THE INSTITUTE OF LAW RESEARCH AND REFORM

WORKING PAPER ON INFANTS' CONTRACTS

SUMMARY

A. EXISTING LAW

1. INTRODUCTION

At common law, infants contracts may be classified as binding, voidable or void.

Binding contracts can be sub-classified as contracts for necessaries, loans for necessaries and beneficial contracts of service.

Voidable contracts are sub-classified as contracts that are binding until repudiated and contracts that are not binding until ratified. Void contracts are contracts which are manifestly prejudicial to the infant. All contracts that are not binding are void or voidable. Contracts that are binding until repudiated are those by which the infant acquires an interest in some subject matter of a permanent nature, which carries with it continuing obligations. All other voidable contracts are not binding until ratified and this class of contracts comprises all contracts which do not fall into any of the other categories.

2. BINDING CONTRACTS

(a) Necessaries

An infant is liable to pay a reasonable price for necessaries sold and delivered to him. Necessaries are goods suitable to the condition in life of the infant and to his actual requirements at the time of sale and delivery. The onus is on the Plaintiff to prove not only that the goods supplied were suitable to the condition in life of the infant but also that he was not

sufficiently supplied with goods of that class at the time of sale and delivery.

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

Peters v. Fleming (1840) 6 M. & W. 42, 152 E.R. 314

Ryder v. Wombwell (1868) L.R. 4 Ex. 32

Soon v. Watson (1962)38 W.W.R. 503 (B.C.) (Purchase of a house

Sale of Goods Act R.S.A. 1970, c. 327, Section 4, (2) & (3)

Necessaries are not confined to goods. Services supplied to the infant are also considered necessaries if suitable to the infant's station in life and to his actual needs. Thus infants have been held liable for medical and legal fees.

SEE Dale v. Copping (1610) 1 Bulst. 39, 80 E.R. 743;

Helps v. Clayton (1864) 17 C.B. (N.S.) 553, 144 E.R. 222;

Education has long been considered a necessary although the Ontario Court of Appeal has held that a contract for a correspondenc course in Accounting was not enforceable as a contract for necessari

International Accountants Society v. Montgomery [1935] O.W. N.3

Again the test is whether the education is suitable to the infants' station in life and to his actual needs.

It is a matter of controversy whether the infant's liability goes beyond the payment of a reasonable price for goods or services sold and supplied to him. Can an infant be held liable on an executory contract for necessaries? The solution to this question, it is argued, depends on whether the basis of the infant's liability is considered to be contract because he has agreed or quasi-contract because he has been supplied. Fletcher Moulton L.J. in Nash v. Inman (Supra) considered the obligation to

be quasi-contractual and in this he is supported by the Sale of Goods Act which was considered to be a codification of existing common law when it was originally enacted in England in 1893. On the other hand, Bulley L.J. in the same case, considered that liability was based on contract. There appears to be only one reported decision dealing with the problem and that is the English Court of Appeal decision in Roberts v. Gray [1913] 1 K.B. 520 in which it was held that a contract by an infant for necessaries and for his benefit is binding on him and cannot be repudiated by him on the grounds that it is partly executory. The contract in that case was one pursuant to which an infant agreed to go on a tour with a professional billiard player.

Cozens-Hardy M.R. at p. 525 referring to Lord Coke Co. -Lit 172 A stated that an infant's contract for necessaries is binding and it was laid down by Coke that that doctrine applied not merely to bread and cheese and clothes but to education and instruction, that is education and instruction in the social state in which the infant is and in which he may expect to find himself when he becomes an adult. The learned Judge went on to construe the agreement before him as one for teaching, instruction and employment and held that it was reasonable and for the benefit of the infant. Damages were awarded against the infant. This case has been criticised on the ground that the proper classification of this contract was that it was one of service and it is said that a beneficial contract of service is enforceable against the infant even when executory. The fact is that the learned Judge did consider that this particular contract was one for employment as well as for teaching and instruction.

(b) Loans for Necessaries

An infant is liable to repay money which he has borrowed and actually used for the purchase of necessaries. The lender is considered to be subrogated to the person who supplied the necessaries to the infant.

SEE Marlow v. Pitfield (1719) 1 P. Wms 558, 24 E.R. 516

It appears that not only must necessaries be purchased with the money borrowed but the purpose of the loan must be for the purchase of necessaries. Thus in Darby v. Boucher (1694) 1 Salk. 279, 91 E.R. 244, a loan to an infant was not enforced even though he had used the money to purchase necessaries.

An interesting Canadian case on loans to infants is Wong v. Kim Yee (1961) 34 W.W.R. 506 (Sask. D.C.) where it was said at page 508:

> "The law does not permit an infant to bind himself legally to repay a loan unless such loan is given for necessaries."

In that case loans had been made to an infant for car repairs, for a life insurance premium, for travelling expenses, for daily use, for a school transfer, school books and for a jacket. The school transfer, school books and jacket were held to be necessaries. The other items were held not be be necessaries. Since the infant was single and had no dependants, his life insurance policy was not considered to be a necessary despite the fact that the Saskatchewan Insurance Act provided for the enforceability of insurance contracts made by infants above a certain age. Accordingly, this case in effect holds that the fact that a statute makes an infant's contract enforceable does not convert the contract into one for necessaries, thereby making

the infant liable to repay a loan obtained for the purpose of entering into that contract.

(c) Beneficial Contract of Service

In addition to recognizing the need for an infant to maintain himself in the condition in life to which he is accustomed and therefore making him liable for necessary goods and services supplied to him and thus encouraging adults to contract with him for these necessaries, the law also recognizes the need for infants to make a living and enables them to make binding contracts for service, provided they are beneficial to him. The fact that there are one or two clauses in a contract of service to the disadvantage of the infant, does not necessarily render the whole contract unenforceable. If the agreement as a whole is for his benefit, it is enforceable against him. There is no half way house. If the contract is for the infant's benefit, it is fully enforceable. If it is not, it is void. A Court will not make a prejudicial contract enforceable by severing the clauses that offend it.

SEE Clements v. London & Northwestern Railway Company (1894), 2 Q.B. 482 (Eng. C.A.)

Miller v. Smith & Company and C.P.R. [1925] 2 W.W.R. 360 (Sask. C.A.)

