incurred a legal obligation which will continue unless he specifically repudiates it, while on the other hand it is also used to describe those contracts by which the infant does not incur any contractual liability unless he actually ratifies the agreement upon coming of age. The legal significance of these two types of "voidable" contracts is obviously very different. In contracts of the former category the infant will be bound if he fails to take positive steps to deny his liability,[51] whereas in contracts of the latter category a similar failure to take action will mean that the infant is not legally bound.

Traditionally the common law classed only four types of contracts as truly voidable, in the sense of binding until repudiated, namely contracts concerning land, share contracts, partnership agreements and marriage settlements. All other infants' contracts for non-necessaries were not binding upon the infant unless he ratified them.[52] At the outset it must be conceded that Canadian courts do not make this distinction with perfect consistency and in some cases the courts appear to suggest that all infants' contracts for non-necessaries are binding unless they are repudiated. The validity of this distinction in modern Canadian law must therefore be examined.

Most commentators on Canadian law have taken the view that the clear common law distinction between these two kinds of voidable contracts is well established in this country.[53] Their position is strongly supported by the considered decision on this point of the Ontario Court of Appeal in *R.* v. *Rash*, where Rose J. went to some lengths to distinguish between the two sub-classes of "voidable" contracts and stated:[54]

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[51] See, *e.g.*, *McDonald* v. *Restigouche Salmon Club* (1896), 22 N.B.R. 472 (N.B.S.C.).

[52] See, *e.g.*, Treitel, *op. cit.*, footnote 2, p. 479; Cheshire and Fifoot, *op. cit.*, footnote 35, p. 396.

[53] Payne, The Contractual Liability of Infants (1966), 5 West. Ont. L. Rev. 136, at p. 143; Smythe and Soberman, The Law and Business Administration in Canada (2nd ed., 1968), p. 93; Edwards, *op. cit.*, footnote 26, p. 5; Ontario Law Reform Commission, Report on the Age of Majority (1969), pp. 34-35. The position is apparently the same in New South Wales, where the original common law still applies. See Report of the Law Reform Commission of New South Wales on Infancy in Relation to Contracts and Property (1969), p. 17, para. 5.

[54] *Supra*, footnote 8, at p. 263; see also the discussion of Rose J. at pp. 257 *et seq.* See also *G. W. Implement Co.* v. *Grams* (1908), 1 Alta L.R. 11, on appeal 1 Alta L.R. 411; *Butterfield* v. *Sibbitt*, [1950] 4 D.L.R. 302, at p. 307 (Ont. H.C.); *Hinspergers' Harness and Tent Co. Ltd.* v. *Koropeski*, [1956] O.W.N. 167 (C.A.).

> While I suppose that cases arising out of contracts to pay for goods (other than necessaries) could be found in which similar language [*i.e.* suggesting that the contracts are binding unless repudiated] has been used, I have not found anything which leads me to suppose that it is accurately used in respect of such contracts.

Despite this relatively settled principle there have been a number of Canadian cases in recent times which suggest that other kinds of infants' contracts are binding unless specifically avoided. For example, in *Blackwell* v. *Farrow*[55] the plaintiff sought, *inter alia*, to avoid a contract made during his infancy for the purchase of a dump truck. The court, having found that the truck was not a necessary, appeared to require that the infant actually repudiate the contract within a reasonable time of reaching full age in order to avoid it. Although the results of this case can be explained equally well by relying upon the plaintiff's ratification after he attained his majority, the language used by Urquhart J. indicates that he considered the contract truly voidable. The view that an infant's contract for non-necessaries may be binding until repudiated has been echoed in other recent cases, although it has not yet emerged as the basis for any decision.[56]

The reasons for this apparent divergence from principle can only be a matter of speculation. Probably the most significant results from the use of the term "voidable" to describe infants' contracts which are not binding unless ratified as well as those which are binding until repudiated. The more natural meaning of voidable is restricted to the latter situation and it may well be that in recent times courts and counsel have simply forgotten that the term has a wider connotation in this area of law. This confusion may in turn be explained by the fact that two leading digests suggest that infants' contracts not dealing with necessaries are voidable meaning "valid until repudiated, not invalid until confirmed".[57] However *Halsbury* cites as supporting this proposition only cases relating to marriage settlements, which are indeed voidable in this sense, and the *Canadian Encyclopedic Digest (Western)* relies on a case which has nothing whatever to do with the point.

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[55] [1948] O.W.N. 7, at p. 10 (Ont. H.C.).

[56] See, *e.g.*, *Fannon* v. *Dobranski, supra,* footnote 6. Traces of the same view can be found in *Coull* v. *Kolbuc, supra,* footnote 6; *Noble's Ltd.* v. *Bellefleur, supra,* footnote 6; *Lafayette* v. *W.W. Distributors Ltd.* (1965), 51 W.W.R. 685 (Sask. D.C.).

[57] 21 Halsbury's Laws of England (3rd ed., 1957), p. 140, n. (h); 13 C.E.D. (Western) (2nd ed., 1962), p. 65, para. 1, citing *G. W. Implement Co.* v. *Grams, supra,* footnote 54.

The existence of this line of Canadian decisions does raise the policy question of why contracts concerning land, partnership agreements, shares and marriage settlements should be governed by rules different from those applicable to other infants' contracts. The traditional justification is that under these four categories of contracts the infant acquires "an interest in permanent property to which continuing obligations attach".[58] But it has been pointed out that this explanation would not cover, for example, an infant's contract to purchase land for a lump sum, because such a contract does not give rise to any continuing obligations.[59] In principle in modern times there would appear to be no real reason to distinguish any longer between a lease of land, which binds the infant until it is repudiated, and a contract for the rental of a chattel, which does not bind him at all unless he ratifies it.

The apparent irrationality of the distinction between these two kinds of voidable contracts has led one commentator to suppose that the special treament of the four truly voidable contracts is based on "social and economic factors which have long since passed away".[60] It is probably this same irrationality which has led some Canadian courts apparently to ignore the distinction and to class all infants' contracts as truly voidable. The really practical problem is that in the cases where this has occurred, the courts have failed to justify their departure from principle or even to recognize that they are making new law. Yet at the same time, other courts in different cases have reiterated the traditional distinction.[61]

As a result, it is impossible to set out the present state of the law with any certainty. In theory the distinction between the two types of voidable contracts is well founded, though arguably irrational. In practice it is sometimes ignored. This situation is patently unsatisfactory, but for the purposes of analysis it is necessary to consider separately the two different types of voidable contracts, bearing in mind that the line of demarcation between them is not as clearly drawn as it once was.

2) *Contracts Binding upon the Infant until Repudiated.*

As discussed above, only four categories of infants' contracts are clearly recognized as binding until repudiated: contracts concerning land, share contracts, partnership agree-

[58] See *R.* v. *Rash, supra,* footnote 8, at p. 263, per Rose J., quoting from Anson on Contract (15th ed., 1920).

[59] Treitel, *op. cit.,* footnote 2, p. 483.

[60] *Ibid.*

[61] See the cases collected in footnote 54.

ments and marriage settlements. Each of these categories will be considered in turn.

*(i). Contracts Concerning Land.*

A strong line of cases classifies an infant's contract which transfers an interest in land as truly voidable. In the words of Ferguson J., of the old Ontario Chancery Division, "when a conveyance passing an estate has been executed by an infant, he must, in order to repudiate, do some distinct act in avoidance of it at or soon after he attains 21, or he will be bound by his acquiescence".[62]

This requirement of a positive act of disaffirmance in order to avoid legal liability has been held to apply to an infant's conveyance of land,[63] a mortgage entered into by an infant[64] and, at least in England, a lease entered into by an infant.[65]

The common law in this area has been modified by statute in most provinces. Under the Alberta Infants Act, for example,[66] provision is made to render fully binding dispositions by infants of various interests in land. Upon application in the name of the infant by his next friend or guardian, and with the infant's consent if he is over fourteen years old, section 2 of the Act permits a Supreme Court Justice in Chambers to order the sale, lease or other disposition of an infant's interest in land, provided that the judge is of the opinion that such a disposition "is necessary or proper for the maintenance or education of the infant or that for any cause the infant's interest requires or will be substantially promoted by such disposition". A conveyance of an interest in land in this manner is described by section 4 of the Act as being as effectual as if the infant had been of full age at the time of the conveyance.

Section 8 of the same Act, which is again paralleled in most provinces, covers the situation where an infant is seized of the reversion of land subject to a lease, with a covenant not to assign or sublet without leave. Under this section the guardian

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[62] *Foley* v. *Canada Permanent Loan and Savings Co.* (1884), 4 O.R. 38, at p. 59 (Div. Ct); see also *Lauzon* v. *Menard* (1923), 25 O.W.N. 387 (H.C.).

[63] *Whalls* v. *Learn* (1888), 15 O.R. 481 (Div. Ct); *McDonald* v. *Restigouche Salmon Club, supra,* footnote 51.

[64] *Foley's* case, *supra,* footnote 62.

[65] *Davies* v. *Benyon-Harris* (1931), 47 T.L.R. 424 (K.B.).

[66] R.S.A., 1970, c. 185. Similar provisions exist in the Ontario Infants Act, R.S.O., 1970, c. 222, ss 4-10. *Cf.* the Saskatchewan Act, R.S.S., 1965, c. 342, s. 9, where transactions can be rendered binding with the consent of the official guardian.

of an infant is permitted, with the approval of a judge of the Supreme Court or the Surrogate Court, to consent to any assignment or transfer of the leasehold interest. Such a consent is as effective as if it had been made by a lessor of full age.

The Act therefore provides a useful mechanism to enable an infant to make a binding disposition of an interest in real property. It must be noted however that this mechanism is not mandatory, in that the Act does not state that any disposition made otherwise than under its terms will be ineffective. Accordingly it appears that if an infant makes a contract concerning an interest in land without following the steps specified in the statute, the rules of the common law will apply and the transaction will be binding on the infant unless he repudiates it.

*(ii). Share Contracts.*

Contracts under which an infant agrees to purchase shares are similarly voidable, with the result that the infant can be liable for calls unless he has previously repudiated the contract.[67]

This principle is vividly illustrated in Canada by reference to early cases in which calls were made on infant shareholders of failed banks for double liability on the par value of their shares. In one case,[68] the father of an infant had purchased shares in a bank for the infant and had the shares placed in her name. When the infant had reached the age of twenty-three, winding up proceedings commenced against the bank and she sought to have her name removed from the list of contributories on the ground that she was an infant when the share contract was made. The Ontario Court of Appeal held that the infant was liable as a contributory on the ground that she had not repudiated the share contract within a reasonable time of reaching her majority. The court therefore clearly classified the share contract as binding unless repudiated.

*(iii). Partnership Agreements.*

An infant's capacity to enter into a partnership agreement is not directly covered by the Partnership Acts. The issue accordingly must be governed by the common law which

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[67] *North Western Ry. Co.* v. *M'Michael* (1850), 5 Ex. 114, 155 E.R. 49.

[68] *Re Sovereign Bank; Clark's* case (1916), 27 D.L.R. 253 (Ont. S.C.). See also *Re Central Bank and Hogg* (1890), 19 O.R. 7 (Ch.); *In the Matter of Prudential Life Insurance Co.; Re Paterson*, [1918] 1 W.W.R. 105 (Man. S.C.).

according to section 80 of the Alberta Act, continues in force to the extent that it is not inconsistent with the terms of the Act.[69]

At common law it is clear that an infant may be bound to his partners under a partnership agreement until he repudiates it, though the restrictions which the common law places on trading contracts prevent him from incurring trading debts with third parties as a result of the partnership. The implications of this rule are well illustrated by the decision of the House of Lords in *Lovell and Christmas* v. *Beauchamp*.[70]

In that case the plaintiffs were creditors of a partnership named Beauchamp Brothers, of which one of the partners was an infant, and the question concerned the extent of the infant's liability for partnership debts. Lord Herschell on these facts held that the infant was bound by his contract of partnership until he disaffirmed it, although he could not become a debtor in respect of goods ordered for the firm. As a result, the only adverse legal effect on an infant in such a situation is that he is not entitled to a share in the profits or assets of the partnership until its liabilities have been paid off.[71] It has been pointed out that in this way third parties benefit indirectly from the infant's liability to his co-partners, for this may swell the available assets of the partnership.[72]

No direct authority supports the application of this case in Canada, but there is no reason to doubt its applicability as part of the common law.[73]

*(iv). Marriage Settlements.*

At common law it is clear that a marriage settlement entered into by an infant is a further instance of a contract which is binding upon the infant unless repudiated[74] and therefore "voidable" in the true sense of the word. The common law in this respect still applies in most provinces, subject only to a small statutory modification, of which the Alberta Infants Act provides a typical example.[75]

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[69] R.S.A., 1970, c. 271, s. 80. For the equivalent Ontario section, see R.S.O., 1970, c. 339, s. 45.

