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Contracts: Infant's Disaffirmance and Infant's Right to Void

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finements, it should not be perpetuated in the name of "stare decisis." That doctrine does not confine our courts to the "Calf-Path," nor to any rule currently enjoying a numerical superiority of adherents. "Stare decisis" ought not be the excuse for a decision where reason is lacking.[35]

CONCLUSION

Attempting to classify policemen as licensees in all circumstances is antithetical to the law's characteristic flexibility. A rational approach to the problem is to classify policemen according to the factual situation of each case.

In *Cameron,* the decision to classify the policeman as an invitee evidenced a rational approach. First, the plaintiff's presence on the premises was as a visitor in the interest of public safety, but primarily for the protection of the defendant's property. A regular pattern of activity had been established. Thus, in this case a serious objection to classifying policemen as invitees is eliminated, the impossibility of forecasting the precise place to which the officer's duties may call him and the infrequency of his improbable visits. Secondly, the policeman, when descending defendant's staircase, did not do so in an unusual manner or in an emergency situation. Thus, the circumstances of this case differentiate it from those cases arising in other jurisdictions which deny recovery. Under these particular circumstances, the officer had a right to assume that the premises, aside from obvious dangers, were reasonably safe for the purpose for which he was upon them and that proper precautions had been taken to make them so.

Cameron establishes that it is the nature of the service, and not the official designation of the person rendering it, which should determine the relationship and resulting liability of the parties. The case does not represent a radical departure, but rather a rational analysis of the facts of the case in the light of the law as the court viewed it.

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Contracts: Infant's Disaffirmance; Infant's Right to Void: In *Kiefer v. Fred Howe Motors, Inc.*,[1] the plaintiff, an emancipated, twenty-year-old minor, married, and employed on a full-time basis, purchased a second-hand station wagon from the defendant, Fred Howe Motors, Inc. After paying the full purchase price of $412.00 and signing the defendant's standard sales contract,[2] the plaintiff took possession of the vehicle. Some time later, the minor experienced difficulty with the auto which he claimed was caused by a cracked block. After the dealer failed

[35] 170 N.E.2d at 885-86.

[1] 39 Wis. 2d 20, 158 N.W.2d 288 (1968).

[2] The sales contract contained the following clause: "I represent that I am 21 years of age or over and recognize that the dealer sells the above vehicle upon this representation." *Id.* at 28, 158 N.W.2d at 292.

to respond to the plaintiff's attempts to secure some adjustment, including a request that the dealer take the car back, the plaintiff contacted an attorney who wrote a letter to the defendant stating that the plaintiff was a minor at the time of sale. The letter also "[D]eclared the contract void, tendered return of the automobile, and demanded repayment of the purchase price."[3] Defendant Howe having failed to respond to the request, an action was commenced. Judgment in favor of the plaintiff was entered for the full purchase price.

Three issues were raised on appeal, two of which are relevant to this article:[4] (1) is an emancipated minor over the age of eighteen legally responsible for his contracts; and (2) has an infant effectively disaffirmed his contract for the purchase of an automobile when he did not return the automobile or the certificate of title as of the time of the trial. Inextricably associated with these issues are two issues more subtle than either of the above, but of greater significance and impact than either of them. The first is whether a minor can ever effectively and irrevocably divest himself of his property, assuming that the adult party supplies no "necessity" to the minor in consideration of the transfer. Secondly, what are the rights and duties of the parties when the minor has disaffirmed.

In addressing itself to the first issue, the court reasserted the general rule; that is, "[T]he contract of a minor, other than for necessaries, is either void or voidable at his option."[5] In addition to necessaries, several other exceptions were catalogued: those shielded from disaffirmance by statute, such as contracts for educational loans; and those related to marriage and child support.[7]

After specifically setting forth the above exceptions, the court examined the philosophy underlying the doctrine of minors' disaffirmance,[8] and on the surface recognized, after alluding to Jack and his famous beanstalk, that the infancy doctrine might be somewhat out of tune with the times. There followed a review of some paradoxes in today's society, such as the status of a minor in tort and criminal actions, the minor's ability to marry, and, finally, his obligation to serve in the armed forces.

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[3] *Id.* at 22, 158 N.W.2d at 289.

[4] There was an issue as to misrepresentation of the minor, and fraud, which was decided on the facts of the case in the minor's favor. *Id.* at 21, 158 N.W.2d at 289.