Doyle v. White City Stadium Limited [1935] 1 K.B. 110 (Eng.C

Slade v. Metrodent Ltd. [1953] 2 Q.B. 112.

Under this head fall not only contracts for apprenticeship and service but also contracts ancillary and incidental to contracts of service and also contracts analogous there

Thus in Doyle v. White Stadium Limited (Supra) the Plaintiff had applied for a license as a boxer and in return for receiving the license from the British Boxing Board, agreed to adhere strictly to the Board's rules as amended and enlarged from time to time. It was held that this contract was sufficiently akin to a contract of service to be one by which the infant might properly be bound. The license was a means by which the infant might enter into a contract of service or performance as a boxer and thereby earn his living.

Also in Chaplin v. Leslie Frewin (Publishers) Ltd. [1966] Ch. 71 (Eng. C.A.), the sixteen year old Plaintiff contracted with the Defendant to write his autobiography, the Defendant to have the copyright and exclusive right to publish and sell. The Plaintiff was seeking to avoid the contract. It was held that this was a contract of a class which would be binding if on the whole it was for the infant's benefit. Authors and composers can make contracts to sell copyright in return for royalties. Such contracts were analogous to contracts of service in that they enabled the infant to earn his living. Likewise for the young man with a good story to tell. The question was was the contract for the Plaintiff's benefit or not and the Judges disagreed on that point.

Despite the fact that the Courts in these cases recognize the infant's need to earn his living and maintain himself, thus enabling him to enter into binding contracts for necessaries and contracts of service and apprenticeship and other contracts analogous to contracts of service, all of which can be enforced against him, they have not considered it wise apparently

for infants to go into business on their own because they have consistently held that trading contracts are not binding on the infant.

Thus in Pyett v. Lampman [1923] 1 D L.R. 249, 55 O.L.R. 149, the Ontario Court of Appeal said that an infant has not sufficient discretion to carry on business or trade and is not liable for goods supplied to him to enable him to carry on business or in the course of any trade, business or occupation and an inquiry as to what is necessary to enable an infant to enter into or carry on a trade is irrelevant. In that case, the infant purchased a car to enable him to go into the business of peddling fish and to obtain quickly oil and gas for a tractor which he used on the farm of which he was a tenant. It was held he was not liable for the purchase price of the car.

SEE Also ex.p. Jones (1881) 18 Ch. D. 109 (Eng. C.A.);

R. v. Rash (1923) 53 O.L.R. 245;

Mercantile Union Guarantee Corporation Ltd. v. Ball [1937] 2 K.B. 498 (Eng. C.A.)

It was held in one case that an infant was liable for so much of the goods supplied to him to trade with as were consumed as necessaries in his own family. The infant was a wholesale grocer:

Tuberville v. Whitehouse (1823) 1 Car. & P. 94 171 E.R. 1116.

Thus an infant is not liable to pay his trade debts and if persons chose to supply goods to him in his trade on credit, they take the chance of being paid.

It has been held that if an infant makes an express representation that he is of full age thereby inducing an adult to trade with him, he has an equitable liability resulting

from the fraud and the creditor can prove in his bankruptcy:

ex. p. Unity etc. Banking Association 3 De. G. and J. 63 44 E.R. 1192.

This appears to be a narrow exception which will not be extended to the general rule that an infant will not be liable to pay for his trade debts: Cf ex. p. Jones (Supra); R. Leslie Ltd. v. Shiell [1919] 3 K.B. 607.

3. VOIDABLE CONTRACTS

(a) Contracts that are binding until repudiated.

These are contracts by which an infant acquires an interest in some subject matter of a permanent nature which carries with it continuing obligations. Until he repudiates the contract during his infancy or within a reasonable time thereafter he is bound to discharge these obligations. Contracts falling under this class include lease agreements, partnership agreements, contracts for the purchase of shares and marriage settlements.

SEE eg. Northwestern Railway Co. v. M'Michael (1850 5 Ex 112, 155 E.R. 49 (Shares)
Edwards v. Carter [1893] A.C. 360 (marriage settlement)
Lovell and Christmas v. Beauchamp [1894] A.C. 607
re Prudential Life Insurance Co. [1918] 1 W.W.R. 105 (Man. S.C.) (Shares)
re Staruck [1955] 5 D.L.R. 807 (Ont. S.C.)

In Lovell and Christmas v. Beauchamp, it was said at page 611 that there was nothing to prevent an infant trading or becoming a partner with a trader and until his contract of partnership be disaffirmed, he was a member of the trading firm. However, he could not contract debts by such trading. Although goods may be ordered for the firm he does not become a debtor in

respect of them. The adult partner can insist that the partnership assets be applied in payment of liabilities of the partnership and these assets are available to the creditors.

An infant will be liable for all obligations that have accrued under the contract before he repudiates. For example, he must pay rent which has fallen due before he repudiates the lease agreement. He must repudiate within a reasonable time after infancy and what is a reasonable time depends on the circumstances. In Edwards v. Carter (Supra) five years was held too long in the circumstances and the factors which influenced their Lordships were that the rights of others had been affected and the infant's father who had created the marriage settlement would no doubt have made a different settlement or changed the settlement had the infant repudiated after he had come of full age before the father's death.

Once an infant has affirmed a contract after he has attained his majority, he cannot thereafter repudiate although it might otherwise be held that he had repudiated within a reasonable time after attaining his majority. Thus in re Prudential Life Insurance Co. (Supra) an infant had purchased some shares. After he attained his majority, he accepted a dividend. The company later went bankrupt and he applied to have his name removed from the list of contributories in the winding up of the company. It was held first that he had affirmed the contract and he could not thereafter repudiate and secondly that two and a half years after his majority was too late to repudiate.

(b) Contracts that are not binding until ratified.

This residuary class of contracts comprises all contracts made by infants that do not fall under any other head. Probably the most common types of contract falling under this class are those where an infant purchases goods other than necessaries on credit, and actions on promissory notes where the money borrowed has been used for the purchase of non-necessaries

SEE eg. Loudon Manufacturing Co. v. Milmine (1907) 14 O.L.R. 532; O.L.R. 53;

Great West Implement Co. v. Grams (1908) 8 W.L.R. 160 (Alta)

A ratification by the infant to be valid must be in writing and signed by him or his agent. This is because English Law as of July 15th, 1870, is part of the law of Alberta (See Brand v. Griffin (1908) 9 W.L.R. 427) and Lord Tenterden's Act 9 Geo. IV, c. 14 is a part of that law. This Act provides:

> "No action shall be maintained whereby to charge 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."