[70] [1894] A.C. 607.

[71] *Ibid.*, at p. 611.

[72] Treitel, *op. cit.*, footnote 2, p. 481.

[73] The principle was raised in argument in *Woods* v. *Woods* (1885), 3 Man. L.R. 33 (Q.B.), but the case was decided on another ground.

[74] *Edwards* v. *Carter*, [1893] A.C. 360 (H.L.).

[75] *Supra*, footnote 66. See also Ontario, *supra*, footnote 66, s. 13. The provisions relating to marriage settlements are derived from the English Infants Settlements Act of 1855, 18 & 19 Vict., c. 43.

Sections 11 and 13 of the Act formerly provided that a male infant, who was not less than twenty years old, or a female infant, of at least seventeen years of age, might make a binding settlement of property in contemplation of his or her marriage with the sanction of a Supreme Court Justice in Chambers. However the reduction of the age of majority to eighteen under the Age of Majority Act has expressly limited the availability of this mechanism to female infants of not less than seventeen years of age.[76] As a result the common law rule again applies in Alberta to the effect that all marriage settlements entered into by infants are voidable, unless the settlement is made in accordance with the Infants Act by a female aged seventeen years. This provision now appears to be a legal anachronism, for there is surely no valid reason for treating marriage settlements of seventeen year old females any differently from those of other infants.

Although the common law places only settlements in contemplation of marriage in the special category of voidable contracts, a Saskatchewan court has viewed a separation agreement in the same light.[77] However the court in that case relied on cases relating to property settlements in contemplation of marriage to support its decision and was very concerned to prevent the plaintiff from ignoring a perfectly fair arrangement. There appear to be no other cases placing separation agreements in this special category of voidable contracts and in principle they should be treated in the same way as other settlements or compromises of legal rights made by infants which, as will be discussed below,[78] are either non-binding until ratified or totally void.

*(v). Repudiation.*

(a). *Rules Relating to Repudiation.*

An infant may repudiate liability under a voidable contract at any time during infancy or within a reasonable time of reaching his majority.[79] If the infant chooses to repudiate

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[76] Age of Majority Act, S.A., 1971, c. 1, s. 19. This amendment was carried out very untidily, as section 11 (1) of the Infants Act now reads:

"Every female infant of the age of 17 years upon or in contemplation of *his* marriage may, with the sanction of the Supreme Court, make a valid and binding settlement . . . of all or any part of *his* property over which *he* has a power of appointment. . . ." (Italics mine).

[77] *Henderson* v. *Northern Trust Co.* (1952), 6 W.W.R. 337 (Sask. Q.B.). Interestingly the same view is taken of separation agreements in New Zealand. Report of Committee on the Contracts and Wills of Minors (1966), para. 12.

[78] See text, *infra.*

[79] See *e.g., Hilliard* v. *Dillon,* [1955] O.W.N. 621, at p. 623 (H.C.); *Murray* v. *Dean* (1926), 30 O.W.N. 271 (H.C.).

during his minority, there is some authority which suggests that he may withdraw his repudiation upon attaining full age.[80]

In the event that a repudiation is made after majority, the courts require it to be made promptly in order to be effective, at least where the former infant is fully aware of his situation and simply fails to do anything to avoid the contract.[81] In addition it appears that an infant's right to repudiate may be lost if he affirms the contract after reaching his majority, even if the reasonable time period has not elapsed.[82]

The act of repudiation of course must show a clear intention on the part of the infant that he will no longer be bound by the contract. Accordingly he must repudiate the contract as a whole and he cannot purport to avoid some parts of it and at the same time to remain bound by others.[83]

(b). *Effects of Repudiation.*

The legal significance of a repudiation of a contract made during infancy can be measured by reference to its effects on three different kinds of obligations: the future and as yet inchoate liabilities of the infant under the contract; the liabilities which have already accrued under the contract; and the recovery of money which has already been paid according to the terms of the contract prior to repudiation. Each of these will be considered in turn.

*Future Liabilities*

It is clearly established that the major effect of a repudiation by the infant is to relieve him from all future obligations, which have not yet become due at the time of repudiation. Hence, for example, an infant lessee who repudiates a lease will be relieved of his liability to pay rent for the remaining portion of the lease.

*Accrued Liabilities*

The effect of a repudiation upon liabilities which have fallen due under the contract prior to its avoidance is a matter of much greater dispute. The question of whether these liabilities survive or are extinguished by the repudiation has arisen,

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[80] *Birkenhead, Lancashire Ry. Co.* v. *Pilcher* (1850), 5 Ex. 114, at p. 127, 155 E.R. 49, at p. 55; *Phillips* v. *Sutherland* (1910), 15 W.L.R. 594 (Man. K.B.).

[81] See, *e.g., McDonald* v. *Restigouche Salmon Club, supra,* footnote 51; and *Re Central Bank and Hogg, supra,* footnote 68.

[82] *Re Paterson, supra,* footnote 68; *Foley* v. *Canada Permanent Loan and Savings Company, supra,* footnote 62.

[83] *Henderson* v. *Minneapolis Steel & Mach. Co.,* [1931] 1 D.L.R. 570 (Alta S.C.).

for example, in relation to an infant's liability to pay rent which was already owed at the time of repudiation,[84] and upon this issue the authorities appear to be divided.

In Canada the more supportable view appears to be that repudiation has a retrospective effect and relieves the infant from liabilities which have fallen due, but which have not been discharged at the time of repudiation. In *Re Central Bank and Hogg*,[85] the petitioner was a shareholder in the Central Bank of Canada, which was in the process of being wound up. An order for calls against the contributories was made in October 1888, though the petitioner did not reach full age until January 1889. In October 1889 she repudiated the share contract by seeking to have her name removed from the list of contributories and the question arose as to whether this relieved her of the existing liability to pay calls. The court held clearly that she was entitled to be discharged as a contributory and hence imparted retroactive effect to her repudiation. This view of the effect of repudiation is supported by dicta in a well-known English case[86] and on balance appears to be based on sounder authority than the contrary view that infants are bound to discharge liabilities already owed at the time of repudiation.[87]

*Recovery of Money Paid or Property Transferred*

The retroactive effect of a repudiation in discharging accrued liabilities does not extend to permit the infant an automatic right to recover money paid or property transferred under a voidable contract. Canadian courts appear to employ different tests in deciding the legitimacy of such a recovery according to whether the infant is seeking the return of money or property. In the former case, the critical point seems to be whether there has been a total failure of consideration, whereas the recovery of property seems to depend upon the infant's ability to effect *restitutio in integrum.*

*Recovery of Money Paid*

Generally the infant's claim to money already paid under a repudiated contract will be denied if the other party

[84] See, *e.g.*, *Blake* v. *Concannon* (1869-70), I.R. 4 C.L. 323.

[85] *Supra*, footnote 68. See Freedman, Isaac Pitblado Lectures (1970), pp. 28, 31.

[86] *N.W. Ry. Co.* v. *M'Michael, supra*, footnote 67, at pp. 125 (Ex.), 54. (E.R.). For a contrary view of this case, see Hudson, Note, (1957), 35 Can. Bar Rev. 1213.

[87] The contrary authority consists of a 17th century English case, *Keteley's* case (1613), 1 Brownl. 120, 123 E.R. 704, and an Irish case of 1870, *Blake* v. *Concannon, supra*, footnote 84.

has performed his part of the bargain.[88] This principle is illustrated by the Ontario case of *Short* v. *Field*,[89] in which the infant plaintiff agreed to purchase a house and lot from the defendant for $1,400.00 and paid a deposit of $200.00 on the transaction. Before repudiating the contract, the plaintiff established a new tenant in the house at an increased rent and brought in a land agent to display the house with a view to resale. In view of his exercise of these rights of occupation and possession the court held that the infant was not entitled to recover the $200.00, as the consideration under the agreement had not failed completely. Of course his position may well have been different if he had not taken effective possession and under those circumstances he may have recovered his deposit.

*Recovery of Property Transferred*

In a number of cases involving property transferred under a repudiated contract, the infant's right of recovery has been contingent upon whether he could restore the adult party to the position he was in before the contract was made. For example in *Whalls* v. *Learn*,[90] the Ontario Divisional Court was concerned with the effect of a repudiation by an infant of a contract under which she had transferred her land to the defendant in exchange for $700.00 and another parcel of land owned by the defendant. While the court was prepared to concede the infant's right of repudiation, it emphasized that she could only recover her land if she made a complete restoration of the land and money she had received from the defendants. This case also illustrates the substantially different effect on both parties of making the recoverability of property dependent upon the infant's ability to effect *restitutio in integrum* rather than upon the failure of consideration test. In *Whalls* v. *Learn* there could have been no question of the infant recovering on the latter ground, for the adult had clearly performed his part of the bargain.

It must be emphasized that Canadian courts have never defined clearly the circumstances governing the application of these two different tests and that they have not made expressly the distinction between the recovery of money and the recovery of property. It simply appears to have been the practice to use the failure of consideration test in the former case and the

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[88] *Steinberg* v. *Scala (Leeds) Ltd.*, [1923] 2 Ch. 452 (C.A.).

[89] (1914), 32 O.L.R. 395 (C.A.); see also *Robinson* v. *Moffat* (1916), 35 O.L.R. 9 (C.A.).

[90] *Supra*, footnote 63. See also *Phillips* v. *Sutherland*, *supra*, footnote 80; *Murray* v. *Dean*, *supra*, footnote 79; *Foley's* case, *supra*, footnote 62, for discussion of the application of the *restitutio* test to the recovery of property.

*restitutio in integrum* test in the latter. There seems to be no reason in principle why the two situations should be considered differently[91] and as a matter of policy it is perhaps preferable that recovery in both cases should depend upon the infant's ability to restore the adult to his former position.[92] This test appears to be fairer in that the adult party's right to retain money or property rests upon the possibility of the infant preventing further serious loss to him, rather than upon the fortuitous circumstance of whether he has performed his part of the contract.

3) *Contracts not Binding upon the Infant until Ratified.*

*(i). Contracts within this Category.*

Subject to some of the inconsistencies in Canadian case law discussed above all infants' contracts, except those for necessaries and those which are truly voidable, are not binding upon the infant until they are ratified, unless the contract is so prejudicial to the infant as to be utterly void.[93] Contracts falling typically under this heading include infants' purchases of goods for trading purposes[94] and purchases of goods other than necessaries.

In particular it is clear at common law that most settlements of legal actions by infants are, at best, not binding unless ratified[95] and that they may be totally void, if prejudicial to the infant's interests. The inconvenience of this area of the law has been mitigated somewhat by statutory provisions in some jurisdictions. In Alberta, for example, section 16 of the Infants Act,[96] which was enacted in 1959, permits an infant, by his guardian, parent or next friend, to make a binding settlement of a personal injury action before a Supreme Court Justice in Chambers, if the judge is of the opinion that the settlement is in the best interests of the infant.

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[91] See the comments of Swift J. in *Pearce* v. *Brain*, [1929] 2 K.B. 310 (Div. Ct).

[92] This suggestion is made by Goff and Jones, *op. cit.*, footnote 28, p. 312.

[93] See text, *infra.*

[94] See *R.* v. *Rash, supra*, footnote 8.

[95] *Mattei* v. *Vautro* (1898), 78 L.T. 682; *Butterfield* v. *Sibbitt, supra*, footnote 54; *Carey* v. *Freeman*, [1938] 4 D.L.R. 678 (Ont. C.A.).

