

## Restitution of Benefits Conferred Under Minors' Contracts

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*This article gives an account of the law relating to restitutionary recovery for benefits conferred by parties to agreements which are unenforceable as a result of the minority of one of the parties. It is argued that the case law offers rules which are inconsistent and unsatisfactory in policy terms but that a sound judicial restatement of them utilizing themes developed in the Canadian cases is both possible and desirable.*

### A. INTRODUCTION

In order to protect persons below the age of majority<sup>1</sup> from the harsh consequences of being compelled to perform what may have been a rash and improvident undertaking, the courts of common law developed a complex cluster of rules which permit minors to refuse to perform certain categories of agreements.<sup>2</sup> The rules which establish whether or not a particular undertaking is binding attempt to balance the objective of releasing minors from potentially oppressive bargains against a number of competing interests. First, there is a general public interest served by rules which foster the stability of transactions. This interest will obviously be felt most keenly by the other party to the transaction and by third party creditors or subpurchasers who may be detrimentally affected by the holding of unenforceability. Secondly, minors themselves may have an interest in being able to give an undertaking which is enforceable at law. The common law has responded to the task of reconciling these interests by developing a number of different categories of transactions to which are attributed various degrees of enforceability. These categories are briefly described in the next section of this paper as

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<sup>1</sup>The age of majority at common law is 21. In Canada, the age of majority has been reduced by statute. In six provincial jurisdictions — Alberta, Manitoba, Ontario, Prince Edward Island, Quebec and Saskatchewan — it is now 18 years of age. See S.A. 1971, c.1., s.1; S.M. 1970, c.91, s.1; S.O. 1971, c.98, s.1; R.S.P.E.I. 1974, c.A-3, s.1; S.Q. 1971, c.85, s.3; S.S. 1972, c.1., s.2. In the other provinces and in the territorial jurisdictions it is now 19 years of age. See S.B.C. 1970, c.1, s.1; R.S.N.B. 1973, c.A-4, s.1; S.Nfld. 1971 c.71, s.6; S.N.S. 1970-71, c.10, s.2; R.O.Y.N.W.T. 1974, c.A-1, s.2; O.Y.T. 1972, c.1, s.3.

<sup>2</sup>Apart from the standard works on contract, see, generally, D. R. Percy, *The Present Law of Infants' Contracts* (1975), 53 Can. B. Rev. 1.

a necessary preliminary to the topic at hand, restitution of benefits conferred under agreements which are unenforceable by reason of the minority of one of the parties.

This paper considers in some detail the law relating to the restitutionary problems which arise once it has been established that the agreement which the minor has entered into is an unenforceable one. If the minor has already conferred benefits on the other party to the agreement, may he recover their value in a restitutionary claim? If the other party has conferred benefits upon the minor, may he recover their value? Or, alternatively, should the minor be required to make restitution of the value of benefits which he has received as a condition of being permitted to invoke the rule which renders the agreement unenforceable? As will be seen, the rules relating to these questions are also complex, indeed, perhaps more so than the enforceability rules.

As a prelude to an examination of the restitutionary case law, it is useful to consider the nature of the competing interests which arise in this context and to suggest a framework of analysis with which the cases might be approached. In the first place, it is obvious that the party who has, at his own expense, conferred a benefit on the other party has an interest in recovering its value. The benefit was conferred in the course of performing an apparent contractual duty and was thus clearly not intended as a gift. As a general matter, this interest is one which has received strong recognition in the common law. Parties to unenforceable agreements are generally entitled to recover the value of benefits conferred on the other party in performance of what were thought to be binding contractual obligations.<sup>3</sup> The body of law which establishes this proposition is now commonly regarded as constituting a major source of the modern law of restitution.<sup>4</sup> In Canada the underlying rationale for these rules is expressed in the general principle of unjust enrichment.<sup>5</sup>

There is evident merit in permitting at least some recovery premised on the unjust enrichment rationale in the context of minors' agreements. Certainly, so far as benefits conferred by the minor upon the adult party are concerned, it is difficult to conceive of an argument against granting the minor a restitutionary award for the value of the benefit conferred. There may also, in certain cases, be much to be said in support of a restitutionary claim brought by the adult party. A convincing case can be

<sup>3</sup>See generally R. Goff and G. Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966), at 16-25. And see, J. D. McCamus, *Restitutionary Remedies in Special Lectures of the Law Society of Upper Canada*, 1975, at 255-299.