Despite this there have been two cases at least where an infant after attaining the age of majority has been held to have ratified a contract by implication.

SEE re Hutton [1926] 4 D.L.R. 1080 (Alta S.C.) and Blackwall v. Farrow [1948] O.W.N. 7

4. VOID CONTRACTS

It must be remembered that an infant can

enforce against an adult all contracts which have been discussed thus far. All voidable contracts for example, are binding on the adult until they are avoided by the infant. The privilege of avoidance is that of the infant only.

SEE eg. Johansson v. Gudmundson (1909) 11 W.L.R. 176 (Man. C.A.)

This is not the case with a void contract. Such contracts are contracts which are manifestly to the prejudice of the infant and as such they are not enforceable by or against him.

SEE Phillips v. Great Ottawa Development Co. (1916) 38 O.L.R. 315 (C.A.)
Butterfield v. Sibbitt and Nipissing Electric Supply Co. [1950] O.R. 504.

It appears that any contract under which an infant may be subject to a penalty or forfeiture will be declared void although one might well ask why this should always necessarily be so if the contract as a whole is for his benefit and if there are good reasons for the penalty. However,

SEE ex. p. Beam v. Beatty (1902) 4 O.L.R. 554 (C.A.)
Ivan v. Hartley [1945] O.W.N. 627
ex. p. Baylis v. Dainely (1815) 3 M & S. 477, 105 E.R. 689.

In one case it has even been said that a contract of loan is prejudicial to an infant and therefore void but this statement must be incorrect;

Upper v. Lightening Fastener Employees Credit Union (1967) 9 C.B.R. (N.S.) 211 (Ont. C.C.)

A contract under which necessary goods or services have been supplied to the infant will be held void if it is prejudicial to the infant. See for example Fawcett v.Smethurst (1914) 84 L.J.K.B. 473 where the infant hired a motor car on terms

that it should be at his risk. It was held that although such a hiring might be a necessary, it would not be so if onerous terms such as that the car should be at the infant's risk formed part of the contract of hiring. The effect would be to render him liable for a loss due to a cause not depending on want of skill or care on his part.

Similarly if a contract of service is prejudicial to the infant, then it also will be void.

SEE DeFrancesco v. Barnum (1890) 45 Ch. D. 430 and Sir W.C. Leng and Co. Ltd. v. Andrews [1909] 1 Ch. 763 (Eng. C.A.)

5. RESTITUTION

Once a contract that has been fully or partly performed is avoided by the infant or is declared void, to what extent can the infant or the adult claim restitution? Obviously if the infant avoids the contract or the contract is declared void when it is still unperformed, neither party has parted with any consideration and the question of restitution does not arise. The problem does arise when one or both parties have partially or fully performed the contract.

(a) Where the contract is fully performed by both parties

The principle in these restitution cases is usually stated to be that unless there has been a total failure of consideration on the part of the adult, the infant cannot obtain restitution. Accordingly, if the adult has fully performed his

side of the contract there has been no failure of consideration and the infant cannot obtain the return of the consideration he has parted with.

Thus in Pearce v. Brain [1929] 2 K.B. 310, the Plaintiff infant had exchanged his motorcycle and side car for a second hand motor car. The infant drove the car for seventy miles whereupon it broke down because of a defect in the back axle. This contract of exchange was not for necessaries and under the English Infant's Relief Act, 1874, which has been held not to be in force in Alberta, the contract was "absolutely void". It was held that the action by the infant Plaintiff for the recovery of the motorcycle and side car which he had transferred to the Defendant, would not succeed unless the Plaintiff could show a total failure of consideration. This he could not do since the adult Defendant had performed his side of the contract by delivering the second hand motor car to him.

Similarly in Fannon v. Dobranski (1970) 73 W.W.R. 371 (Alta. D.C.), the Plaintiff infant bought a car for which he paid in full by cash. He took delivery and drove it for seventy miles when the transmission broke down. He returned the car to the Defendant's home and left it there with its keys and a note repudiating the contract. He thereafter sued to recover the purchase price. His action was dismissed, one of the grounds being that he had received valuable consideration having derived some benefit under the contract.

The Court also held however, that the infant could not repudiate the contract because the contract had been executed, fully completed and discharged by performance and so

there were no remaining obligations to be avoided and nothing left to repudiate.

It is doubtful that this is an accurate statement of law since some Canadian cases have allowed an infant to repudiate a fully performed contract and recover the consideration he has paid provided he can restore the adult party to his former position and in fact does so. Thus in Sturgeon v. Starr (1911) 17 W.L.R. 402 (Man.), it was held that the infant Plaintiff was not entitled in the circumstances to recover monies paid for the rent of premises and for the purchase of goods and fixtures because he could not restore the other party to his former position. The Court stated the principle to be as follows:

> "It is settled beyond any dispute that 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 statement of the law was followed in the unreported 1964 Alberta District Court decision in Bo-Lassen v. Josiassen. There the seventeen year old infant Plaintiff had purchased a motor cycle, had paid for it and had taken delivery. He discovered it to be in a shocking state of repair and so repudiated the contract. It was found that by returning the motor cycle he could place the Defendant in statu quo since he hadn't used it and it was in the same condition as when he had purchased it. Thus it was held that since the Defendant could be restored to his former position, the infant could recover the purchase price on the return of the motor cycle.

(b) Where the contract has been partly performed by one party and either partly or wholly performed by the other party.

The infant cannot recover the consideration he has paid because there has been no total failure of consideration

SEE Holmes v. Blogg (1817) 8 Taunt 308, 129 E.R. 481, (rent paid on lease)

Short v. Field (1914) 32 O.L.R. p. 95 (C.A.) (Payment of deposit by infant on purchase of house and lot. Infant went into possession and controlled property).