[96] *Supra*, footnote 66. See also the B.C. provisions, which can apply to settlements of all types of actions: *supra*, footnote 38, s. 17; subsantially amended: 1966, c. 45, s. 9; 1971, c. 27. In addition to the statutory mechanisms, it should be possible to make a compromise practically effective by taking an indemnity from a responsible adult (*e.g.*, a parent) against any loss caused by the breach of the settlement by the child. See text, *infra.*

The statutory mechanism however only applies to personal injury actions and not to the settlement of other tort actions, breach of contract actions or even separation agreements. All of these compromises fall within the general rules governing this category of infant's contracts and are entered into at the risk of the adult party. However there is good authority which suggests that settlements of these actions can be rendered binding if they are presented to the court for approval. In these circumstances the settlement obtains its binding force not from the agreement itself, but from the approval by the judgment of the court[97] and it is clear that the court will satisfy itself that the settlement is in the best interests of the infant before endorsing it.

*(ii). Liability under Contracts not binding until Ratified.*

(a). *Effects of the Contract.*

The mere fact that an infant's contract in this category does not bind him until it is ratified does not mean that the contract is of no legal effect. In the first place it is well established that the infant may enforce the contract against the adult party,[98] although not by way of specific performance, as that remedy would not be available to the adult against him.[99] In addition, third parties cannot rely on the invalidity of the infant's contract for the privilege of considering the contract avoided is personal to the infant alone. This principle emerges from the case of *McBride* v. *Appleton*,[100] where an infant purchased a motorcycle from the plaintiff under a conditional sale contract. After a few weeks he sold the vehicle to a dealer, who resold it to the defendant, with the result that when the infant defaulted on his payments, the plaintiff sought possession from the defendant purchaser. The Ontario Court of Appeal held, *inter alia*, that the

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[97] *Poulin* v. *Nadon*, [1950] 2 D.L.R. 303 (Ont. C.A.); see also *Re Birchall* (1880), 16 Ch. D. 41 (C.A.); *Glynn* v. *Unwin* (1926), 30 O.W.N. 188 (H.C.). In the United States, several methods of making binding settlements have been tried, often unsuccessfully. However, the procedure set out in *Poulin* v. *Nadon* seems to be valid there too. See Bucklin, Settlements of Personal Injury Claims of Children (1967-68), 44 N. Dak. L. Rev. 52.

[98] *Farnham* v. *Atkins* (1670), 1 Sid. 446, 82 E.R. 1208, is usually taken as representing the common law on this point. The decision was specifically approved in *Nash* v. *Inman*, *supra*, footnote 18, at p. 11 and its principle was assented to in *R.* v. *Rash*, *supra*, footnote 8, at p. 253.

[99] *Melville* v. *Stratherne* (1878), 26 Gr. 172; this case does envisage specific performance being available to the infant where the adult has received all the benefits to which he was entitled under the contract; see also *Flight* v. *Bolland* (1828), 4 Russ. 298, 38 E.R. 817.

[100] [1946] 2 D.L.R. 16. See also *Can. Acceptance Corporation* v. *West End Motors and Frost*, [1953] O.W.N. 961 (C.A.).

defendant could not set up the invalidity of the original contract of sale to defeat the plaintiff's claim. In the words of Roach J.A.:[101]

> In the case of a contract which is voidable only, the infant may, on attaining his majority, elect to affirm it and be bound thereby, or even during his infancy elect to disavow it so that ratification or disavowal is something personal to the infant.

Accordingly the contract is by no means void and can have considerable legal consequences even before it is ratified.

(b). *The Infant's Liability.*

It is clear from the basic nature of a contract which is non-binding unless ratified that if the infant chooses not to stand by the contract, he will be relieved of all future and accrued liabilities.[102] The major issue in this category of contracts concerns the extent of the infant's liability to recover property transferred under the contract prior to its avoidance.

If the infant party has transferred money or property under the contract, his ability to recover it seems dependent in the first place upon whether there has been a total failure of consideration.[103] This proposition is illustrated by the recent Alberta case of *Fannon* v. *Dobranski*,[104] where the infant plaintiff purchased a second-hand car for $300.00 cash. He took possession and drove the car seventy miles when the transmission broke down, at which stage he returned the car and purported to avoid the contract. Belzil D.C.J. held that the plaintiff was unable to recover his payment, as he had received valuable consideration for it in the form of the ownership and possession of the car, even for such a short period. In this context of course the test of total failure of consideration requires the actual performance of his promise by the other party before the infant is barred from recovering his property; his mere promise to perform, which is consideration in the normal sense, is insufficient.[105]

Other Canadian cases suggest that the true criterion upon which the infant's recovery of money paid or property transferred should rest is his ability to effect *restitutio in integrum* to the other party. As intimated earlier, this is a wider

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[101] *Ibid.*, at pp. 34-38.

[102] See *e.g.*, *Pyett* v. *Lampman*, *supra*, footnote 8.

[103] *Nicklin* v. *Longhurst*, [1917] 1 W.W.R. 439 (Man. C.A.); *Holmes* v. *Blogg* (1818), 8 Taunt. 508, 129 E.R. 481.

[104] *Supra*, footnote 6. See also *Coull* v. *Kolbuc*, *supra*, footnote 6; *McDonald* v. *Baxter* (1911), 46 N.S.R. 149 (S.C.).

[105] See Goff and Jones, *op. cit.*, footnote 28, p. 31; *Lafayette* v. *W.W. Distributors*, *supra*, footnote 56.

principle than that of total failure of consideration, for there are many cases in which the infant may have received good consideration for his money and yet still be able to restore the other party to the position he was in before the contract was made.

The restitution principle was set out in the recently reported decision of the Alberta District Court in *Bo-Lassen* v. *Josiassen*.[106] In this case the plaintiff, at the age of seventeen, purchased an old motorcycle from a secondhand dealer for $130.00 cash, subsequently regretted his action and sought the return of his payment. Buchanan C.J.D.C. held that the infant could effect *restitutio in integrum* to the plaintiff, as the motorcycle had not been used by him and was still in the same condition as at the time of purchase. Accordingly he could recover his $130.00 on condition that he returned the motorcycle to the dealer. It is extremely doubtful whether the court could have reached such a conclusion on the total failure of consideration test, because the dealer had clearly performed his part of the bargain.

A possible reconciliation between these two tests, which involve different practical consequences, was provided by Prendergast J. in a rather old Manitoba case. He stated the governing principle in these terms:[107]

> If an infant pay money without valuable consideration, he can get it back; and if he pay money for valuable consideration, he may also recover it; but subject to the condition that he can restore the other party to his former position.

This may be a satisfactory statement of the law and it was adopted by the court in the *Bo-Lassen* decision.[108] However, the principle has not been mentioned in the other recent cases and for the purposes of accurate analysis, it is probably correct to say that Canadian courts have used both tests quite arbitrarily.

Further confusion as to the rules relating to the recovery of property is provided by the decision of *Chaplin* v. *Frewin*, which was discussed earlier.[109] In that case, which was outside the scope of the English Infants' Relief Act and hence governed by the common law, the Court of Appeal considered whether the infant plaintiff could recover a copyright which he had assigned under an avoided contract. Lord Denning M.R., in dissent, considered that a disposition of property by an infant, by a written document as opposed to by delivery, was voidable

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[106] Reported at the instance of the author [1973] 4 W.W.R. 317.

[107] *Sturgeon* v. *Starr* (1911), 17 W.L.R. 402, at p. 404 (Man. K.B.).

[108] *Supra*, footnote 106, at p. 320.

[109] *Supra*, footnote 41.

because it would be absurd "to hold that a contract to make a disposition is voidable and that the disposition itself is not".[110] With respect, this view is not well supported by authority[111] and it would be equally absurd for the recovery of property to depend upon whether the disposition was accomplished by delivery or by a written document. However, the majority of the court took the more orthodox view that the recovery of the infant's property was not automatic and their refusal to allow the return of the copyright can be justified on the basis that *restitutio in integrum* was no longer possible.[112]

The operation of the rules of restitution in this area of law is complicated where the infant has made a partial payment of the price and received the goods under the contract or obtained the goods on credit. For example, in *Coull* v. *Kolbuc*,[113] an infant agreed to purchase a second-hand sports car, gave a deposit of $50.00 and took immediate delivery. The infant used the car for a short time, apparently about two weeks, and then sought to return it to the vendor and to recover his deposit. In this situation, Cormack D.C.J. held that the infant could neither recover his deposit nor apparently rescind the contract, for the vendor had performed his contractual obligations. The latter part of this decision is surely contrary to principle, for it confuses the infant's right to rescind with the question of his ability to recover money paid under an avoided contract.[114] Clearly the infant in *Coull* v. *Kolbuc* ought to have been able to rescind future liabilities under the contract, including his obligation to pay the balance of the purchase price, and the real problem concerned only the recoverability of his deposit.

This issue becomes one of considerable importance if the facts of *Coull* v. *Kolbuc* are varied slightly. If the infant in that case had paid a deposit of $750.00 on a car valued at $1,000.00 and instead of returning the car had simply refused to pay the balance, a genuine dilemma arises assuming that *restitutio in integrum* is no longer possible. If the court were to require

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[110] *Ibid.*, at p. 90.

[111] See the comments of Winn L.J., *ibid.*, at pp. 96-97.

[112] Debicka, Isaac Pitblado Lectures (1970), 7, at p. 10, considers that *restitutio in integrum* was still possible here, but it has been pointed out that the infant could not undo contracts which to his knowledge had been made with foreign publishers for the publication of the work. See Cheshire and Fifoot, *op. cit.*, footnote 35, p. 401.

[113] *Supra*, footnote 6. The facts of this case do not emerge from the judgment with any clarity, but the view taken in the text appears to be the most supportable.

[114] Belzil D.C.J. in *Fannon* v. *Dobranski, supra*, footnote 6, emphasizes the importance of keeping separate these two issues.

either that the infant pay the balance or that he return the car and forfeit his deposit, in effect it would be enforcing the contract. If, on the other hand, the infant were required to return the car and the owner to return the deposit, the court would be permitting the infant to recover money paid where *restitutio in integrum* was no longer possible and where there had been no total failure of consideration. As a third possibility, if the defence of infancy were to succeed and the court were to leave the parties where they stood, the infant would be unjustly enriched at the adult's expense.

This point does not appear to be directly covered by authority and the governing law is a matter of considerable doubt. An analogous situation can be found in the well-known Ontario case of *Louden Mfg. Co.* v. *Milmine*,[115] in which an infant purchased certain merchandise from the plaintiffs to the value of some $287.00. He failed to ratify the contract upon reaching full age, but continued to refuse to pay for the goods. On appeal, the infant was held liable to return those goods which were still in his possession when he attained his majority. In reaching this decision, Meredith C.J. considered the following principles as "abundantly clear":[116]

> It must be that if an infant avails himself of the right he has to avoid a contract which he has entered into and upon the faith of which he obtained goods, he is bound to restore the goods which he has in possession at the time he so repudiates.

On this basis it appears that the infant, who had paid a deposit of $750.00 on a car worth $1,000.00 and who refused to pay the balance, would be required to restore the car.[117] He would presumably be unable to recover his deposit as *restitutio in integrum* was no longer possible.

The apparent harshness of this rule upon the infant is mitigated by the fact that it only applies if he is unable to restore the owner to his former position or if the owner has performed his part of the contract. In addition it avoids countenancing an unjust enrichment of a blatant nature. However, in effect in does mean that the infant may lose his privileged legal position quite easily.

The adult's action for restoration presumably would be framed in detinue and, as one commentator has recently

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[115] (1907), 14 O.L.R. 532, aff'd (1908), 15 O.L.R. 53; approved in *Molyneux* v. *Traill* (1915), 32 W.L.R. 292 (Sask. D.C.).

[116] (1908), 15 O.L.R. 53, at p. 54.

[117] This conclusion is given some support by Debicka, *op. cit.*, footnote 112, p. 11.

pointed out, the adult could not be met by the argument to be discussed later, that this would amount to the indirect enforcement of a contract by a tortious action. This is explained by the fact that the action is based upon a recognition that the contract has been rescinded by the infant and cannot be enforced.[118] The adult is in fact treating the contract as repudiated and seeking to recover his property rather than to enforce the contract.