<sup>4</sup>*Ibid.*

<sup>5</sup>The leading Canadian authority adopting the unjust enrichment principle and rejecting the "implied contract" rationale is *Degelman v. Guaranty Trust Co. and Constantineau*, [1954] S.C.R. 725; [1954] 3 D.L.R. 785 (contract unenforceable for want of formality, recovery allowed for value of benefit conferred). And see, American Law Institute, *Restatement of the Law of Restitution* (1937), s.1 ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

made on policy grounds for the recovery of the value of necessities supplied to the minor.<sup>6</sup> Were the rule otherwise, minors might have difficulty obtaining necessities on a credit basis. The argument in favour of a general right of recovery for benefits conferred on the minor is more tenuous. In support, it might be argued that a rule which uniformly denied a right of restitutionary recovery to adults who have dealt in good faith might encourage irresponsible and exploitative conduct on the part of minors. On the other hand, relentless pursuit of the restitutionary interests of the supplier in this context could have the effect of undermining the objectives underlying the rules which render the agreement unenforceable. A rule which invariably permitted the adult party to recover the value of benefits conferred might have the effect of rewarding sharp practice of a kind which the unenforceability rule is designed to discourage. Further, there may be situations in which the imposition on the minor of a duty to make restitution may subvert the policy of permitting minors to resile from unwise bargains. For example, in cases where the benefit conferred has been consumed or wasted, the imposition of a restitutionary duty to pay for its reasonable value may be as offensive to the underlying policy as would direct enforcement of the bargain.

In sum, there are strong arguments to be made in favour of recovery on unjust enrichment grounds where the minor has conferred a benefit on the other party to the unenforceable agreement. Further, an adult party who has supplied necessities should be entitled to relief. More generally, one who has dealt in good faith with the minor should also be entitled to recovery subject to the proviso that such relief ought not be awarded where to do so would subvert the policy of affording special protection to young and inexperienced bargainers.

For reasons considered further below, the case law, particularly the English case law, has not developed a pattern which conforms closely to this model. Although some measure of restitutionary relief is accorded to both parties under the English rules, an examination of the nature of such relief and the circumstances in which it has been granted does not reveal a consistent approach to the problem of resolving the competing interests articulated above. Indeed, it appears to be generally agreed that the English law is unsatisfactory. In 1967, the *Latey Committee Report* recommended statutory reform which would extend restitutionary recovery, as a general rule, to both parties.<sup>7</sup>

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<sup>6</sup>See, *infra*, the text at footnotes 32 to 45.

<sup>7</sup>See, *Report of the Committee on the Age of Majority* (1967), Cmnd. 3342 (hereinafter, the *Latey Report*) secs. 309-319. Although the Ontario Law Reform Commission in its 1969 *Report on the Age of Majority and Related Matters*, 53 *et seq.*, indicates some hesitation with respect to the imposition of restitutionary duties on the minor (subject to a judicial discretion to relieve), the general thrust of this aspect of the *Latey* proposals has gained acceptance elsewhere. See, e.g., Alberta Institute of Law Research and Reform, *Report No. 14, Minors' Contracts* (1975), 29-33; Law Reform Commission of British Columbia, *Report on Minors' Contracts* (1976), 28-32; the New Zealand *Minors' Contracts Act*, S.N.Z. 1969, No. 41; the New South Wales *Minors (Property and Contracts) Act*, S.N.S.W. 1970, No. 60. For a thorough treatment of the latter, see D. J. Hartland, *The Law of Minors in Relation to Contracts and Property* (Sydney: Butterworths, 1974).

It is argued below, however, that a close reading of the Canadian case law suggests that considerable progress has been made by Canadian courts in developing restitutionary rules which are less random in their application and which, in their substance, approach more closely the analytical framework which has been proposed here.

## B. THE RULES RELATING TO THE ENFORCEABILITY OF MINORS' CONTRACTS

The general rule at common law is that minors' agreements do not bind the infant party unless the agreement has been ratified by the infant after reaching the age of majority.<sup>8</sup> Minors' contracts are thus voidable in the rather unusual sense that they cannot be enforced against one of the parties unless a ratification occurs.