In Steinberg v. Scala (Leeds) Limited [1923] 2 Ch, 452 (Eng. C.A.), the infant Plaintiff applied for shares and paid an amount due on application. The shares were alloted to her and she paid the amounts due on allotment and on the first call. No dividends were received by her nor did she attend company meetings. While still under age, she repudiated the contract and asked for repayment of the money paid. She sued to recover this money and it was held that the only ground on which the Plaintiff could succeed was by showing that there had been a total failure of consideration and this she failed to do since she had received something which had monies worth. This case should be contrasted with Hamilton v. Vaughan - Sherrin Electrical Engineering Company [1894] 3 Ch. 589 where it was held on the same facts that the infant shareholder having derived no advantage from the contract, the consideration had wholly failed and she was entitled to prove in the winding up for the amount paid by her on the shares.

If the principle set out in Sturgeon v. Starr (Supra) to the effect that restitution is possible even where

there has been no total failure of consideration provided the other party can be restored to his former position is accepted, these two cases might be distinguishable on the grounds that in Steinberg v. Scala, the shares at one time had had substantial value and to restore these shares would not be restoring the Defendant to his former position. In the Hamilton case on the other hand, the value of the shares may not have changed and by returning them, the infant would be restoring the Defendant to its former position. One is bound to say, however, that this principle was not discussed in these two cases.

There is a suggestion in one English case that the principle is a valid one and that case is Valentini v. Canali (1889) 24 Q.B.D. 166 (Div. Ct.). There the infant Plaintiff agreed with the Defendant to become the tenant of a house and to pay for the furniture therein. The Plaintiff paid the Defendant part of the agreed sum and occupied the house and used the furniture for several months. It was held that the Plaintiff was not entitled to recover back the amount paid. It was said that when an infant has paid for something and used it, it is contrary to natural justice that he should recover back the money which he had paid. Since he had had the use of the furniture, he could not give back this benefit or replace the Defendant in the position in which he was before the contract; the implication being that if he could have replaced the Defendant in the position in which he was before the contract, restitution would have been ordered.

This principle is not referred to in Chaplin v. Leslie Frewin (Publishers) Ltd. [1966] Ch. 71 (Eng. C.A.) where the sixteen year old Plaintiff had assigned his copyright in a future work but in that case the contract as a whole was binding on him because it was for his benefit. The Court did say however that if an infant is entitled to revoke a contract and does so, because it is void or voidable, nevertheless property and interests which have previously been transferred by him for value cannot be recovered by him. There was no mention of the restoration principle.

In Coull v. Kolbuc (1969) 68 W.W.R. 76 (Alta. D.C.) the infant Plaintiff paid $50.00 as a deposit on the purchase price of a second hand sports car, not a necessary, and took delivery of the vehicle of which he enjoyed some week's use before dissatisfied with its condition, he returned it to the vendor. He now sought the return of his money. It was held that he could not succeed since he had derived a real advantage from the contract. Whether the contract was void or voidable, this fact disentitled him either to repudiate or to the return of his money. The statement in this case to the effect that an infant can not repudiate a contract whether void or voidable once he has derived some advantage from it, is open to question. This implies that the adult could enforce the contract against him which is not true. Also such a view leaves no room for the operation of the restoration principle.

(c) Where the contract is fully or partly performed by the infant and unperformed by the adult.

If the contract has been unperformed by the

adult, then clearly there has been a total failure of consideration, and the infant may recover what he has parted with. The old case of Wilson v. Kearse (1800) Peake Add. Ca. 196, 170 E.R. 243 is to the contrary but is now considered to have been wrongly decided. The infant Plaintiff had contracted to purchase the goodwill and stock of a public house and had paid a deposit of 20 pounds. He thereafter refused to complete and the Defendant sold the public house to someone else. It was held that the infant could not recover the money back unless he could show fraud.

This principle holds good whether the contract is void or voidable. Thus in Phillips v. Greater Ottawa Development Co. (1916) 38 O.L.R. 315 (C.A.) the infant had contracted to purchase land from the Defendant and for the payment during his minority of the purchase money with a forfeiture clause under which in the event of default, he might lose the land and everything he had paid. Under the contract, the Plaintiff did not get possession nor selling title nor a right to specific performance. It was held the contract was to his prejudice and so not merely voidable but void. Judgment was nevertheless given for the recovery of payments made since he had received no valuable consideration for them. It was stated that if an infant pays a sum of money under a contract, in consideration of which the contract is wholly or partly performed by the other party, he has no right to recover the money back, but if the infant has received no consideration at all, he can recover.

In Altobelli v. Wilson [1957] O.W.N. 207 (C.A.) the infant contracted to construct a house and abandoned it after the house was partially completed. The infant sued for payment

for the work done. It was held first that the contract was to the Plaintiff's disadvantage since he had no opportunity to obtain any benefit from it, it was detrimental to his interest and therefore void. Nevertheless the infant was held entitled to the value of his contribution for the benefit of the other since the infant received no benefit or consideration in return. The building owner was not entitled to be enriched by what was done by way of furnishing labour or the supply of material by the infant.

Two cases of voidable contracts where the infant recovered what he had parted with because he had received no benefit are:

> Nicklin v. Longhurst [1917] 1 W.W.R. 439 (Man.C.A.)
> LaFayette v. W.W. Distributors & Co. Ltd. (1965), 51 W.W.R. 685 (Sask. D.C.).

(d) Where the contract is unperformed by the infant and fully or partly performed by the adult.

The principle here is usually said to be that the adult cannot obtain restitution unless the infant has been fraudulent and remains in possession of the consideration he has received from the adult. Otherwise the Court would in effect be enforcing the contract against him.

Thus in Clarke v. Cobley (1789) 2 Cox 173, 30 E.R. 80, the Defendant's wife made two promissory notes in favour of the Plaintiff before marriage. The Defendant after marriage gave the Plaintiff his bond for the two notes and the Plaintiff delivered them up to him. Sued on the bond, the Defendant pleaded infancy. It was held that the Defendant must deliver back the notes

The parties must be put in the same situation they were in at the time the bond was given, the principle being that an infant shall not be allowed to take advantage of his own fraud. SEE also Lempriere v. Lange (1879) 12 Ch. D. 675.