A considerable amount of confusion as to Canadian law in this context is caused by statements in English textbooks, echoed in at least one Canadian case and assumed by the Ontario Law Reform Commission, to the effect that an infant can both keep and refuse to pay for non-necessary goods.[119] The question arises as to why this should be the case when such contracts are in England "absolutely void" under the Infants' Relief Act, whereas they are merely voidable in Canada. The answer appears to be a matter of statutory interpretation. Despite the wording in the English statute, it has been held that title can pass under the "absolutely void" contract.[120] If this is the case, then no action can be taken in detinue or conversion for the adult has no claim to the goods. However the situation in Canada is different, for although title does initially pass to the infant under a voidable contract, once he elects to treat it as rescinded, he can surely have no claim to possession when confronted with the owner's action, for he has already denied its only possible basis.

Although it is established by the *Louden* case that an infant is liable to restore any consideration which is still in his possession if he chooses not to perform the contract, it is quite clear that his liability ceases if he no longer has the goods at that time. This point was not actually raised in the *Louden* case, although the court appeared to work on the assumption that the infant was not liable to restore, or to pay compensation for, those goods supplied by the plaintiff which he had sold to third parties during his minority.[121] Similarly it appears that the infant will not

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[118] Payne, *op. cit.*, footnote 53, at p. 150. *Cf. Ballett* v. *Mingay*, [1943] K.B. 281 (C.A.), discussed *infra.*

[119] See, *e.g.*, Treitel, *op. cit.*, footnote 2, p. 499. The Canadian case referred to is *Meyers* v. *Blackburn* (1905), 38 N.S.R. 50 (S.C.) and for the Ontario Law Reform Commission Report, see *supra,* footnote 53, p. 63.

[120] The point is disputed. For the position taken in the text, see *Stocks* v. *Wilson*, [1913] 2 K.B. 235, at pp. 246-247. If property does not pass in the English cases, then there should be no real objection to an action in detinue or conversion. See Atiyah, Liability of Infants in Fraud and Restitution (1959), 22 Mod. L. Rev. 273, at p. 281.

[121] For an unexplained decision contrary to this view, see *McCallum* v. *Urchak*, [1926] 1 W.W.R. 137 (Alta C.A.).

be liable for any depreciation in goods remaining in his possession which he is forced to return.[122]

It is also clear in these situations that the vendor ought not to be able to recover the goods or their value from the third party, who purchased them from the infant. The reason for this result is that the contract, though not binding upon the infant until ratification is not a nullity. As mentioned above,[123] the privilege of avoiding the contract is personal to the infant and, at least until that privilege is exercised, he should be able to give good title to a third party.

*(iii). The Requirement of Ratification.*

At common law an infant who was not otherwise bound by a contract would become liable if he ratified it upon reaching full age. The requirement of ratification is now surrounded by some controversy except in British Columbia, where ratification is not possible at all by virtue of the adoption of the English Infants' Relief Act.[124] In most of the other common law provinces the position in strict theory appears to be that a ratification must be in writing to be of any effect. This requirement is enshrined in various Acts in Ontario and the Maritime provinces which embody the Statute of Frauds and in particular Lord Tenterden's Act.[125] Lord Tenterden's Act provided, in words very similar to those adopted in the present day Canadian legislation:[126]

> That no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.

In the West these provisions have not been expressly adopted in statutory form, although in principle they ought to apply by reception, for on the 15th day of July, 1870, Lord Tenterden's Act was still in force in England. This view is confirmed by the existence of express authority which holds that the Act is applicable in Saskatchewan.[127] In addition the English

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[122] See *Noble's Ltd.* v. *Bellefleur, supra,* footnote 6, where this rule applied even where the infant was guilty of fraud. *A fortiori,* this rule should apply where the infant has not been involved in any fraud. This case is discussed further in the text, *infra.*

[123] See text, *supra.*

[124] *Supra,* footnote 1.

[125] R.S.N.S., 1967, c. 290, s. 8; R.S.P.E.I., 1951, c. 64, s. 1; R.S.O., 1970, c. 444, s. 7; R.S.N.B., 1952, c. 218, s. 5.

[126] (1828), 9 Geo. 4, c. 14, s. 5.

[127] *Molyneux* v. *Traill, supra,* footnote 115.

Infants' Relief Act of 1874, which repealed the rules relating to ratification set out in Lord Tenterden's Act, has been held not to be in force in Alberta.[128] Accordingly, the unrepealed Act must still in theory be applicable in Manitoba, Saskatchewan and Alberta.

As might be expected with a rule, which in present day conditions can only be described as archaic, courts appear to be reluctant to apply it rigorously to cases which it would normally govern. However some indication of the scope of the rule can be gained both from the Saskatchewan case and from those jurisdictions which have specifically re-enacted Lord Tenterden's Act as part of their own Statute of Frauds.

The clearest effect of the Act is to render non-actionable an act by an infant, which would otherwise amount to a ratification, unless it is supported by some written evidence.[129] If some written evidence can be found which purportedly constitutes a ratification, it is obviously a question of fact whether it does so or not. The test suggested in some Canadian cases, relying on English authority prior to the Infants' Relief Act, is whether the document, if executed by an adult, would have amounted to a ratification of an otherwise unauthorized act of a party acting as his agent.[130] The ratification must be "an admission of existing liability",[131] rather than a mere recognition of a debt or contract made during infancy.

In accordance with the general principles of the Statute of Frauds, any ratification which is not in writing is not of course void, but merely unenforceable. Accordingly the requirement of ratification is discharged by execution by the infant and its unenforceability becomes irrelevant.[132]

There are, however, several cases in which courts have appeared to neglect the requirement that a ratification must be in writing, though it is not clear whether this is caused by a dislike or an ignorance of Lord Tenterden's Act. In the Alberta case of *Re Hutton* in 1926, for example, Ives J. stated boldly that

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[128] *Brand* v. *Griffin* (1908), 1 Alta L.R. 510.

[129] See *Molyneux* v. *Traill*, *supra*, footnote 115. English authority suggests that the requirement of writing may not apply if the infant has continued to enjoy the benefit of the contract for a considerable period after majority. *Cornwall* v. *Hawkins* (1872), 41 L.J. Ch. 435.

[130] *Lynch Bros.* v. *Ellis* (1909), 7 E.L.R. 14 (P.E.I.S.C.). See also the *Louden* case, *supra*, footnote 115, at first instance; *International Accountants Soc.* v. *Montgomery*, *supra*, footnote 10.

[131] Per Cockburn C.J. in *Rowe* v. *Hopwood*, [1868] L.R. 4 Q.B. 1, at p. 3.

[132] See *Blackwell* v. *Farrow*, *supra*, footnote 55; Payne, *op. cit.*, footnote 53, at p. 145, n. 38.

"the ratification does not have to be in writing".[133] Such a comment can only be taken to have been made *per incuriam*, but in policy terms it is surely justifiable. In present conditions, there can be no reason why a ratification must be in writing and, in the words of one commentator, the requirement can only be viewed as "a relic of a bygone age".[134]

D. *Void Contracts.*

1) *Contracts Within this Category.*

There has been considerable controversy as to whether the common law recognized a category of infants' contracts which were totally void. Sir Frederick Pollock was adamant that no such category existed: he considered that all infants' contracts, other than those for necessaries, were voidable and that the addition of a group of void contracts created a distinction "in itself unreasonable" and contrary to "the weight of all modern authority".[135] Other writers contended that it was well established in common law that certain infants' contracts were void in the true sense, even though they doubted the need for such a rule.[136]

This controversy is of course of great importance in Canada, where there has been no statutory intervention to change the original common law position. It was clearly raised in the Ontario Court of Appeal decision of *Beam* v. *Beatty*,[137] in which Garrow J.A. explicitly rejected Pollock's view. In that case an infant sold fifty-five shares, valued at $10.00 each, to the plaintiff and agreed to secure him against any loss he might suffer by reason of his purchase. To this end, the infant gave a bond in the penal sum of $1,100.00, conditioned to indemnify the plaintiff against possible loss and obliging the infant to purchase eleven of the plaintiff's shares at a price of $50.00 per share if requested to do so at any time after the date of the bond. Some years later, when the shares had become worthless, the court held that the latter obligation was totally void, relying on a number of old English

[133] [1926] 4 D.L.R. 1080, at p. 1083 (Alta S.C.). In fairness, this may not have been the basis for his decision, which does not emerge clearly from the case. *Blackwell* v. *Farrow, supra*, footnote 55, also uses language which suggests that a ratification may be made by implication.

[134] See Payne, *op. cit.*, footnote 53, at p. 145.

[135] Winfield (ed.), Pollock's Principles of Contract (13th ed., 1950), pp. 47-48; this view was shared by the late Dean Wright, *op. cit.*, footnote 26, at p. 323.

[136] See *e.g.*, Jaeger, ed., Williston on Contracts (3rd ed., 1959), ss 223, 226.

[137] (1902), 3 O.L.R. 345; (1902), 4 O.L.R. 554 (C.A.). A modern application of the rule in this case can be found in *R.* v. *Leduc* (1972), 5 C.C.C. (2d) 422 (Ont. D.C.), in which an infant's bail bond was held void.

decisions which classified all bonds with penalties given by infants as void and not merely voidable.

This case has formed the starting point for a steady stream of Canadian authority which has widened considerably the category of void contracts. In the first stage of the development of the law from *Beam* v. *Beatty*, the courts moved to hold void all infant's contracts involving a penalty. For example, in one case in which an infant agreed to purchase certain city lots from the defendant on instalment payments, the contract was held void when it appeared that the infant had agreed, in case of any default of more than three months duration, to forfeit all payments previously made and the land itself to the defendant.[138] This decision may appear to go further than necessary in protecting the infant, for a genuine penalty clause of that nature would have been legally unenforceable against an adult party, by virtue of the established rule of equity providing for relief against penalties.[139] However, if an adult had been involved, the defendant would have been permitted to sue for his actual loss upon the breach of contract, without reference to the penalty clause. The presence of an infant, on the contrary, rendered the whole contract void with the result that the defendant was unable to recover anything by way of damages, though he did retain his land.

From the fairly incontrovertible cases in which contracts involving penalties were held void, Canadian courts seem to have moved to the position where almost any "prejudicial" contract entered into by an infant will be considered in the same manner. Accordingly, in one case in which an infant purchased land valued at $5,000.00 for $9,000.00 and gave a mortgage of $7,000.00 on the land purchased and $1,000.00 on other land which he owned, the mortgages were considered void on the basis that "the transaction was necessarily to the defendant's prejudice".[140] In more recent times, the courts have adopted the same theory to declare void a totally improvident sale of an interest in land eleven years after the former infant reached full age,[141] a "wholly unfair" contract whereby an infant agreed to

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[138] *Phillips* v. *Greater Ottawa Development Co.* (1916), 38 O.L.R. 315 (A.D.).

[139] See Megarry and Baker, eds, Snell's Principles of Equity (27th ed., 1973), p. 534. This rule was commonly employed in relation to bonds with penalties entered into by adults. It is given statutory force in the Alberta Judicature Act, R.S.A., 1970, c. 193, s. 32 (o).

[140] *McKay* v. *McKinley*, [1933] O.W.N. 392, at p. 393 (H.C.).

[141] *Re Staruch*, [1955] 5 D.L.R. 807 (Ont. S.C.).

build a house[142] and a loan agreement and wage assignment made by an infant.[143]

This extension of the law has rendered it extremely difficult to predict when a court will hold that a contract is void. In particular, courts have occasionally held an infant's contract void when a decision that it was voidable would have been ample to protect his rights,[144] thus indicating perhaps a looseness in terminology rather than a conscious desire to expand the category. In other cases, however, the courts have been quite explicit in extending the scope of void contracts. Indeed there have been suggestions that any contract not for the infant's benefit will be void,[145] though this surely goes far beyond what is necessary to protect the infant. At the same time other cases insist on the existence of a penalty or a clear prejudice to the infant before the contract will be held void.[146] Consequently, the present scope of this category of infants' contracts is somewhat uncertain, but it is suggested that the latter, narrow view is more justified in policy terms. The reasons for this position become apparent when the effects of holding a minor's contract void are examined.