[5] *Id.* at 23, 158 N.W.2d at 290.

[6] WIS. STAT. § 48.985(1) (1965).

[7] 39 Wis. 2d at 23, 158 N.W.2d at 290.

[8] The philosophy stems from the policy of protecting the minor against his own improvidence and the impositions of more mature and worldly adults, by permitting the minor to freely void his contracts not for necessities. Annot., 12 A.L.R.3d 1174 (1967). This policy is perfected by use of the historical doctrine of incapacity to make a binding contract or irrevocable conveyance. Such a tool was borrowed from early feudal law, where it was enacted to protect not so much the child or the wife of the lord of the manor, but the lord himself, since the responsibilities and obligations of the minors and women fell upon him.

But, surprisingly enough, upon a weighing of the merits, the conclusion was reached that "[T]he reasons for allowing that obstacle (the ability of the minor to disaffirm his contracts) to remain viable at this point outweigh those for casting it aside."[9]

The second issue questioned whether the procedures for disaffirmance in this case were adequate. This matter was rather summarily dismissed, in that the court concluded, citing Williston,[10] that the minor's demand for the return of his money, plus the letter from his attorney to the car dealer, would suffice.

A primary question, not sufficiently answered by this decision, is whether the minor's right to disaffirm executory contracts, executed contracts, and transfers of property necessarily rests on identical policy foundations. It is nearly a universal rule that minors may disaffirm an executory contract (assuming it is not for necessities or one covered by statute) before reaching twenty-one, or within a reasonable time after reaching majority.[11] This rule applies identically to executed contracts of a minor, notwithstanding the logical conclusion that once a contract has been executed it ceases to be a contract,[12] and represents nothing more than a completed transfer of property. The reason for such a result is that a minor, lacking the capacity to bind himself to a promise, is legally deemed equivalently incompetent to irrevocably transfer any property, other than for the exchange of necessities.[13] If a minor can disaffirm a contract, either executory or executed, or a transfer of property, the conclusion must be that a minor cannot effectively and irrevocably, by his own action, divest himself of any property.[14]

Conceding the minor's incapacity to bind himself or to convey irrevocably, a second question, one with even greater impact, arises: what are the rights and duties of the parties where a minor disaffirms. The failure to clearly delineate the rights and duties of a minor is the most critical failure of this decision.

[9] 39 Wis. 2d at 25, 158 N.W.2d at 290.

[10] "Any act which clearly shows an intent to disaffirm a contract or sale is sufficient for the purpose to disaffirm . . . a tender or even an offer to return the consideration or its proceeds to the vendor is sufficient." 2 WILLISTON, CONTRACTS § 234, at 26 (3rd ed. 1962); 39 Wis. 2d at 26, 158 N.W.2d at 291.

[11] Olson v. Veum, 197 Wis. 342, 222 N.W. 233 (1928); Thormaehlen v. Kaeppel, 86 Wis. 378, 56 N.W. 1089 (1893); Callis v. Day, 38 Wis. 643 (1875); WILLISTON AND THOMPSON, CONTRACTS, § 14, at 10 (1938); 43 C.J.S. *Infants* § 71 (1945); WILLISTON, *supra* note 10, § 223.

[12] WLLLISTON AND THOMPSON, *supra* note 11; 43 C.J.S. *supra* note 11; Annot., 11 A.L.R. 491 (1921).

[13] THOMPSON, REAL PROPERTY § 2946 (2d ed. 1962); 43 C.J.S. *supra* note 11, § 36.

[14] Another area of the law which permits recission of a contract is conveyance of land in a manner contrary to the Statute of Frauds. In this area the distinction between an executory and an executed contract is recognized and rescission is not permitted where the conveyance is completely executed on one side. Schwartz v. Syver, 264 Wis. 526 59 N.W. 489 (1953); Foster v. Flack, 140 Wis. 48, 121 N.W. 890 (1909); McLennan v. Prentice, 85 Wis. 427, 55 N.W. 764 (1893); Smith v. Hughes, 50 Wis. 620, 7 N.W.2d 489 (1880); Booth v. Ryan, 31 Wis. 45 (1872); Cuddy v. Foreman, 107 Wis. 519, 83 N.W. 1103 (1900), and cases cited therein.