In R. Leslie Ltd. v. Sheill [1914] 3 K.B. 607 (Eng. C.A.) the infant Defendant by fraudulently representing that he was of full age, induced the Plaintiffs to lend him two sums of 200 pounds each. To an action by the Plaintiffs to recover the amount on the ground of fraudulent misrepresentation or for money had and received, the Defendant pleaded infancy and it was held that this defence was a good answer, since if the Court held otherwise, it would be enforcing against him the contractual obligation entered into while he was an infant. Restitution stops where repayment begins.

The Canadian case of Louden Manufacturing Co. v. Milmine (1907) 14 O.L.R. 532, 15 O.L.R. 53 goes one step further than only allowing restitution of the very consideration recovered. It was held in an action against an infant for the price of certain articles sold to him on credit that the Plaintiff could recover the value of the goods in the infant's possession at the time of the infant's repudiation of the contract since the effect of repudiation was to revest the property in the vendor. There was no mention of fraud in this case and one would think by forcing him to choose between returning the goods and paying the value, the Court is in effect enforcing a voidable contract.

Two other cases should be mentioned in this connection. In Cowern v. Nield [1912] 2 K.B. 419, an infant trader entered into a contract for the sale of goods and was

paid the price by the purchaser but subsequently failed to deliver the goods. It was held that the purchaser could not recover the price in an action for money had and received even though the contract was for the infant's benefit unless it could be proved the cause of action in substance arose ex delicto. A new trial was ordered to give the Plaintiff an opportunity to prove fraud. R. Leslie Ltd. v. Sheill (Supra) appears to have overruled this case insofar as it implies that the purchase price could have been recovered if fraud had been proved.

The Leslie case also appears to have overruled Stocks v. Wilson [1913] 2 K.B. 235 where the infant Defendant by fraudulently representing that he was of full age, induced the Plaintiff to sell and deliver certain furniture and effects of which she was owner. He promised to pay at a future date and gave her a licence to resume possession if not paid. After the purchase, the Defendant sold some of the goods and with the knowledge and assent of the Plaintiff, granted a Bill of Sale of the residue as security for an advance of 100 pounds. He failed to pay the purchase money. Judgment was obtained by default against him, a receiving order was made and set aside on appeal. This was an action for an Order to pay the reasonable value of the goods. It was said that the Courts prevent an infant from retaining the benefit of what he has obtained by reason of his fraud. There would be no damages for fraud. However, if he obtains property by fraud, he must restore it. This applied to money also. It follows that if an infant has wrongfully sold property acquired by a fraudulent misrepresentation as to age, he must account for the proceeds to the party defrauded.

6. THIRD PERSONS

What is the position of a third person to whom an infant has resold goods acquired by him pursuant to a void or voidable contract? Clearly the third person should not receive good title if the vendor to the infant retained ownership under a Conditional Sale Contract which he has properly registered. It is where this is not the case that the problems arise.

In McBride v. Appleton 1946 O.R. 17 (C.A.) the infant bought a motor cycle from the Plaintiff pursuant to a Conditional Sale Agreement. The infant resold the motor cycle before the price was fully paid and after intermediate sales, it came into the Defendant's possession. The Plaintiff claimed it and it was held he was entitled to succeed. The contract was voidable. Since it had not been avoided by the infant, the Defendant could not set up its invalidity to defeat the Plaintiff's claim. There was one dissenting Judge who found the contract void and since the action was based on a void contract, it failed. The Plaintiff was estopped from claiming ownership because he had given the insignia of ownership to the infant and had not registered the contract. The Defendant was an innocent purchaser for value without notice.

This is a surprising decision because if in fact the contract had not been registered, the Plaintiff was an innocent purchaser for value without notice and should have been entitled to retain the motorcycle. It might be said that the opposite conclusion should have been reached by the dissenting

Judge on finding that the contract was void, since if a contract is void, surely title does not pass. His calling in aid the principle of Estoppel however, may in fact be a very good way around such an unfortunate conclusion.

In Canadian Acceptance Corporation Ltd. v. West End Motors Ltd. and Frost [1953] O.W.N. 961 (C.A.), the infant was purchasing a vehicle under a Conditional Sale Contract and resold the vehicle to the Defendant. This was an action to recover the vehicle and the Defendant argued the contract was void because of infancy and accordingly restitution was not a remedy available to the Plaintiff. It was held the contract was voidable not void, the result of which is that the title remained in the conditional seller and no one could take advantage of the infant's right to avoid the contract except the infant himself.

This case again surely would only be correct if the Conditional Sale Contract had been registered or the Defendant was not an innocent purchaser for value without notice. Neither of these facts appear in the Judgment.

It appears that the Defendants in both these Ontario cases argued they were in the same position as the infant which, as the Courts held, they are clearly not. It is submitted that such cases should not be argued or dealt with on the question of infancy at all, but on the issues of Estoppel in the event the contract was void and on the issues of failure to register or innocent purchaser for value without notice if the contract was voidable.

7. TORT AND INFANTS CONTRACTS

An infant cannot be made liable in tort if to do so would be indirectly to enforce a contract unenforceable against him. The tort must be independent of a contract before an infant can be held liable and whether it is so or not appears to depend on whether what the infant has done was contemplated by a contract, a difficult decision to make in most cases.

Two cases usually cited to illustrate the distinction between a tort independent of contract and a tort contemplated by a contract are Jennings v. Rundall (1799) 8 T.R. 33, 101 E.R. 1419, where the infant hired a mare for riding and injured her by excessive and improper riding and Burnard v. Haggis (1863) 14 C.B. (N.S.) 45, 143 E.R. 360, where the infant hired a mare on the understanding that she would not jump the mare. She lent the mare to a friend who did jump it as a result of which the mare was killed. In both cases, the wrongful act would not have been committed had no contract been made. Nevertheless, in the first case, the infant was held not liable and in the second case, the infant was held liable, the distinction appearing to be that in the first case, the act contemplated by the contract was riding and the infant could not be liable, however immoderately he rode the horse and in the second case the hiring of the horse was for riding only and this contract did not contemplate the act of jumping.

Other cases that may be usefully contrasted in this connection are Fawcett v. Smethurst (1914) 84 L.J.K.B. 473 and Ballett v. Mingay [1943] 1 K.B. 281 and Victoria-U-Drive

Yourself Auto Livery Ltd. v. Wood [1930] 2 D.L.R. 811 (B.C.C.A.) and Dickson Bros. Garage and U. Drive Ltd. v. Woo Wai Jing (1958) 11 D.L.R. (2d) 477 (B.C.C.A.)