2) *Effects of a Void Contract.*

An infant's void contract has two different effects when contrasted with a contract which is merely voidable. Firstly, the contract cannot be ratified by the infant, even when he reaches full age, and secondly, it appears to be governed by different rules for the recovery of property. In addition it may have an indirect, adverse effect upon the position of third parties to the contract.

In several decisions sufficient evidence has existed of acts which would amount to ratification in the case of voidable contracts but this has been considered irrelevant where the contract is void, on the assumption that a void contract is incapable of ratification.[147] This rule, which permits the former infant to avoid an improvident bargain even in the face of an unequivocal recognition of its binding nature after the age of legal maturity, appears to be unduly protective of the infant's rights. In contrast, if the infant

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[142] *Altobelli* v. *Wilson*, [1957] O.W.N. 207 (C.A.).

[143] *Upper* v. *Lightning Fasteners Employees' Credit Union* (1967), 9 C.B.R. (N.S.) 211 (Ont. Co. Ct).

[144] See, *e.g.*, *International Accountants Society* v. *Montgomery*, *supra*, footnote 10; *Ivan* v. *Hartley*, [1945] 4 D.L.R. 142 (Ont. H.C.).

[145] See, *e.g.*, Kerwin J in *McKay* v. *McKinley*, *supra*, footnote 140, at p. 393.

[146] *Coull* v. *Kolbuc*, *supra*, footnote 6. *Hagerman* v. *Siddell & Johnson*, [1924] 2 D.L.R. 755 (Sask. K.B.).

[147] See, *e.g.*, the *Phillips* case, *supra*, footnote 138; *McKay* v. *McKinley*, *supra*, footnote 140; *Beam* v. *Beatty*, *supra*, footnote 137.

had actually entered the contract as an adult, rather than merely ratifying it, he would clearly be bound notwithstanding that it was against his interests. The distinction seems somewhat arbitrary, for it appears to ignore the general principle that an adult will be bound by a contractual act simply because the act can be related back to a bargain made during infancy. This reasoning would apply *a fortiori* if the courts adhered strictly to the requirements of ratification discussed earlier in this article.

It appears that if an infant's contract is held to be void, he may recover back money paid or property transferred regardless of any benefits he has received and of his ability to make restitution to the other party.[148] If the contract is indeed void this rule seems consistent with both principle and authority, but in one case it was suggested that the infant's right of recovery only existed if there had been a failure of consideration.[149] However, the authority of this decision is not strong, for the court based its conclusion upon cases involving voidable contracts and, in any event, it appeared to allow recovery despite the fact that the infant had received some benefit under the contract.[150]

This extensive right to recover money paid or property transferred illustrates the unfairness caused by the existence of a large group of void contracts. Not only is it extremely difficult for a court to decide whether a given contract is on balance prejudicial, but it can also be argued that even if the contract is against his best interests, the infant is well protected if it is held voidable and not utterly void. Williston cites these reasons for the abandonment by American courts of the category of void contracts[151] and it is submitted that they have considerable merit. The general limitations on the infant's right to recover property transferred under a voidable contract, namely that there must have been a total failure of consideration or that he can effect *restitutio in integrum*, are surely founded on principles of fairness, unless the adult party has taken blatant advantage of an infant's immaturity. The extension by Canadian courts of the notion of void contract appears to ignore these principles, which represent a reasonable compromise between the interests of both infant and adult.

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[148] See *Upper's* case, *supra*, footnote 143; *Re Staruch, supra*, footnote 140; *Corpe* v. *Overton* (1833), 10 Bing. 252, 131 E.R. 901; and *cf.*, Guest, ed., Anson's Law of Contract (23rd ed., 1969), p. 603.

[149] *Phillips* case, *supra*, footnote 138.

[150] *Ibid.*, at p. 324, per Riddell J. (dissenting).

[151] *Op. cit.*, footnote 136, s. 226. The Ontario Law Reform Commission also considers the category of void contracts unnecessary, *op. cit.*, footnote 53, p. 34. The disagreement of the Ontario Court of Appeal in *McBride* v. *Appleton, supra*, footnote 10, provides a good example of the difficulty of applying the "prejudicial" test.

Finally, it must also be noted that the apparent willingness of the courts to hold an infant's contract void could seriously affect the position of third parties to the contract. If a third party were to purchase goods from an infant which the latter had obtained from the original seller under a void contract, then presumably the goods could be recovered by the original seller under the rule *nemo dat quod non habet*. In other words, the risk of loss is transferred from the party who originally dealt with the infant to an innocent third party. If on the other hand, the contract between the infant and the original seller is merely voidable, the third party will be able to resist the original seller's claim to the goods.[152]

This undesirable effect of holding an infant's contract void can only be evaded if the innocent third party can allege that the original owner is estopped from denying the infant's authority to sell.[153] This possibility arose in the earlier discussed decision of the Ontario Court of Appeal in *McBride* v. *Appleton*,[154] which involved the sale of a motorcycle to an infant under a conditional sale agreement. Roach J.A., dissenting,[155] held that the contract between the owner and the infant was void, but that the owner was estopped from relying on this in an action to recover the motorcycle against an innocent third party purchaser by the fact that he had signed an application for the transfer of the motorcycle permit. This enabled the infant to acquire his own permit and to appear as the registered owner of the vehicle. Although this exception to the *nemo dat* rule offers some protection to third parties, it must be appreciated that the requirements of estoppel are rather strict.[156] In other cases where there is less evidence to support an estoppel, the position of the third party will be completely undermined. He will lose the goods to the owner's superior claim and have no recourse against the infant for a failure to give good title, for at this stage the latter presumably will have elected to avoid the contract with him.

The adverse effect on third parties has been of little concern to the courts in those cases in which they have held infants' contracts void. It is surely a further good reason against the apparently continued expansion of this category of contracts, when the infant is well protected by a decision that his bargain is merely voidable.

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[152] Sale of Goods Act, *supra*, footnote 21, s. 25.

[153] *Ibid.*, s. 24(1).

[154] *Supra*, footnote 100,

[155] The majority held that the contract was merely voidable. The apparently harsh result of the majority decision for the third party was of course due to the Conditional Sales Act, R.S.O., 1937, c. 182, s. 2, rather than the law of infants' contracts.

[156] See Fridman, Sale of Goods in Canada (1973), pp. 117-122.

E. *Liability for Torts Connected with the Performance of the Contract.*

1) *General Principles of Liability.*

The general rule has long been established that an infant is ordinarily liable for his torts, unless he is of tender years and the tort in question requires some specific mental element such as malice or negligence.[157] It is equally clear however that the infant will not be held liable in tort if the effect of this would be to enforce against him indirectly an otherwise unenforceable contract.

The principles governing this area of the law were clearly set out by Sir Frederick Pollock in a manner which has been specifically approved in Canada. He adopted the following distinction:[158]

> (a) He (*i.e.* an infant) cannot be sued for a wrong, when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract. . . .
>
> (b) But if an infant's wrongful act, though concerned with the subject matter of a contract, and such that, but for the contract, there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable.

The *locus classicus* of the first branch of this rule is found in the old case of *Jennings* v. *Rundall*,[159] in which an infant hired a horse which was to be "moderately ridden". He was held not to be liable in tort for inflicting harm on the horse by "wrongfully and injuriously" riding it for, in the view of Lord Kenyon, the true basis of the plaintiff's action was in contract. In his words, "if it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants".[160]

This case is the foundation of a strong trend of authority in both English and Canadian common law. A more modern application of the same principle can be found in the New Brunswick case of *Noble's Ltd.* v. *Bellefleur*,[161] where an infant purchased a new car under a conditional sale contract which provided

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[157] See, *e.g.*, *Continental Guaranty Corp.* v. *Mark*, [1926] 4 D.L.R. 707 (B.C.C.A.); *Pollock* v. *Lipkowitz* (1971), 17 D.L.R. (3d) 766 (Man. Q.B.).

[158] Pollock, *op. cit.*, footnote 135, pp. 62-63; approved in *Dickson Bros. Garage* v. *Woo Wai Jing* (1958), 11 D.L.R. (2d) 477, at p. 478 (B.C.C.A.).

[159] (1799), 8 Term Rep. 335, 101 E.R. 1419; see also *Fawcett* v. *Smethurst, supra*, footnote 23.

[160] *Ibid.*, at p. 1420 (E.R.).

[161] *Supra*, footnote 6.

that the car would be at his risk and that he would insure against the possibility of physical damage. Within a few hours of taking possession, the infant was involved in an accident resulting in the total destruction of the car. The plaintiff's action in negligence against the infant failed on the ground that he had clearly contemplated the possibility of physical damage caused in this manner, as was evidenced by the insurance and risk provisions of the contract. Accordingly, to permit the plaintiff to recover in tort under these circumstances would be tantamount to enforcing the provisions of an otherwise unenforceable contract. However, the court appeared to leave open the possibility that the infant might be liable in tort if he had damaged the car by some act totally outside the purview of the contract.[162]

This possibility of course refers to the second branch of Pollock's rule, which states that an infant may be liable for a tort which, though connected with a contract, is independent of it. This rule was established by the old case of *Burnard* v. *Haggis*,[163] in which an infant student hired a horse for riding, but expressly not for jumping. The infant was held liable in trespass when the horse was fatally injured through being jumped by a friend to whom he had lent it. Willes J. considered the action of the infant as much a trespass as if he had simply gone into a field, taken someone's horse and jumped it in such a way as to cause her death. In his words:[164]

> It was a bare trespass, not within the object and the purpose of the hiring. It was not even an excess. It was doing an act towards the mare which was altogether forbidden by the contract.

Similarly in more modern times an infant who rented an amplifier and microphone was held liable in detinue when he was unable to return the goods because he had wrongfully disposed of them to a third party.[165] Again the infant had not merely performed an authorized act in a tortious manner, but had acted totally beyond the scope of the contract.

Although Pollock's distinction between independent torts and torts directly connected with contracts is well established, it appears to be open to objections from the standpoint of both practice and policy.

In practical terms, the distinction is extremely artificial and difficult to apply with any certainty. Even the two leading

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[162] *Ibid.*, at p. 521, quoting *Dickson Bros. Garage* v. *Woo Wai Jing*, *supra*, footnote 158, discussed *infra*.

[163] (1863), 14 C.B.N.S. 45, 143 E.R. 360.

[164] *Ibid.*, at p. 364 (E.R.).

[165] *Ballett* v. *Mingay*, *supra*, footnote 118. See also the similar Alberta case of *McCallum* v. *Urchak*, *supra*, footnote 121.

cases of *Jennings* v. *Rundall* and *Burnard* v. *Haggis*, which are taken as illustrating each branch of the principle, are not easy to distinguish. The actions of the defendants in both cases were equally breaches of a term of their respective contracts. Traditionally their different results have been rationalized by considering that the contract in the former case was for riding, so that however immoderate it might have been, the defendant's conduct was of the kind authorized by the contract; in the latter case on the contrary, jumping was expressly forbidden by the contract.[166] However, it can be argued that "moderate riding" only was within the contemplation of the contract in *Jennings* and the immoderate riding was as far removed from it as jumping was from the contract in *Burnard*.[167] Nor can it be said that the distinction rests entirely upon the fact that in the latter case the defendant had lent the horse to another and thus stepped completely beyond the contract of bailment. This factor alone was not viewed by the judges as decisive[168] and there is no sound reason why the infant's liability should depend solely upon the existence of this type of breach.

The deficiencies of Pollock's test in other than the most obvious situations are similarly illustrated by its more modern applications in Canada. In the case of *Victoria U Drive Yourself Auto Livery Ltd.* v. *Wood*,[169] an infant plaintiff was held liable in tort when the car which he had hired was severely damaged by another infant whom he had permitted to drive. The majority of the British Columbia Court of Appeal considered that this amounted to an independent tort, despite the fact that it must have been very close to enforcing a term of the contract which required the infant to make good all damages. Some twenty-seven years later the same court took a different view in the case of *Dickson Bros. Garage* v. *Woo Wai Jing*,[170] which involved similar facts except that it was the negligence of the hirer himself which caused the destruction of the car. In that case Davey J.A. considered that to hold the infant liable in tort would amount to enforcing the contract against him, on the ground that the contract itself envisaged the possibility of negligence by requiring the infant to indemnify the owner against damage to his property and against liability for personal injuries. The *Victoria U Drive* case was distinguished on the basis that there the accident was caused by a person whom the infant had permitted to drive in contravention of

[166] Cheshire and Fifoot, *op. cit.*, footnote 35, p. 408.

