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## CONTRACTS OF AN INFANT— THE NECESSARY AUTOMOBILE

The plaintiff, a minor, bought a new car from the defendant seller. The plaintiff used the car for seven months and then elected to disaffirm the purchase by notifying the seller of his intention and by offering to return the vehicle upon a refund of the purchase price. The plaintiff then brought suit to rescind the contract and to have the purchase price refunded in full. The trial court entered judgment for the seller, stating that the car was a necessity for the plaintiff and that rescission would not be allowed. On appeal to the District Court of Appeal, Third District, *held*, affirmed: The fact that the car was used by the plaintiff to carry on his school, business and social activities supported the chancellor's finding that the car was a necessity. Furthermore, even if the plaintiff were entitled to rescission, the seller could set-off the depreciation in value from the date of sale up to the time of disaffirmance. *Rose v. Sheehan Buick, Inc.*, 204 So.2d 903 (Fla. 3d Dist. 1967).

Generally, an infant has the right to disaffirm or avoid his contracts while still a minor or within a reasonable time after reaching his majority.<sup>1</sup> The contracts of a minor are thus voidable, not void, and are valid until the minor elects to disaffirm. The reason for giving the infant the right to avoid his contracts was stated by the Supreme Court of Florida in 1911:

The right of an infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others; and, though its exercise is not infrequently the occasion of injury to others who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants . . . .<sup>2</sup>

A major exception to the right of disaffirmance is that the minor is liable for any "necessaries" he buys. This exception, in part a recognition of the hardship often wrought on those who deal with infants, is rationalized on the basis that the imprudence of the minor in purchasing necessities is immaterial except as to the price agreed to be paid.

The problem with the exception is how to define it in its correct application. For example, in the instant case, the problem is whether an automobile is a necessity for which an infant is liable. In describing what constitutes a necessity, Lord Coke stated:

[A]n infant may bind himself to pay for his necessary meat, drinke, apparell, necessary physicke, and likewise for his good

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1. S. WILLISTON, *CONTRACTS* § 226 (3d ed. 1959).

2. *Putnal v. Walker*, 61 Fla. 720, 721, 55 So. 844, 845 (1911).

teaching or instruction, whereby he may profit himself afterward.<sup>3</sup>

Modern courts look upon necessities as a relative term<sup>4</sup> including even things used for the comfort of the minor.<sup>5</sup> However, the courts generally have not regarded the automobile as a necessary for the minor.<sup>6</sup> Where an automobile is used solely for pleasure or for the enhancement of social status it cannot be a necessary and the minor may disaffirm the contract of sale.<sup>7</sup> Close questions arise where the minor uses the car to commute to and from work. Even where the place of employment is five or ten miles away, however, courts have been reluctant to find the minor liable on his contract of purchase,<sup>8</sup> especially where other means of transportation are available to the minor, such as another family car, public transportation, or the opportunity to walk.<sup>9</sup> Probably what is required by most courts is that the automobile be an actual necessity used by the infant to earn his livelihood.<sup>10</sup>

It is difficult to find a case where an automobile was held to be a necessity before the Mid-1950's. Recently a few courts, because of the

3. E. COKE, *INSTITUTES OF LAW OF ENGLAND* § 172(a) (1797).

4. [T]here is no hard and fast rule by which it may be determined just what is and what is not requisite for the reasonable convenience of a minor, and . . . that question is one which must, of necessity, depend upon the particular facts and circumstances of each case . . . .

*Braham & Co. v. Zittel*, 232 App. Div. 406, 409, 250 N.Y.S. 44, 46 (Sup. Ct. 1931).

5. "Necessaries," in the technical sense, mean such things as are necessary to the support, use or comfort of the person of the minor, as food, raiment, lodging, medical attendance, and such personal comforts as comport with his condition and circumstances in life, including a common school education; but it has been pithily and happily said, that necessities do not include "horses, saddles, bridles, liquors, pistols, powder, whips and fiddles."

*Price v. Sanders*, 60 Ind. 310, 314 (1878).

6. Annot., 78 A.L.R. 392 (1932).

7. *Crockett Motor Co. v. Thompson*, 177 Ark. 495, 6 S.W.2d 834 (1928) (car used only for pleasure is not a necessity); *Pelham v. Howard Motors, Inc.*, 20 Ill. App. 2d 528, 156 N.E. 597 (1959); *Bowling v. Sperry*, 133 Ind. App. 692, 184 N.E.2d 901 (1962). See also *Arkansas Reo Motor Car Co. v. Goodlett*, 163 Ark. 35, 258 S.W. 975 (1924), where the court said that an automobile could not be considered as a necessary for a girl or boy under 18 years of age.