The essential sense of the rule, conceded by most authorities, is that minority is a defense to an action brought to enforce the performance of the minor's promise.[15] However, this right is of no practical help to the minor who has executed his contract, or who has transferred his property. In those instances, in order that his tardy disaffirmance be at all effective, he must be allowed to bring an action to recover what he had paid for, or given in exchange for, the consideration he has received.

Several authorities hold that, on disaffirmance of a contract, either executory or executed, the minor may maintain an action in replevin or trover, as the case may be, for the recovery of the consideration he parted with, or of the property transferred.[16] Generally, the name given to an action commenced by the minor to recover the property given under a contract that has been afterwards rescinded, is an action "for money had and received."[17] In *Gavahan v. Shorewood*,[18] the Wisconsin Supreme Court held that, although such an action is an action at law, the right to recover is equitable in its nature, and sustainable only if the defendant has received money that in equity and good conscience he ought to pay to the plaintiff.[19]

Realistically, these rights must be granted to the minor if the right of disaffirmance is going to have any effect at all. However, the same cannot reasonably be said to apply to the minimal duties that a minor owes to the adult party. When disaffirming an executory contract, the general rule is that a minor does not invariably have to tender back the fruits of the transaction received by him, as a condition precedent to establishing the defense, or maintaining an action to recover what he has parted with,[20] although before he may recover or effect the defense, he must tender back the fruits of the transaction received by him which remain in his physical possession or control.[21] Under the general rule,

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[15] Even in negotiable instrument law, when the plaintiff claims as a holder in due course, the policy-grounded defense is available. UNIFORM COMMERCIAL CODE § 3-305(2)(a).

[16] 43 C.J.S. *supra* note 11.

[17] Meyers v. Hurley Motors Co. 273 U.S. 18 (1927); Annot., 11 A.L.R. 491 (1921), supplemented by Annot., 50 A.L.R. 1184 (1927).

[18] 200 Wis. 429, 228 N.W. 497 (1930); *accord,* County of Sheboygan v. City of Sheboygan, 209 Wis. 178, 245 N.W. 87 (1952).

[19] Similar language can be found in Richland County Bank v. Joint School Dist., 213 Wis. 178, 250 N.W. 407 (1933), where the court said:

> Recovery in such an action is based on the law of quasi-contracts and is ordinarily permitted only when there has been an unjust enrichment, the receipt by one person from another of a benefit . . . which benefit it is inequitable that the defendant retain . . . which would, *under all of the circumstances of the case,* be unjust or inequitable (emphasis added). Richland County Bank v. Joint School Dist., *supra* at 183-84, 250 N.W. at 499.

[20] Bowling v. Sperry, 133 Ind. App. 692, 184 N.E.2d 901 (1962); *accord,* James v. Barnett, 404 S.W.2d 886 (Tex. Civ. App. 1966); WILLISTON, *supra* note 10, § 238.

[21] Western Life Ins. Co. v. White, 331 S.W.2d 19 (Mo. 1959); Annot., 12 A.L.R. 3d 1184 (1967); Annot., 13 A.L.R.3d 1247 (1967).

wasted, consumed, or disposed of, the minor is not responsible for any restitution, leaving the adult party remedliless.[22]

A different approach is applied by a minority of jurisdictions which attempt to avoid the inequity of the general rule. Such approach is characterized as the *benefit rule,* the essence of which is to seek an equitable result, more or less limiting, in effect, the contractual disabilities of the minor. This rule resembles an extension of the necessities doctrine, in that the extent of the minor's liability is the fair market value of the goods purchased, as opposed to the price fixed by the contract. Basically, this solution follows a quasi-contract analysis.[23]

The general rule applies identically to executed contracts as well as to executory contracts,[24] notwithstanding the theoretical definition of the action under which the minor proceeds. No distinction is made in the rule of a minor's disaffirmance as is made in a situation where a conveyance is declared voidable as against the Statute of Frauds, where recission is a termination at the stage of performance then reached, subject to payment of any damages, but not undoing what has already taken place. Even under Wisconsin's version of the real property statute, declaring the oral agreement absolutely void, the party against whom the avoidance is claimed is protected by doctrines of part performance, estoppel, unjust enrichment, and "unjust detriment."[25]

As to executory contracts of minors, Wisconsin has followed the general rule, rejecting the benefit rule. *Olson v. Veum*[26] held that a minor is not responsible for restitution when he cannot make restitution. He is not required to account for any use, depreciation, consumption, waste, or other disposition of the consideration he has received under the contract, regardless of language seemingly indicating the contrary in earlier to the extent that the consideration received by the minor has been

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[22] In Reynolds v. Garber-Buick Co., 183 Mich. 157, 149 N.W. 985 (1914), a minor was allowed to recover the full purchase price after totally demolishing the vehicle.