[167] See Pearce, Fraudulent Infant Contractors (1968), 42 Aust. L.J. 294, at p. 300.

[168] See especially the judgment of Willes J., *supra*, footnote 163, at p. 364 (E.R.).

[169] [1930] 2 D.L.R. 811 (B.C.C.A.).

[170] *Supra*, footnote 158.

the contract of bailment. This approach suggests that the infant's liability in *Victoria U Drive* arose because he had done something forbidden by the contract, whereas in the *Dickson Bros.* case the infant had merely done negligently the authorized act of driving. If this is the result of these two cases, then it is extremely artificial for apparently the owner's ability to recover in future cases will depend upon whether he has in his contract an express prohibition of the activity in question or a mere indemnity against its consequences. In other words, major practical results will flow from minor differences in contractual drafting.

The case of *Dickson Bros.* v. *Woo Wai Jing* also illustrates an extremely capricious result in policy terms of the current approach of Canadian courts. Pollock's test speaks of an infant being liable for a tort "independent of the contract in the sense of not being an act of the kind contemplated by it". As mentioned above, Davey J.A. in that case appeared to regard the fact that the contract itself envisaged the possibility of negligence as showing that the tort was not independent of the contract and therefore not actionable.[171] This leads to the odd result that a well-drawn contract, intended to indemnify the bailor for property damage, in fact worked against him for his action then clearly involved the enforcement of the contract. If, however, his contract was less carefully worded and made no reference to liability for negligence, then a much better argument could be made that the infant's acts were totally outside the contract and therefore a possible foundation for tortious liability.[172]

At the present time, it is suggested that there is no clear test for determining when an infant will be liable for a tort connected with a contract. Perhaps the best approach is that suggested in Anson's *Law of Contract*, where the learned editor suggests three factors which are relevant, though not in themselves decisive, in assessing whether the tort is independent of the contract. These factors are: firstly, the terms of the agreement; secondly, the presence or absence of an express prohibition; and thirdly, the nature of the subject matter of the contract.[173] In addition, the loss caused to the plaintiff and the degree of culpability exhibited by the infant appear to be strong influences on the approach of the courts.[174]

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[171] *Ibid.*, at p. 480.

[172] For an argument along these lines, see Edwards, *op. cit.*, footnote 26, at p. 7.

[173] Anson, *op. cit.*, footnote 148, p. 202.

[174] See Pearce, *op. cit.*, footnote 167, at p. 301.

2) *Liability for Fraudulent Misrepresentation.*

*(i). The General Rule.*

It is well established that an infant's immunity from tortious liability in performing the contract extends to prevent him from being liable in deceit for a fraudulent misrepresentation which induces the contract.[175] Again the rationale for this rule is that if an action for deceit were to lie in these circumstances, the protection afforded to infants could be circumvented by an adult simply obtaining a representation as to full age prior to contracting, for example by including a statement to that effect in his standard form contract.

It must also be noted that for similar reasons the courts will not permit the infant's misrepresentation to estop him from pleading the defence of infancy.[176] Therefore, an infant's fraudulent misrepresentation does not alter his common law right to avoid a contract for goods other than necessaries, though of course it may well deprive him of equitable remedies, and he remains subject to the ordinary rules regarding property or money transferred under the contract.[177]

*(ii). Effect of Fraud in Equity.*

Although it is clear that fraud does not alter the infant's legal position, it can have some effect in equity.

Before assessing these equitable effects of an infant's fraud, it is first necessary to discuss exactly what constitutes the "fraud" necessary to attract equity's attention. Traditionally it has been considered that only an express, false representation by the infant that he is of full age will amount to fraud. But in more recent times Professor Atiyah has pointed out that the equitable conception of fraud has always been much wider than this and that in his opinion "for an infant to attempt to obtain something for nothing is, in equity, fraudulent conduct".[178] Although it is conceded that Atiyah's argument accords with the spirit of equitable principles, it is not supported by any direct authority. Indeed in Canada, as well as in England,[179] there are strong dicta

[175] *Stocks* v. *Wilson, supra,* footnote 120; *Re Darnley & C.P.R.* (1908), 9 W.L.R. 20.

[176] *Jewell* v. *Broad* (1909), 19 O.L.R. 1; aff'd (1910), 20 O.L.R. 176 (C.A.).

[177] It is suggested that these two factors explain the early B.C. case of *Gregson* v. *Law and Barry* (1914), 5 W.W.R. 1017 (B.C.S.C.), which was apparently doubted by *Pearce, op. cit.,* footnote 167, at p. 295, n. 9.

[178] Atiyah, *op. cit.,* footnote 120.

[179] See, *e.g.,* the emphatic comments of Jessel M.R. in *Ex. p. Jones* (1881), 18 Ch. D. 109, at p. 120. See also *Stikeman* v. *Dawson* (1847), 1 De G. & Sm. 90, 63 E.R. 984.

which suggest that only an actual fraudulent misrepresentation by an infant will support the intervention of equity. For example, in an old Ontario Court of Appeal decision, Hagarty C.J.O. stated emphatically:[180]

> It seems to be clear that to form an equitable defence to the plea of infancy, which could not avail at law, there must be some actual misrepresentation by the infant as to his age.

This statement appears to reflect accurately the existing state of the law, though there is much to be said for Atiyah's wider definition of fraud. However, as will be pointed out shortly, the need to prove any kind of fraud may be much less in Canada than it is in current English law.

The effect of an infant's fraud in equity is two-fold:

(a). *Release of Obligations.*

As has been mentioned earlier[181], the normal result when an adult contracts with an infant, unless the contract involves necessaries, is that the infant may enforce the contract though the adult cannot. However, when the contract has been procured by the infant's fraud, the court will permit the adult party to be released from his obligations. Hence in *Lempriere* v. *Lange*[182] a landlord was permitted to set aside a lease, which had been induced by an infant's fraudulent misrepresentation of his age, even though the infant apparently wished to retain the premises.

(b). *Restoration of Benefits.*

In English law, it is clear that the major effect of an infant's fraud upon his legal position is to force him to restore anything he acquired by virtue of his fraud. A simple illustration of the operation of this rule is provided by the case of *Noble's Ltd.* v. *Bellefleur*,[183] the facts of which have been discussed already in another context. In that case, where an infant had obtained possession of a car under a conditional sale contract induced by his own fraud and subsequently destroyed it, the New Brunswick Court of Appeal considered that the equitable doctrine of restitution required the infant to restore only the remains of the car and nothing more. The essence of this equitable doctrine is therefore that the infant is obliged only to restore those goods which remain in his possession.

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[180] *Confederation Life Association* v. *Kinnear* (1896), 23 O.A.R. 497, at p. 499.

[181] See text, *supra.*

[182] (1879), 12 Ch. D. 675 (C.A.).

[183] *Supra,* footnote 6.

The obligation to restore in these circumstances illustrates the vital importance of proving fraud in English law, for the most commonly accepted view in England is that an infant who purchases goods other than necessaries on credit may, in the absence of fraud, both keep and refuse to pay for the goods. However, if the view of Canadian law taken earlier[184] is correct, namely that an infant must restore any goods still in his possession if he chooses not to be bound by a contract for non-necessaries, then proof of fraud is far less essential in this country.

Accordingly, it is suggested that the obligation to restore imposed by equity in cases of fraud may not be important where the goods are still in the infant's possession. The only situation in which equitable restitution may be relevant in Canada is where the infant has already disposed of the goods when he chooses not to perform the contract. In these circumstances he is clearly under no legal obligation to compensate the owner,[185] but there is some controversy as to whether equity might require the infant to restore the proceeds of any such disposition in some situations.

The source of this argument is to be found in the case of *Stocks* v. *Wilson*,[186] in which an infant purchased some furniture on credit from the plaintiff under a contract induced by a fraudulent misrepresentation as to his age. Clearly, if the infant still had the furniture in his possession, he would be compelled to restore it, but in this case he had sold the goods to a third person for £30. On these facts Lush J. held that the infant must account for the proceeds of his disposition to the plaintiff, although not for the true value of the goods if that exceeded the amount which he received.

This decision was, however, seriously doubted one year later by the Court of Appeal and its current validity is extremely uncertain. In the celebrated case of *Leslie* v. *Shiell*,[187] an infant borrowed the sum of £400 from a firm of moneylenders, who lacked the usual circumspection of their profession, on the strength of a fraudulent misrepresentation as to his age and was held not liable to restore the money when he had apparently spent it. In reaching this decision, Lord Summer distinguished *Stocks* v. *Wilson* and apparently restricted its operation to very narrow circumstances indeed. By virtue of his famous dicta to the effect that in equity "restitution stopped where repayment began",[188] he

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184 See text, *supra.*
185 See text, *supra.*
186 *Supra*, footnote 120.
187 [1914] 3 K.B. 607 (C.A.).
188 *Ibid.*, at p. 618.

clearly contemplated that the infant's equitable obligation required the return of property still in his possession but did not extend to demand an accounting of the proceeds of any prior sale of the property.

To this extent these cases add nothing to the right of an adult to recover his property or its value from a fraudulent infant in Canadian law. However, the court did appear to leave open the slight possibility that the principle of *Stocks* v. *Wilson* might apply to compel the infant to refund the proceeds of any sale of property obtained under the avoided contract where the money could still be "traced". Although several English writers urge that this gives rise to a real possibility of forcing the infant to make restitution, it is suggested that an argument along these lines is unlikely to succeed in Canada for the following reasons.

The "tracing" referred to by the Court of Appeal in *Leslie* v. *Shiell* might occur at common law or in equity. Common law tracing requires strictly that the property in money or goods must not have passed before there is any possibility of a remedy. As a result, it is unlikely to be very useful in Canada where the vast majority of infants' contracts are merely voidable, though it may be a possibility in England where most infants' contracts are void under the Infants' Relief Act.[189] The only situation in which the remedy might apply in Canada would be where the contract is so prejudicial as to be void. Even in these circumstances, it would scarcely be possible for an adult to allege that he should recover his property on the ground that he succeeded in making his contract sufficiently onerous to be void, when a more deserving adult, whose contract was fair and consequently voidable, clearly would be barred from recovery. Equitable tracing too would seem to be little more than a theoretical possibility in this country because of the requirement that before a claimant can establish a right of property in equity, there must be a fiduciary relationship between him and the defendant who holds the property.[190] Such a relationship, it is submitted, would be difficult to imply between an adult trader and an infant purchaser in normal circumstances.

Accordingly, although the theoretical possibility of compelling a fraudulent infant to disgorge the proceeds of any sale of property is left open by *Leslie* v. *Shiell*, its practical utility is severely limited by the technical obstacles outlined above. This has the effect of permitting a fraudulent infant in most cases to avoid his restitutionary obligations by simply exchanging the

[189] See Atiyah, *op. cit.*, footnote 120, pp. 283-286.

[190] Goff and Jones, *op. cit.*, footnote 28, p. 40; Debicka, *op. cit.*, footnote 112, p. 13.

goods obtained by fraud for something else. In this respect, Canadian law appears to treat the fraudulent and innocent infant on virtually the same footing insofar as restitution is concerned. It is submitted that this goes beyond the bounds necessary to protect an infant against his own indiscretion and that the fairly rigid rule limiting the infants' obligation to restore only those goods still in his possession be modified to permit some compensation to the adult party in limited circumstances.