8. *Harris v. Raughton*, 37 Ala. 648, 73 So.2d 921 (Ct. App. 1954) (automobile was not a necessity, even though the minor was married and purchased the auto for use as a conveyance to and from employment which was a distance of 8 miles); *Schoenung v. Gallet*, 206 Wis. 52, 238 N.W. 852 (1931) (automobile was not a necessity for the personal use or support of the minor; the mere fact that his place of employment was three miles from the home of his parents, with whom he lived, did not necessitate his ownership of an automobile).

9. *Perry Auto Co. v. Mainland*, 229 Iowa 187, 294 N.W. 281 (1940). (The distance to work was one and a half miles. When the minor had an auto he used it, when he did not, he walked.) *Schoenung v. Gallet*, 206 Wis. 52, 238 N.W. 852 (1931) (brother's auto was available for transportation).

10. *Russell v. Buck*, 116 Vt. 40, 68 A.2d 691 (1949) (even though trucking was the only means by which the infant supported his family, the court held that the truck was not a necessity since the use of the truck was not the only means of earning a livelihood open to the infant); *Robertson v. King*, 225 Ark. 276, 280 S.W.2d 402 (1955) (pickup truck was not a necessity, where it appeared that the purchaser-minor had quit school and was earning his own living).

ever-increasing distances involved in commuting, have expressed the more realistic view that an automobile may be a necessary link in the chain of physical survival in today's world. Commenting on a contractual arrangement made by a minor for transportation to his job, the Supreme Court of Kansas stated:

It might be said that earlier in the history of our country, when industry was centralized in cities or industrial communities where housing was adequate and public transportation, by way of the streetcar, the bus or the community train, was available to all, private transportation was not necessary for one getting to and from his work. However, since World War II there has been a tremendous growth in our country's population, and in this highly industrial age, where industry has the tendency to decentralize and move to less populated or rural communities within which there is a shortage of housing and very little, if any, public transportation available, the worker is, as a result, required to commute long distances to and from his place of employment. We are, therefore, of the opinion that private transportation for the worker is now a necessity.<sup>11</sup>

The court took notice of the fact that in order for the minor to hold his job, he had to get to and from work. Therefore, the arrangement was necessary insofar as the minor was concerned.<sup>12</sup>

Because of the rapid changes in our way of life, courts in the future, as the court in the instant case, will undoubtedly recognize the fact that an automobile is, for many minors, a necessity.

The court was also faced with the issue of whether the seller has a right to a deduction for the use or depreciation of goods purchased by an infant.

Although given the right to disaffirm a contract, an infant should not be able to retain an advantage from his dealings with an adult. Therefore, upon disaffirmance, the infant must return the property in his possession.<sup>13</sup> However, if the infant has disposed of the goods, generally he still has a right to disaffirm and is not required to place the other party in status quo.<sup>14</sup>

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11. *Ehrsam v. Borgen*, 185 Kan. 776, 780, 347 P.2d 260, 263 (1960).

12. *Id.*

13. See generally S. WILLISTON, *CONTRACTS* § 238 (3 ed. 1955). Some jurisdictions have broadened this rule to require the infant to return either the property which remains in his hands *in specie* or any other property which the specific property was exchanged for. See *In re Bierman*, 271 F. Supp 774, 776 (S.D. Ohio 1967).

The prerequisite of returning the auto prior to the disaffirmance is not always helpful to the seller since the limitation of goods in the minor's possession may come into play. For example, a minor may have the car in his possession but a finance company will be holding title. Upon disaffirmance the auto would be returned but not the title. See *Keser v. Chagnon*, 159 Colo. 209, 410 P.2d 637 (1966).

14. *MacGreal v. Taylor*, 167 U.S. 688 (1897) (the minor need only return the fruits of the contract that are then in his possession and if for any reason he cannot place the

Most courts refuse to allow the vendor any set-off for depreciation and permit the infant to recover the entire purchase price or as much of it as has been paid.<sup>15</sup> The reason given by these courts for not allowing the seller a deduction is that depreciation due to the minor's use or misuse is a result of the very improvidence from which the law seeks to protect the minor and which those who deal with him must anticipate. One court has said:

The infant is not required to account for the use or depreciation of the property while in his possession, or for its loss, if squandered or destroyed, for this is the very improvidence against which the law seeks to protect him.<sup>16</sup>

A minority of jurisdictions, however, along with the court in the instant case, would permit the seller to deduct for use and depreciation.<sup>17</sup> The reasoning of these courts, as seen in the following language, is that the minor should as a matter of justice be held accountable for his use of the property up to the time he disaffirms the contract:

[T]he plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justice and in fairness, to account for its reasonable use or deterioration in value. Otherwise she would be making use of the privilege of infancy as a sword, and not as a shield. In the absence of wanton injury to the property, the value of the use would be deemed to include the deterioration in value . . . .<sup>18</sup>

Since the instant case was an equitable cause of action, the court based its reasoning for allowing a depreciation deduction on the equitable maxim "he who seeks equity must do equity." For a comparison, the court cited the United States Supreme Court case of *Myers v. Hurley Motor Company*.<sup>19</sup> The distinction between *Myers* and the instant case is that in *Myers* the infant had fraudulently represented that he was an adult; whereas in the instant case the minor at no time held himself out

other party in status quo, he does not because of such inability lose his right to disaffirm); *Weathers v. Owen*, 78 Ga. 520, 51 S.E.2d 584 (App. Ct. 1949); *Bowling v. Sperry*, 133 Ind. App. 692, 184 N.E.2d 901 (1962).

15. *Arkansas Reo Motor Car Co. v. Goodlett*, 163 Ark. 35, 258 S.W. 975 (1924); *Utterstrom v. Kidder*, 124 Me. 10, 124 A. 725 (1924); *Reynolds v. Garber-Buick Co.*, 183 Mich. 157, 149 N.W. 985 (1915) (regardless of wear which he has given it, the minor may recover back the money paid for the automobile); *Collins v. Norfleet-Baggs, Inc.*, 197 N.C. 659, 150 S.E. 177 (1929).

16. *Collins v. Norfleet-Baggs*, 197 N.C. 659, 660, 150 S.E. 177, 178 (1929).

17. *Rodriguez v. Northern Auto Auction, Inc.*, 35 Misc. 2d 395, 225 N.Y.S.2d 107 (Sup. Ct. 1962); *Scalone v. Talley Motors, Inc.*, 3 App. Div. 674, 158 N.Y.S.2d 615 (Sup. Ct. 1957); *Rice v. Butler*, 160 N.Y. 578, 55 N.E. 275 (1897) (bicycle); *Petit v. Liston*, 97 Ore. 464, 191 P. 660 (1920) (motorcycle).

18. *Rice v. Butler*, 160 N.Y. 578, 580, 55 N.E. 275, 276 (1897).

In *Toon v. Mack Int'l Motor Truck Co.*, 87 Cal. App. 151, 262 P. 51 (1927), the vendor was even allowed to recover for depreciation in excess of amounts paid to him by the infant.

19. 273 U.S. 18 (1927).

to be an adult.<sup>20</sup> In *Myers*, the Court first decided that, although the authority was in conflict,<sup>21</sup> the minor was not estopped to maintain an action by reason of his misrepresentations. On the question of whether the defendant seller may, by way of affirmative defense against the minor plaintiff's claim, set-off the amount for use, the court stated:

How far the equitable maxim, that he who seeks equity must do equity, applies generally in suits brought for relief because of infancy, we need not inquire . . . . The maxim applies, at least, where there has been, as there was here, actual fraud on the part of the infant. When an infant of mature appearance, by false and fraudulent representations as to his age, has induced another person to sell and deliver property to him, it is against natural justice to permit the infant to recover money paid for the property without first compelling him to account for the injury which his deceit has inflicted upon the other person.<sup>22</sup>

The court in the instant case, by stating that it would recognize the seller's right to depreciation if the minor were allowed to rescind the contract, seemed to balance properly the equities in an effort to find a line of distinction between protecting the minor and preventing him from using his privilege of contractual avoidance so as to do injustice to others. To be sure, a minor has an interest that the law should protect, but it should be accomplished with the least possible injury to those who deal with him. The sanctity of infancy should not be preserved when justice requires a remedy for his innocent victims.

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20. The court in the instant case held that the mere fact that the minor "might have had the appearance of a person over twenty-one years of age could not constitute misrepresentation." *Rose v. Sheehan Buick, Inc.* 204 So.2d 903, 905 (Fla. 3d Dist. 1967).

21. See generally S. WILLISTON, *CONTRACTS* § 245 (3d ed. 1955). If the infant is guilty of actual misrepresentation of his age the authorities are not uniform, but the view is generally accepted that the minor is not precluded from disaffirming his contracts. For a Florida case, however, where the minor was estopped to disaffirm his purchase, see *Mosler Acceptance Co. v. Perlman*, 47 So.2d 296 (Fla. 1950).

22. *Myers v. Hurley Motor Co.*, 273 U.S. 18, 26 (1927).