[23] Porter v. Wilson, 106 N.H. 270, 209 A.2d 730 (1967); Annot., 13 A.L.R.3d 1251 (1967); Annot., 12 A.L.R.3d 1184 (1967).

[24] THOMPSON, *supra* note 13, § 2950.

[25] Schwartz v. Syver, 264 Wis. 526, 59 N.W.2d 489 (1953), and cases cited therein; WIS. STAT. § 240.06 (1965): "No estate or interest in lands, other than leases for a term not exceeding one year . . . shall be created, granted, assigned, surrendered, or declared unless . . . by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. . . ." *See also* WIS. STAT. §240.08 (1965).

Remedies: *Specific Performance:* Kelly v. Sullivan, 252 Wis. 52, 30 N.W.2d 209 (1947); Papenthien v. Cooper, 184 Wis. 156, 198 N.W. 391 (1924); WIS. STAT. § 240.09 (1965), first construed and applied in Wall v. Minneapolis, St. P. & S. Ste. M. Ry., 86 Wis. 48, 56 N.W. 367 (1893); *Estoppel:* Pick Foundry, Inc. v. General Door Mfg. Co., 262 Wis. 311, 55 N.W.2d 407 (1952); *see generally,* Stuesser v. Ebel, 19 Wis. 2d 591, 120 N.W.2d 679 (1963); Marshall & Ilsley Bank v. Schuerbrock, 195 Wis. 203, 217 N.W. 416 (1928); *Recoupment in Realty Transactions:* 49 MARQ. L. REV. 419 (1965).

[26] 197 Wis. 342, 222 N.W. 223 (1928).

cases,[27] or a published circuit court opinion specifically adopting the benefit rule.[28]

Prior to *Kiefer,* Wisconsin had not set out the duties of a minor seeking to recover the consideration he parted with under an executed contract which he sought to disaffirm. In *Wallace v. Newdale,*[29] the court, after noting a conflict among the decisions as to the minor's obligation to restore benefits received, dodged the issue:

> We are not called upon to decide the question because there is no claim for such use or deterioration [of the value given by the adult] in the answer and for the stronger reason that no evidence was offered on the subject.[30]

Six years later, in *Schoenung v. Gallet*[31] (handed down just three years after *Olson),* the court followed the reasoning of *Wallace,* and similarly did not decide the issue as to the duty of the minor to restore to the adult any benefits received under an executed contract.[32]

Only one right is allowed the adult party to a contract with a minor in jurisdictions which recognize the general rule in regards to the duty of the disaffirming minor. That right is the right to refuse to transact

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[27] Knaggs v. Green, 48 Wis. 601, 4 N.W. 760 (1880); Callis v. Day, 38 Wis. 643 (1875). In *Knaggs* the court said that where a minor purchases real property, giving a mortgage as part of the purchase money, "[H]e would not be allowed to avoid the mortgage on the ground of infancy, without rescinding the contract and restoring the property. . . ." Knaggs v. Green, *supra* at 604, 4 N.W. at 760. *Knaggs* has been interpreted as requiring that any minor who disaffirms a contract must restore to the other party the consideration, or its equivalent, with interest. Drumhiller v. Norwich Motor Co., 144 Okla. 174, 289 P. 298 (1930).

See Thormaehlen v. Kaeppel, 86 Wis. 378, 56 N.W. 1089 (1893), where the court held that as a condition to disaffirming a contract, a minor, if he had received and retained any part of the consideration, had to return the same before he would be allowed to assert the invalidity of the contract because of his infancy.

[28] Duranso v. Fitzgerald, 6 MARQ. L. REV. 77 (1922). The article reprinted in full the text of the opinion by Judge A. H. Reid in the Circuit Court of Lincoln County, entered on February 2, 1922. This case involved a suit by a minor to recover money paid upon the purchase price of an automobile. In an opinion based upon the premise that contracts of minors are voidable, Judge Reid stated that "[J]ust conditions must attach to [the minor's] right to void them." The opinion, recognizing that the majority rule relieves the minor from responsibility for benefits received under contractual undertakings, nevertheless stated that this approach "[Does] not seem [to be] in consonance with justice and good conscience." Duranso v. Fitzgerald, *supra* at 78-79.