3) *Liability in Quasi-Contract.*

A further offshoot of the desire to avoid the indirect enforcement of an infant's contract apparently has precluded the quasi-contractual action for money had and received as a means of preventing the unjust enrichment of the infant. The only situation in which this action traditionally lies against an infant is where the true cause of action is tortious and completely independent of contract,[191] although even this has been doubted.[192]

The leading authority against the availability of the action for money had and received against an infant is *Cowern* v. *Nield*.[193] In this case, the plaintiff ordered hay and clover from the infant defendant and paid him in advance. The hay was never delivered and the plaintiff properly refused to take delivery of the clover because it was rotten. Nevertheless, the plaintiff was unable to recover his money unless he could prove that his action for money had and received was based on an independent tort and not on contract. Accordingly, the case was sent back for trial on the issue of fraud. Similarly, in *Leslie* v. *Shiell*[194] the action was denied to moneylenders seeking to recover £400 lent to an infant, on the ground that an unenforceable contract could not be circumvented by a claim based on an implied contract.

Although these two cases have been widely taken in England to establish that the action for money had and received is not available against an infant in the absence of an independent tort,[195] the issue is not so clear cut in Canada either in principle or on authority.

In principle, the English cases appear to have been decided on the assumption that quasi-contractual liability depends on an implied contract and that if an infant cannot be made liable on an express contract, then still less should he be liable on an

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[191] *Bristow* v. *Eastman* (1784), 1 Esp. 172, 170 E.R. 317. See also *Peters* v. *Tuck* (1915), 11 Tas. L.R. 30 (S.C.).

[192] Per Kennedy L.J. in *Leslie* v. *Shiell, supra,* footnote 187, at p. 621.

[193] [1912] 2 K.B. 419.

[194] *Supra,* footnote 187.

[195] See, *e.g.,* Anson, *op. cit.,* footnote 148, pp. 202-203.

implied one.[196] This assumption in England has been described as "objectionable"[197] and in this country it appears to be contrary to a Supreme Court of Canada decision which suggests that the basis of quasi-contract is to be found, not in implied contract, but in an independent obligation created by the law.[198] Once this confusion is cleared, as it appears to be in Canada, there should be no objection to permitting an action for money had and received to lie against an infant where this would not amount to an indirect enforcement of the contract. On this basis, *Cowern* v. *Nield* would not be followed in Canada as the quasi-contractual action would not be aimed at enforcing the contract, but rather at recovering the purchase price where consideration has totally failed. The decision in *Leslie* v. *Shiell*, on the contrary, would remain good law as the recovery of the £400 lent to the infant even by a quasi-contractual action would amount to an indirect enforcement of the contract, since the main object of the infant's contractual obligation was to return the money lent.

In addition to this argument in principle, there is some slender authority in Canada to suggest that the action for money had and received may be available against an infant in these circumstances. In *Molyneux* v. *Traill*,[199] the plaintiff agreed to purchase from an infant six steers for $300.00 and paid him a deposit of $50.00 on the purchase price. When the infant refused to deliver the cattle, the plaintiff was of course prevented by the defence of infancy from claiming damages but he was nevertheless permitted to recover his deposit. Unfortunately, neither *Cowern* v. *Nield* nor *Leslie* v. *Sheill* was cited in this case, but it certainly appears to permit an action for money had and received against an infant, for there is no other explanation of the recovery of the deposit.

F. *Infants and Agency.*

The capacity of an infant to appoint an agent is a question of considerable practical importance given the current proliferation of infant entertainers and professional athletes and yet it poses a number of problems on which only scant authority can be found. For the purpose of analysis these problems will be divided into four categories: the relationship between an infant principal and his agent; the relationship between an infant principal and the third party; the infant as agent; the infant and the power of attorney.

196 For an excellent criticism along these lines, see Goff and Jones, *op. cit.*, footnote 28, pp. 314-315. See also Debicka, *op. cit.*, footnote 112, p. 12.

197 *Ibid.*

198 *Deglman* v. *Guaranty Trust Co.*, [1954] S.C.R. 725, at pp. 734-735.

199 *Supra*, footnote 115.

1) *The Relationship Between an Infant Principal and his Agent.*

The nature of an agency relationship with an infant principal has been the subject of much confusion, even in very recent times. In 1953 for example, Lord Denning in discussing an infant's powers, stated categorically:[200]

> If he purports to appoint an agent, not only is the appointment itself void, but everything else done by the agent on behalf of the infant is also void and incapable of ratification.

This view of the law, if correct, not only would give rise to great practical inconvenience for infants, but also would go far beyond was was necessary to protect them and apparently contradict basic principles of agency. However the notion that an infant's contract of agency is void conflicts with a number of well-known English cases in which the courts appeared to assume, without expressly considering the point, that an infant could create a valid agency relationship in some circumstances.[201]

In Canada, the position has been far more settled owing to the widely-cited case of *Johansson* v. *Gudmundson*,[202] which adopts the sensible rule that an infant's contract of agency should be considered on the same footing as other infants' contracts. In that case the father of the infant plaintiffs had agreed as their agent to purchase the defendant's farm for $500.00. The defendant refused to carry out the contract and set up as a defence that the father had no right to act as the plaintiff's agent. In upholding the plaintiffs' claims for damages, Howell C.J.A. gave the following view of the law:[203]

> . . . the appointment of an agent is void or voidable just like any other act, undertaking or contract of the infant. . . . If an agent is appointed to execute a bond with a penalty, the appointment would be void. An infant can appoint an agent to purchase necessaries, to dispossess a trespasser, to receive livery of seisin, to repudiate a contract, to elect on a contract and for many other purposes.

In recent times the authority of this case has been strengthened by Lord Denning's reversal of his earlier position and

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[200] *Shephard* v. *Cartwright*, [1953] 2 All E.R. 608, at p. 619 (C.A.); this quotation still represents the position in a number of American states. See Note (1972), 37 Mo. L. Rev. 150.

[201] See *e.g.*, *Doyle* v. *White City Stadium Ltd.*, *supra*, footnote 42; *Shears* v. *Mendeloff* (1914), 30 T.L.R. 342; *MacKinlay* v. *Bathurst* (1919), 36 T.L.R. 31; *De Francesco* v. *Barnum*, *supra*, footnote 40. These cases are analyzed as supporting the view set out in the text in Webb, The Capacity of an Infant to Appoint an Agent (1955), 18 Mod. L. Rev. 461, at pp. 464-471.

[202] (1909), 11 W.L.R. 176 (Man. C.A.).

[203] *Ibid.*, at p. 178.

adoption of a principle similar to that of *Johansson* v. *Gudmundson* in a decision of the English Court of Appeal. In that case, the learned Master of the Rolls formulated the principle that "wherever a minor can lawfully do an act on his own behalf, so as to bind himself, he can instead appoint an agent to do it for him".[204]

The application of this principle to infants' contracts of agency means that they can be placed in the same four classes as infants' contracts generally.[205] They may be binding (if related to the purchase of necessaries or to beneficial contracts of service), truly voidable (if related to the purchase of land, shares, *et cetera*), non-binding unless ratified (if related to, for example, the purchase of non-necessaries), or void (if related to a prejudicial contract). By extension of this approach, the cases appear to suggest that the classification of the agency contract as binding, voidable or void depends entirely upon the nature of the primary contract with the third party.[206] Some objection has been taken that the agency contract should be assessed independently of the primary contract, "without regard to the validity of the transaction which the agent is to effect on the infant's behalf".[207] This may indeed be technically correct, for there is no good reason why the agency contract should always inherit the status of the primary contract. For example, out of sheer extravagance or laziness, an infant might appoint an agent to purchase a necessity on his behalf, when he could well make the purchase himself. The contract of purchase would surely be binding, but the contract of agency would be voidable or even void in the same way as any trading contract, as it could not be described as a contract for a necessary. However, the practical results wrought by this approach do not seem to be very different, for there must be few, if any, cases in which an infant could validly appoint an agent to do something which he himself was unable to do.[208]

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[204] *G(A)* v. *G(T)*, [1970] 3 All E.R. 546, at p. 549 (C.A.).

[205] In this context, the suggestion of Webb, *op. cit.*, footnote 201, *passim*, but especially at pp. 471-472, that an infant's contract of agency will bind him if it is beneficial, is surely much too wide.

[206] See especially *McLaughlin* v. *Darcy*, *supra*, footnote 33; *Johansson* v. *Gudmundson*, *supra*, footnote 202, at p. 184; Webb, *op. cit.*, *ibid.*

[207] Powell, The Law of Agency (2nd ed., 1961), p. 298; O'Hare, Agency, Infancy and Incapacity (1970), 3 U. Tas. L.J. 312, at pp.320-321.

[208] O'Hare, *op. cit.*, *ibid.*, suggests two cases, but neither of these seems supportable. Firstly, he suggests an infant may in some circumstances validly appoint an agent to obtain a loan, which has been declared void by statute. But surely if the legislature has declared a policy that a loan to an infant is void, the courts could not uphold a contract to obtain a loan by an agent. Secondly, he suggests that the traditional view violates the principle that an infant may lawfully appoint an agent by contract to

2) *The Relationship between the Infant Principal and the Third Party.*

From the foregoing account it can be concluded that, in relation to the third party, the acts of the agent will have the same effect as if they were the acts of the infant himself.[209] Accordingly, if the contract is for necessaries or truly voidable, he may be sued for breach in some circumstances by the third party. However, if the contract is void or voidable, in the sense of non-binding unless ratified, the infant may presumably resist any action by the third party.

This categorization also affects the rights of the third party against an agent representing an infant principal, for if the contract of agency is void the agent will be liable to the third party for breach of warranty of authority, unless he disclaims such authority or the third party is aware that he lacks it.[210] Strictly the agent may be similarly liable if the agency contract is classified as non-binding unless ratified, because there will be no contractual basis for his authority in the absence of ratification.

3) *The Infant as Agent.*

It appears to be generally accepted that an infant can act as an agent and that the principal cannot plead the infancy of his agent in order to avoid the primary contract.[211] Of course the extent to which the agency contract is binding upon the infant is governed by the general principles discussed elsewhere in this article.

However, the third party who deals with the infant agent may incur two disadvantages.[212] Firstly, where an infant is acting for an undisclosed principal, the third party's election to treat either the agent or the undisclosed principal as the contracting principal will be purely nominal, for the infant agent should be

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make even detrimental admissions on his behalf, because if reference is made to its primary object, the agency contract would not be held binding. This is surely misleading, for although an infant may *lawfully* make admissions through an agent, it does not follow that a contract with someone to make those admissions on his behalf should be binding. Although the object of the contract is *lawful,* it is not inevitably *necessary* and the agency could surely be voidable just as if the infant has appointed an agent to purchase a sports car, which would be lawful, but not necessary. The voidability of the contract to make the admissions does not make the admissions themselves any less lawful.

[209] Webb, *op. cit.*, footnote 201, at p. 469. See also the *Johansson* case, *supra,* footnote 202.

[210] Fridman, The Law of Agency (3rd ed., 1971), p. 179.

[211] Powell, *op. cit.*, footnote 207, at p. 173.

[212] O'Hare, *op. cit.*, footnote 207, at pp. 322-323; *Smally* v. *Smally* (1700), 1 Eq. Cas. Abr. 283, 21 E.R. 1047.

able to rely on his normal contractual incapacity to defend any action against himself. Secondly, the third party may well be deprived of any action for breach of warranty of authority against the infant as agent. Although it is uncertain whether this action is contractual or quasi-contractual in nature, its availability would appear to defeat the normal legal protection given to the infant by limiting his capacity. Of course the third party might have a remedy if he could show a fraudulent misrepresentation, upon which to found a separate action for deceit.

4) *The Infant and the Power of Attorney.*

It is generally accepted that, whatever the rule in relation to agency created in other ways, an infant's grant of power of attorney is void.[213] Although this proposition is well established, it is difficult to understand the reasoning behind it in modern conditions, for a power of attorney is nothing more than an appointment of an agent by deed and should surely be considered on the same basis as other types of agency.

G. *Securing Performance by Introducing a Third Party.*

In view of the wide restrictions upon the infant's ability to contract, which in many cases prevent the infant from acquiring what he wants and force the tradesmen to lose potential business, efforts have been made to render the transaction binding by the introduction of an adult party. This may be accomplished successfully by taking an indemnity from the adult or by joining the adult as a principal party to the transaction. Each of these devices will be examined in turn.

1) *An Indemnity from an Adult Party.*

It is clear that a businessman may protect himself in a contract with an infant by taking an indemnity from an adult party. It is most important, however, that this security in law constitute an indemnity and not a mere guarantee, for there are severe doubts about the enforceability of the latter device in this situation.