In Noble's Limited v. Bellefleur (1963) 37 D.L.R (2d) 519 (N.B.C.A.) it was held that an infant cannot be liable for a tort committed in the course of doing an act contemplated by a contract which as an infant, he is entitled to avoid. The infant in this case purchased a car by instalments and the contract provided the car was to be at his risk. He destroyed it within a day of purchase and it was held the seller could not recover the balance. Although the infant had misrepresented his age, the most that could be required of him under the restitution principle was to restore the very goods obtained and it was wrong to require him to pay their value.

8. GUARANTY AND INDEMNITY

A guarantor undertakes to answer for the liability of another. If the person whose obligation he guarantees fails to perform, then the guarantor has to perform it. If it turns out however, that this person is not liable, then the guarantor has no liability. Thus if an adult guarantees the liability of an infant under a contract which subsequently turns out to be void, that adult cannot be held liable if the infant fails to perform. Thus in Coutts v. Brown - Lecky [1947] 1 K.B. 104, the Defendant guaranteed a loan by way of overdraft made by a bank to an infant. This loan was void under the Infants Relief Act, 1874, and it was held that the guarantors could not be made liable since the infant himself was not liable.

On the other hand, where a person indemnifies another in respect of a contract which the other has made with an infant, he is primarily liable. He is in fact undertaking to see the Plaintiff paid whether the infant is liable on the contract or not. Thus in Feldman (Crosstown Motors) v. Horn and Rae (1960) 33 W.W.R. 568 (Alta. D.C.), the infant Defendant Horn bought a car and together with the Defendant, Rae, signed a Conditional Sales Contract and a Promissory Note for the purchase price. The note was severable from and made no reference to the Conditional Sales Contract. It was held that Rae was not a guarantor. Her undertaking was to see the Plaintiff paid, which was the real consideration for the sale and she was liable.

Similarly in Yeoman Credit Ltd. v. Latter [1961] 1 W.L.R. 828 (Eng. C.A.), a finance company sold a car on hire purchase to an infant. An adult signed a form undertaking to indemnify the finance company against loss resulting out of the hire purchase agreement. It was held that this was a contract of indemnity, not guarantee and therefore enforceable.

This is not the place to discuss further the distinction between guarantee and indemnity which is a very technical one. Suffice it to say that it is difficult to see why the guarantor should escape liability since invariably, the guarantee or indemnity has been sought because the main contracting party is an infant. In Coutts v. Brown Lecki (Supra) it was suggested that where the fact of infancy is not known to all the parties, then the guarantor should be liable. One would have thought that the opposite situation should have been the case also.

9. SPECIFIC PERFORMANCE

This remedy is not available to one party unless it can be used against him. This principle is known as The Want of Mutuality Rule and has special application to the infant's contract situation where the contract is voidable. Because an adult cannot obtain specific performance against an infant, an infant cannot obtain specific performance against an adult.

SEE Lumly v. Ravenscroft [1895] 1 Q.B. 683 (Eng. C.A.) (adult)
Flight v. Bolland (1828) 4 Russ. 298, 38 E.R. 817. (infant)

It has been said that where an adult party has received all the benefits from a contract to be received by him, an infant can obtain specific performance.

Melville v. Stratherne (1878) 26 Gr. 52 at pp. 64-65.

B. DEFECTS IN THE LAW

As with much of the common law, the law has been developed by judicial precedent in piece meal fashion and with a lack of attention to policy considerations. Basically, the policy of the law appears to have been that infants must be protected from their own immaturity and inexperience. Immaturity and inexperience lead to improvident contracts and exploitation on the part of adults. The law does however recognize that some degree of contractual capacity is required. An infant must be fed, must be clothed and he must have a roof over his head, must be educated and he must be able to earn a living. Thus to

encourage adults to contract with infants, certain contracts which fulfill these needs of the infant are binding on the infant. Hence the categories of necessaries, loans for necessaries and beneficial contracts of service. While the law recognizes the need of an infant to earn a living, it does not consider that an infant is mature or experienced enough to enter into business on his own account. Thus, contracts made in the course of trade are not considered binding on the infant. These contracts fall into the same class as all other contracts made by infants which are either void or voidable. They are void if clearly to the prejudice of the infant. Voidable otherwise.

It seems that the main defect in this part of the law is that it is difficult to apply to concrete facts and is therefore uncertain in many areas.

For example, into what category does the proposed contract fall? This can often not be determined by the adult, even if he knows what the law is. How is he to determine whether an infant needs the articles he is wanting to purchase and whether they are suitable to his condition in life? An infant comes to borrow money from an adult and tells him that it is to be used for necessaries. How is the adult to be sure that it is so used, because he cannot recover the money in an action, unless the money is used for necessaries? He also has the problem of knowing whether the articles the infant is going to buy are in fact necessaries. Thus the policy of the law is being defeated here since it can never be clear at the time of contracting, whether the contract is going to be binding or not.

A further defect discouraging adult infant contracts is the fact that there is no consistent or settled law with regard to restitution where an infant avoids the contract and consideration has passed. Often in this respect the law appears to enable the infant to profit materially from his infancy, particularly where he has been fraudulent as to his age and has parted with the consideration received by him from the other party. If he has not been fraudulent, there is no restitution from the infant.

What has happened is that adults either will either not contract at all with infants or they will do one of two things, either see that another adult is equally bound with the infant or see that the infant has executed his part of the contract at the same time or before he performs his obligations under the contract. Adults are unwise to deal with infants without these safeguards.

C. PROPOSALS FOR REFORM

1. THE LATEY COMMISSION

In England in 1965 a committee was appointed by the Lord Chancellor to examine the problem of the age of majority. The committee which was under the chairmanship of Mr. Justice Latey reported in July 1967 recommending that the age of majority be lowered to eighteen (18). They also made sweeping recommendations with respect to the law relating to infants' contracts. The committee decided that it did not wish to do anything to enlarge the possibility of an infant being

sued for damages for breach of contract. The main purpose of the rule as to infancy was to protect the infant against his own immaturity and inexperience. Nothing should therefore be done to make it more difficult for the infant to withdraw from an unwise transaction. On the other hand the committee believed the law should not enable an infant to profit materially from his infancy as it does at present. The committee therefore saw the operation of the future law on what they termed restitutionery rather than contractual principles. The general principle should be that contracts are not binding on those under the age of majority. There would be no exceptions. Infants would however be liable to restore benefits they had received if they were unwilling to perform their part of the contract.