[29] 188 Wis. 205, 205 N.W. 819 (1925).

[30] *Id.* at 208, 205 N.W. at 820.

[31] 206 Wis. 52, 238 N.W. 852 (1931).

[32] In both *Wallace* and *Schoenung* the court did not decide whether a minor, when disaffirming an executed contract, is responsible for any waste, consumption, or other disposition of the consideration received; however, both cases did imply that where the adult party to an executed contract has made a claim for recovery, coupled with affirmative proof of the value not returned, the court would closely examine the controverted area of the law and make a determination. In *Kiefer,* the defendant had made a claim for the loss in value of the car, although in the form of a claim for damages for false and fraudulent representations. He also offered uncontroverted proof of the value of the auto not returned to the defendant. What more is needed?

business with a minor. It is admitted by courts which have adopted such a rule that if there is a loss, the adult must bear that loss,[33] since one dealing with a minor acts at his own peril.[34]

It is submitted that to impose such a doctrine on an ever-increasing segment of the population[35] could have dire effects. Where adults follow the only remedy open to them, the greatest burden will be upon the minor himself, especially a minor circumstanced as was the plaintiff in *Kiefer:* a young man trying to raise a family and requiring not only basic necessities such as shelter, food, and health services, but a number of relatively dispensable goods and services as well. He must be allowed to deal in the market place without restraint, or his living environment will soon become intolerable.

In the past, at least, the business community, believing that the risk of disaffirmance is negligible in comparison with the potential profit to be gained by transacting business with minors freely and openly, has, in fact, feverishly sought the trade of minors. It is suggested, however, that the risk of disaffirmance, as experienced, has been low, primarily because of minors' naive ignorance of the existence of the general rule and its scope. There are distinct evidences that this submissive lack of legal sophistication may soon become a thing of the past, if it is not already. Suppose that the annual youth migration during Easter vacation, by plane to Florida for a week and a half of vacationing, was to produce a rash of actions by the migrants to recover from the airlines and travel agents all that they had spent. One such outbreak of litigation, which would literally bankrupt many small travel agencies and put a good dent into the profits of the airlines, would be sufficient to assure the subsequent exclusion of minors from the entire business community.

CONCLUSION

Whether or not the current yardstick of age twenty-one as the age of minority should selectively be revised represents a value judgment to be made by the court or the legislature. As the court in *Kiefer* stated:

> No one really questions that a line as to age must be drawn somewhere below which a legally defined minor must be able to disaffirm his contracts for non-necessities. . . .[36]

But, as noted in the dissent: "[T]he magical age limit of twenty-one

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[33] Annot., 12 A.L.R.3d 1174 (1967).

[34] THOMPSON, *supra* note 13, § 2952; Annot., *supra* note 33; for a recent case, *see* Kesser v. Chagnon, 159 Col. 209, 410 P.2d 637 (1966).

[35] It has been estimated that minors contribute more than twelve billion dollars annually in consumer purchases to the American economy. Of greater significance to this article is the fact that by 1960 there were already over one half million males in the United States who were married and under twenty-one years of age. 41 IND. L. J. 146 (1965), *citing* 1960 CENSUS OF THE POPULATION, vol. 1, pt. A, table 179.

[36] 39 Wis. 2d at 24, 158 N.W.2d at 290.

years as an indication of contractual maturity no longer has a basis in fact or in public policy."[37]

Even accepting the foregoing, that minors may contract with relative impunity, it is submitted that the decision should, as a minimum, have delineated judicially the responsibility of the minor for his contractual undertakings in the event of disaffirmance, and therefore preferably have followed the benefit rule suggested by *Duranso*. Since the entire procedure of disaffirmance is cloaked with a mantle of public policy and is essentially an action for rescission, it should follow that, as a bare minimum, an approximate restoration of the status quo should be required, at least of those who are not juveniles, to convert the "shield" of minority into a sword.[38] Since *Kiefer* rules that voidable minors' contracts can be voided *ab initio*, an attempt to reach an equitable result for both parties should be made. In the absence of overreaching, there seems to be no valid reason for enforcing a legal doctrine that approximates a "reverse unjust enrichment" theory against a theoretically innocent party.

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[37] *Id.* at 29, 158 N.W.2d at 293.
[38] JAMES KENT, KENT'S COMMENTARIES 239 (5th ed. 1844).