The liability imposed by a guarantee is of course strictly secondary; it only arises if there is a debt, default or miscarriage by the party primarily liable. Accordingly, if it happens that no debt is actually owing from the party thought to be primarily liable, then the responsibility of the guarantor ceases. This was the case in

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[213] *Zouch d. Abbott & Hallett* v. *Parsons* (1765), 3 Burr. 1794, 97 E.R. 1103; *Johansson* v. *Gudmundson, supra,* footnote 202, at pp. 180, 182; Chitty on Contracts (23rd. ed., 1968), Vol. 1, p. 205; Powell, *op. cit.,* footnote 207, at p. 298.

*Coutts & Co.* v. *Browne-Lecky*,[214] in which an adult's guarantee of a loan made to an infant by way of overdraft was held to be unenforceable. The loan to the infant was absolutely void by statute and therefore there could be no default by the infant to render the adult liable under the guarantee. The principle of *Browne-Lecky's* case would presumably apply in Canada to render unenforceable guarantees of the small category of infants' contracts which are prejudicial and therefore void. It does not necessarily follow that the same rule would apply to guarantees of the vast majority of infants' contracts, which of course are merely voidable in this country.

This point does not appear to be directly covered by authority in Canada, although in one case Meredith C.J.C.P. did urge caution in applying to the very different Canadian problems in this area English cases involving contracts which were void under the Infants' Relief Act.[215] The matter must therefore be examined on principle.

In favour of the guarantee being held valid, it is well established in other contexts that the privilege of considering the primary contract avoided is strictly personal to the infant and that others cannot normally share in this protection.[216] As a consequence in American law, sureties have not been permitted to avoid liability on the ground that the infant's contract is voidable.[217] In addition Canadian courts have enforced guarantees where the principal obligation was unenforceable in some cases not involving infants.[217a]

On the other hand, the liability of the guarantor only arises when the infant has refused to perform his part of the contract and disaffirmed it. As the infant is entitled to do this without legal penalty, there is arguably no longer any debt or default to attract the liability of the guarantor. This strong argument against the liability of a guarantor of a voidable infant's contract can be further supported by reference to cases in the general law of guarantees relating to contracts voidable for reasons other than infancy.

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[214] [1947] 1 K.B. 104; followed after full consideration in *Robinson's Motor Vehicles Ltd.* v. *Graham*, [1956] N.Z.L.R 545. See also *Stadium Finance* v. *Helm* (1965), 109 Sol. J. 471 (C.A.); *Heald* v. *O'Connor*, [1971] 2 All E.R. 1105, at p. 1113. The case has recently been disapproved in B.C. See *First Charter Financial Corp'n.* v. *Musclow, supra*, footnote 5.

[215] *Pearson* v. *Calder* (1916), 35 O.L.R. 524, at pp. 528-529 (C.A.).

[216] See, *e.g.*, *McBride* v. *Appleton, supra*, footnote 100.

[217] Williston, *op. cit.*, footnote 136, pp. 24-25.

[217a] *C. L. Hagan Trans. Ltd.* v. *C.A.C. Ltd.*, [1974] S.C.R. 491.

A situation closely analogous to that of a voidable infant's contract was considered in the Australian decision of *Insurance Office of Australia Ltd.* v. *T.M. Burke Pty. Ltd.*[218] In this case the plaintiffs had sold land to the debtor under a contract providing for the payment of the price in instalments and had taken a guarantee from the defendant for the due performance of all the debtor's obligations. After defaulting on his payments the debtor rescinded the contract, as he was entitled to under a Moratorium Act, and the plaintiff sought to make a guarantor liable for the unpaid balance. However, the New South Wales Supreme Court held that the plaintiff's recission destroyed all future obligations under the contract and that the guarantor's liability disappeared with the obligations to which it was collateral. Although there appear to be few Canadian or English authorities on the point covered in the *Burke* case, it is suggested that it may well be taken in this country as preventing the enforcement of a guarantee of a contract which an infant elects to avoid. This is particularly possible as the reasoning employed by the court in the *Burke* case was also used by a strong High Court of Australia in another case involving the guarantee of a contract for the sale of land, which the purchaser elected to rescind in accordance with the terms of his contract. In that case, Starke J. stated the general principle that, "a surety, however, is not liable on his guarantee where the principal debt cannot be enforced, because the essence of the obligation is that there is an enforceable obligation of a principal debtor".[219]

It therefore appears at least arguable in Canadian law that a guarantee of an infant's voidable contract is not enforceable. If this is the legal position, it may not be easily justified in policy terms. It has been pointed out that guarantees perform a useful function in permitting a minor to get credit where he would otherwise be unable to do so and that it seems strange that adult guarantors should be permitted to escape the liability which they undertook with full knowledge of what they were doing,[220] although they may not always be aware that their normal

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[218] (1935), 35 S.R. (N.S.W.) 438, discussed in Else-Mitchell, Is a Surety's Liability Co-extensive with that of a Principal Debtor (1947), 63 L.Q. Rev. 355, at p. 369.

[219] *McDonald* v. *Dennys Lascelles Ltd.* (1933), 48 C.L.R. 457, at p. 471; see also Dixon J., at pp. 479-481. Canadian courts have gone much further in adopting this principle than English or Australian courts by refusing to enforce a guarantee of a co-operative society's *ultra vires* contract: *MacDonald-Crawford Ltd.* v. *Burns*, [1924] 2 W.W.R. 413 (Sask. C.A.). For a recent discussion of the vexed co-extensiveness principle, see Steyn (1974), 90 L.Q. Rev. 246.

[220] Cohn, Validity of Guarantees for Debts of Minors (1947), 10 Mod. L. Rev. 40, at pp. 41, 50-51. This reasoning appeared to influence the court strongly in the *Musclow* case, *supra*, footnote 5.

right of subrogation against the principal debtor will be useless. Because the present rule does not endanger those interests of the infant which the law seeks to protect, the Latey Commission in England has recommended that guarantees of infants contracts be made enforceable by statute.[221] In Canada, the Quebec Civil Code already has a provision to this effect,[222] in common with many civil law countries.

Whatever the difficulties relating to the effect of an adult's guarantee of an infant's contract, it is clear that they may be avoided if the adult undertakes a principal liability by way of indemnity.[223] This raises the vexed distinction, so familiar in Statute of Frauds cases, between a guarantee and an indemnity. One judge has recently described this as "a most barren controversy" which "has raised many hair splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public".[224] This is not the place to discuss the complexities of the distinction, but it may be commented that it seems odd that such major legal consequences for the creditor depend on an extremely technical categorization. It is particularly difficult for a tradesman to avoid this pitfall, for the whole question rests, not upon what the transaction is called, but upon its "essential nature",[225] which is derived from minutely detailed factors which are likely to be far beyond the ordinary businessman's normal sphere of knowledge.

2) *The Adult as Principal Party.*

It has long been clear that an infant's lack of contractual capacity can be overcome if an adult undertakes a primary liability on behalf of the infant[226] or if he is joined as a principal party to the transaction.

The Alberta decision of *Feldman* v. *Horn and Rae*[227] illustrates the operation of the latter device. The plaintiff sold a car to an infant under a conditional sale contract and took a promissory note for the amount of the debt. Both documents were signed jointly by the infant and the defendant adult. Upon the default of the infant the defendant was held liable for the balance owing, as by signing the note she had become a principal in the

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221 (1967), Cmnd. 3342, para. 366.

222 Art. 1932.

223 *Yeoman Credit* v. *Latter*, [1961] 1 W.L.R. 828 (C.A.).

224 *Ibid.*, per Harman L.J., at p. 835. This case also contains an excellent discussion of the distinction by Holroyd Pearce L.J., at pp. 831-834.

225 *Ibid.*, at p. 831.

226 *Harris* v. *Huntbach* (1757), 1 Burr. 373, 97 E.R. 355.

227 (1960), 33 W.W.R. 568 (Alta D.C.).

transaction, jointly and severally liable with the infant. There could therefore be no question of this being merely an unenforceable guarantee given by the defendant.

The same reasoning applies if the adult signs a promissory note as a principal to secure the extension of credit to an infant, even though he is not a party to the actual contract. For example, in the Ontario case of *Pearson* v. *Calder*[228] an infant agreed to purchase a millinery business, together with the stock in trade, under a bill of sale from the plaintiff. After a delay in payment by the infant, the plaintiff threatened to take back her property, but desisted when the defendant gave her a promissory note for the purchase price. The infant was not a party to the note, or indeed to any part of the transaction between the plaintiff and the defendant. In an action upon the note, the court rejected the defence that the defendant had given a mere guarantee and held that she was fully liable as a principal. As in other cases in this area of law, the court was much influenced in holding that the defendant was not a mere guarantor by the fact that a contrary decision would have rendered the whole transaction a sham. Where the unenforceability of the infant's promise is the entire reason for introducing the adult party into the transaction, it is a reasonable inference that the parties intend that he undertake an independent enforceable obligation. In the words of Meredith C.J.C.P.:[229]

> Milliners may make fantastical "creations" in the way of their trade; but no milliner, nor anyone else, would make such a ridiculous creation as that in the way of a contract to pay money.

Generally, therefore, an adult who knowingly signs a promissory note independently or jointly with the infant, for credit extended to the infant will be unable to take advantage of the infant's legal disability. The possibility exists that the adult party may raise the equitable defence that he in fact signed the note as a surety, although he appeared on the face of it to be a principal.[230] However such a defence would be most unlikely to prevail where the parties were aware of the infant's incapacity, for it would mean that the adult party had knowingly entered into an arrangement for the advancing of money on a promissory note under which no one was liable. To permit the adult to escape liability in these

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[228] *Supra*, footnote 215. See also *Wauthier* v. *Wilson* (1912), 28 T.L.R. 239 (C.A.).

[229] *Ibid.*, at p. 527; for a similar approach, see *Yeoman Credit* v. *Latter, supra*, footnote 223, at p. 835.

[230] *Mutual Loan Fund Association* v. *Sudlow* (1858), 5 C.B. (N.S.) 449, 141 E.R. 183; *Eldridge and Morris* v. *Taylor*, [1931] 2 K.B. 416 (C.A.).

circumstances would be, in the words of Farwell L.J., "a gross libel on equity".[231]

In summary, under the present law it is possible for a businessman to protect himself in contracting with an infant by taking an indemnity from an adult or by introducing an adult as a principal party. But in both situations he must ensure that the adult assumes a primary and not a secondary liability, for otherwise there is a considerable risk that these devices will fail.

### III. *Conclusion.*

This survey of the law of infants' contracts shows that despite the reduction in the age of majority, the law in this area is indeed ripe for reform. Probably the most serious defect is that much of the present law is extremely uncertain, even on basic questions. Instances of this uncertainty are to be found on such fundamental issues as the nature of an infant's contract for non-necessaries, whether it is truly voidable or non-binding unless ratified or even void, the requirement of ratification itself and especially the restitutionary obligations of an infant when he elects to avoid his contract. It may be speculated that there is not much prospect that this unpredictability will be diminished by the development of the common law, because many of the basic principles are now obscured in a mass of conflicting decisions and because few cases on infants' contracts now reach the higher courts, perhaps for the reason that they rarely involve large sums of money.

Those rules which can be discerned in the current law often create arbitrary and rather irrational distinctions. Their roots are to be found in the nineteenth century and even earlier periods and they often bear little relationship to present day realities. It is perhaps only necessary to refer to the strangely disparate group of contracts classified as truly voidable and to the treatment of the fraudulent infant in contrast to the innocent infant to support this contention.

On this basis, it is submitted that the present law requires a thorough overhaul to serve better the interest of both infant and adult. As such it is surely a timely subject for serious consideration by the various provincial Law Reform Commissions.[232]

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[231] *Wauthier* v. *Wilson, supra*, footnote 228, at p. 239; applied in *Pearson* v. *Calder, supra*, footnote 215.

[232] At the time of writing, the Alberta Institute of Law Research and Law Reform has a Report pending on this subject. Legislation has been enacted in New Zealand, Minors' Contracts Act 1969, No. 41, as am., and New South Wales, Minors' (Property and Contracts) Act, 1970, No. 60.