Accordingly, the proposals were as follows:

1. All contracts entered into by an infant should not be enforceable against him by action or otherwise.

2. Where as infant receives money, property or services under a contract which he fails to perform, he should be liable to make restitution by accounting to the other party for the benefit he has received.

3. The Courts should have wide discretionary powers in restitutionary actions including the power to relieve the infant from liability to account to such extent as to sees fit.

4. Where an infant has parted with money or property under a contract which is unenforceable against him, he should be entitled to the return of the money or property subject to an obligation to account to the other party for any benefit he has received, if the infant resiles from the contract before it is fully performed.

5. The Court should have a discretion whether to give effect to any term in an infant's contract of service or apprentic

ship if it is of the opinion that such term is unreasonable harsh or not in the infant's interest.

6. Infants should be liable in Court for deceit unconnected with age even if the effect would be indirectly to enforce a contract.

7. Infants should remain exempt from liability in tort for deceit where misrepresentation as to age has induced other parties to contract with them.

8. Any contract by a person of full age to accept liability in the event of the failure by an infant to carry out what he has undertaken to do should be enforceable notwithstanding the unenforceability or nullity of the infant's undertaking.

9. The guarantee or indemnity of an infant's undertaking should be enforceable only if it is signed in a space marked in such a manner and accompanied in the document by such words as may be specified. The wording should be short but designed to draw to the signatories attention just what he is letting himself in for. A possible form of what the wording mught be was suggested by the committee.

> "If you sign this YOU may become personally liable to pay the money. Sign it only if you want to be legal bound."

Finally, it appears that the committee believed that an infant should be able to ratify on attaining his majority because its members were quite clear that while protection against contractual liability is needed by persons under the age of majority, there is no justification for protecting adults against the consequences of fresh contracts or of ratification. They did not suggest that ratification should be in writing.

The Latey proposals have been criticized, particularly by the 1969 Ontario Law Reform Commission's Report on the age of majority and related matters. They felt that despite the judicial discretion to relieve the infant the whole emphasis on protection would shift since the infant would be liable to account for any benefit he had received and therefore would be indirectly required to perform the contract. The Ontario Law Reform Commission apparently felt that it was fine to require an infant to account for any benefit he retained but the Commission wasn't at all sure that the infant should absorb the loss in situations where the infant no longer retained the benefit he received or its value. The Commission recognized the wide judicial discretion proposed by the Latey Commission which would leave it up to the Judge to decide to what extent an infant would have to make restitution but felt that this would cause considerable uncertainty in many ways. In answer to this criticism, it is clear that wherever the law calls for the exercise of judicial discretion there is uncertainty and this reflects a perennial problem of the law. To what extent should it be certain as opposed to flexible? The greater the flexibility the greater the uncertainty but at the same time the more scope there is in the individual case for doing justice. The greater the certainty the easier it is to resolve a dispute outside the Courts and otherwise regulate human relationships.

2. THE NEW ZEALAND SOLUTION

The New Zealand Minor's Contracts Act, 1969, has created two categories of infant, those under eighteen (18)

and those between eighteen (18) and twenty-one (21) and has dealt with these two categories differently with respect to their contractual capacity.

Section 5 of the act provides that every contract which is entered into by a minor who has attained the age of eighteen (18) years shall have effect as if the minor was of full age. However, if the Court is satisfied that at the time the contract was entered into, the consideration for the minor's promise was so inadequate as to be unconscionable, or any provision of any such contract imposing an obligation on any party thereto who was a minor was harsh or oppressive, it may in the course of any proceedings or on application made for the purpose, cancel the contract or decline to enforce the contract against the minor or declare that the contract is unenforceable against the minor, whether in whole or in part and in any case may make such order as to compensation or restitution of property as it thinks just.

Section 6 provides that every contract entered into by a minor who has not attained the age of eighteen (18) years, shall be unenforceable against the minor. However, if the Court is satisfied that any such contract was at the time the contract entered into, a fair and reasonable one, it may in its discretion in the course of any proceedings, or on application made for the purpose, enforce the contract against the minor or declare that the contract is binding on the minor whether in whole or in part and in any case, may make such order entitling the other party or parties to the contract on such conditions as the Court thinks just to cancel the contract and may make

such order as to compensation or restitution of property as it thinks just.

Two other sections are of interest. Section 4 provides that the minor who is or has been married shall have the same contractual capacity as if he were of full age and Section 9 provides that every contract entered into by a minor shall have effect as if the minor were of full age if before the contract is entered into by the minor, it is approved under this section by Magistrate's Court.

The Section concerning married minors is an interesting one because as we have seen, the law seeks to protect an infant from his lack of judgment. Does an infant achieve maturity or judgment on marriage? One would have thought not although the rationale for this section is presumably that a married minor has a greater need for making binding contracts than an unmarried minor.

The point made by the Ontario Law Reform Commission with respect to the Latey proposals applies equally to the New Zealand Minor's Contracts Act. Uncertainty is created because of the wide discretion given to the Courts as to enforceability of any infants contracts and also as to compensation and restitution. Of course, where a contract is a really important one, it is possible to make its enforceability certain by invoking the provisions of Section 9 and obtaining the approval of a Magistrate's Court.

The legislature in Alberta has now determined that the age of majority should be eighteen (18) and has therefor recognized what has been said in many committee reports, namely that young persons are maturing earlier these days and

are capable of taking on responsibility in looking after their own affairs at the age of eighteen (18). It is not recommended that young persons between eighteen (18) and twenty-one (21) years be placed in a special position with regard to the law of contract, at least at this time. If experience with the new age of majority demonstrates that some special protection is required for this age group over and above the protection adults already receive, then the matter should be reconsidered.

3. THE ONTARIO LAW REFORM COMMISSION

This Commission concluded that recommendations on the law of infants' contracts should not be made at the time they reported because if the age of majority was lowered, it would be salutary to observe how the law of infants' contracts worked in respect of those under the reduced age. Also a study ought to be made of credit granting practices and collection procedures if meaningful proposals for change were to be made. The Commission did not consider the best solution to be to impose on infants a liability to account for benefits received. Nor would the imposition of liability to account only where a benefit is retained, likely achieve practical results. The Commission also felt that the removal of the eighteen (18) to twenty-one (21) age group from legal infancy would substantially lessen the need for any immediate change in the law. The Commission agreed that the law should continue to protect the minor. Its fundamental purpose should be to protect him whether he is seven (7) or seventeen (17) from exploitation by others

and from his own immaturity. The Commission also rejected prohibition of all transactions with minors because such a rule would be unrealistic. Rules as to infant's contracts must take into account the economic realities of life. Vast numbers of contracts are entered into every day by the young. Nearly all of these involve purchases ranging from bubble gum to motor cars. The purchasing powers in the hands of the young will continue to increase as our society becomes more affluent. On the other hand, it might well be advisable to consider whether certain kinds of transactions should be prohibited or regulated such as the granting of credit or sales of motor cars.

4. THE NEW SOUTH WALES LAW REFORM COMMISSION

This Commission reported in 1969 and proposed a bill which if enacted would be called The Minority Act. The Act would give full contractual capacity to infants over eighteen (18). So far as persons under eighteen (18) are concerned, the act proposed covers a very wide field indeed and uses the term Civil Act which is defined in Section 7. A Civil Act includes amongst other things a contract. Section 18 of the proposed bill provides that where a minor participates in a civil act, the civil act is not binding on him except as provided for by the Act. It talks in terms of an act being presumptively binding. Section 7 (3) states the effect of presumptively binding. It means that the act is as binding on him and has effect as if he were not under the disability of

infancy at the time of his participation and except where other provision is made by the act, the civil act is binding and has effect in favour of all persons. The scheme of the act is that a civil act in which a minor participates is presumptively binding on him if one of a number of objective tests is satisfied (Section 20 - 26) for example if it is for his benefit (Section 20) or if it is authorized or affirmed by a Court (Sections 27, 28, 29) or if it is affirmed by the minor after reaching eighteen (18) years or by his representative in case of his death (Section 29) or if it is not repudiated within a year after his eighteenth birthday or his death, (Sections 30,31,33,37). If a civil act is not presumptively binding and is duly repudiated a wide judicial discretion would be given for the adjustment of the rights of persons interested (Section 36.). A minor would not be entitled to enforce a civil act unless it were presumptively binding on him, (Section 37).

Without going into further detail on this proposed act, it seems clear that it is open to the same objection as the present law with respect to its division of contracts into various categories. The proposed Act's categories may be more logical but there will still be the problem of knowing into which category the contract falls. Is it presumptively binding or isn't it? Is it for his benefit or isn't it? It is indeed a most flexible system. There is little certainty. Judicial discretion abounds.

5. TOTAL ABOLITION

It is suggested by Robert H. Teskey in his

April, 1970 research paper on Infants' Contracts for the Faculty of Law, The University of Alberta, that a special law of infant's contracts may not be needed at all since there is already adequate protection provided by the law whether common or statutory from predatory salesmen and unfair contracts. The Consumer Affairs Departments at the Federal and Provincial Government levels keep on the look out for unfair trade practices. There is a Direct Sales Cancellation Act in Alberta which makes virtually all direct consumer sales at the purchaser's residence voidable for a given length of time. There is an Unconscionable Transactions Act which protects the borrower from cases in which the cost of loan is excessive and the transaction harsh and unconscionable. There is also a recent amendment to the Federal Bills of Exchange Act concerning consumer purchases which enables the borrower to rely on the same defences against the finance company as he would have been able to rely on against the original vendor. There is the Orderly Payment of Debts Plan provided for in the Bankruptcy Act and in force in Alberta. There is the common law of duress and undue influence. There is the protection given to judgment debtors by the Exemptions Act and the exemptions where wages are garnisheed. It may be that there will soon be added a further protection where Assignments of Wages are concerned. In fact, Alberta could in many ways be considered a debtor's paradise. Thus it is argued that the protection given to all contractors is sufficient in itself to protect the infant against an unwise contract and the existing law of infant's contracts should be abolished and not replaced by a new regime.

D. RECOMMENDATIONS

It is not recommended that there be any limitation on the contractual capacity of persons between the ages of eighteen (18) and twenty-one (21), at least until experience shows there is a need for such special rules.

It is considered that for those under eighteen (18) contractual categories are to be avoided but it has to be recognized that persons under eighteen (18) will make contracts and therefore to have a general rule to the effect that all such contracts are unenforceable is to ignore the realities of the situation. It is often necessary for a person under eighteen (18) to make a contract. The category of binding contracts therefore for necessaries for loans for necessaries and for service is a rational one. Often however, a person under eighteen (18) will wish to make a contract although not strictly a necessary one. The law is supposed to be for the infant's benefit. Why should he be restricted in his making of contracts? It is therefore proposed that all infants' contracts be binding but that the Courts be given a dispensory power to relieve the infant from the consequences of executing an improvident or otherwise prejudicial contract. All contracts therefore should be binding unless a Court exercises the dispensory power proposed and categories of contract would be abolished. While of course the Courts would be given a wide discretion, they have not shirked the responsibility of exercising the considerable discretion they have under the existing law and frankly from the reports one has read, the problem isn't that great, the number of cases on

infants' contracts coming before the Courts being relatively few.

Guarantors of infants' contracts should be bound and the Court should have broad restitutionary powers where it exercises its dispensory power so that factors such as fraud by the infant or knowledge on the part of the adult of the prejudicial nature of the contract or lack of such knowledge may be taken into account in determining whether restitution should be required either on the part of the infant or the adult.

It is not recommended that there be no special regime for infants because the protection given to adults is simply not wide enough to protect the foolish or inexperienced infant and involves analytical problems. What protective device applies in the particular circumstances?

It might be argued that to make all contracts enforceable would put the onus on the infant to go to Court and obtain the exercise of the dispensory power. If an infant was not performing a contract, however, an adult before going to Court would have to weigh the risk of the dispensory power being exercised

The truth is that there is no perfect answer. Some discretion has to be given the Courts. The best one can do is to simplify the legal position of the infant and do away with the complicated and unsatisfactory state of the present law.

G.N. PRATT