There are a number of exceptions to this general rule. First, since a complete immunity from contractual liability might be more of a hindrance than a help to a self-supporting infant who must deal with others, some types of agreements have been recognized as binding at common law. This is the case with beneficial contracts of service and apprenticeship. In some provinces, the enforceability of such agreements has been made the subject of legislation.<sup>9</sup> It is also established that the infant is liable for the reasonable value of goods and services supplied which are "necessaries" in the requisite sense, though it is unclear whether this liability is grounded in contract or restitution, a question considered further below. Another general category of exceptional cases consists of agreements by which the infant acquires an interest in a subject-matter of a permanent nature which carries with it continuing or recurrent

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<sup>8</sup>See *R. v. Rash* (1923), 53 O.L.R. 245 (C.A.), at 257. *et seq.*, per Rose J. And see, generally, Percy, *supra*, footnote 2, at 12 *et seq.*

That the ratification must be evidenced in writing is a requirement introduced in England by *Lord Tenterden's Act* (1828), 9 Geo. IV, c.14, s.5. It has been adopted in some Canadian jurisdictions — New Brunswick, Nova Scotia, Ontario and Prince Edward Island — by statute. See R.S.N.B. 1973, c.S-14, s.5; R.S.N.S. 1967, c.290, s.8; R.S.O. 1970, c.444, s.7; R.S.P.E.I. 1974, c.S-6, s.1. In others — Alberta, Manitoba and Saskatchewan — its effect derives from the reception of English law. See *Mobyneux v. Traill* (1915), 32 W.L.R. 292; 9 W.W.R. 137 (Sask. D.C.). In England and British Columbia, legislation rendering such ratifications unenforceable has been enacted. See the *Infants Relief Act* (1874), 37 & 38 Vict., c.62, s.2 and the *Infants Act*, R.S.B.C. 1960, c.193, s.3.

<sup>9</sup>For typical provisions, see *e.g.*, the *Infants Act*, R.S.B.C. 1960, c.193, s.4, and *The Child Welfare Act*, R.S.M. 1970, c. C-80, s.105 (contracts of service). See further, *e.g.*, the *Apprenticeship and Tradesmen's Qualification Act*, R.S.B.C. 1960, c.13, s.16 and *The Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1970, c.24, ss.13,14 and 15.

obligations.<sup>10</sup> Agreements to purchase land,<sup>11</sup> conveyances,<sup>12</sup> mortgages,<sup>13</sup> and leases of land,<sup>14</sup> as well as agreements to purchase shares,<sup>15</sup> partnership agreements,<sup>16</sup> and marriage settlements<sup>17</sup> are included in this category and are said to be voidable in the more orthodox sense of being valid and binding until repudiated by the infant, either before attaining majority or within a reasonable time thereafter.<sup>18</sup> Again, the enforceability of these types of agreements has been the subject of legislation in some jurisdictions.<sup>19</sup>

Such were the exceptions to the general rule developed by the English courts. To some extent, they may be seen as reflecting a concern to prevent undue hardship to an adult dealing with an infant in good faith. One further Canadian development must be noted, however, in which the primacy of the interests of the infant has been asserted. Canadian courts have recognized an additional category of exceptional cases consisting of contracts which are "necessarily to the prejudice of the infant". Such

<sup>10</sup>See, generally, Percy, *supra*, footnote 2, at 15 *et seq.*

<sup>11</sup>*Whittingham v. Murdy* (1889), 60 L.T. 956 (Q.B.D.); *Thurstan v. Nottingham Permanent Benefit Building Society* [1902] 1 Ch. 1, 71 L.J. Ch. 83 (C.A.), *aff'd* [1903] A.C. 6, 72 L.J. Ch. 134 (H.L.). And see, generally, V. Di Castri, *The Law of Vendor and Purchaser* (2nd ed.), at 64 *et seq.*

<sup>12</sup>*Foley v. Canada Permanent Loan and Savings Co.* (1883), 4 O.R. 38 (D.C.); *Whalls v. Learn* (1888), 15 O.R. 481 (D.C.); *McDonald v. Restigouche Salmon Club* (1896), 33 N.B.R. 472 (C.A.); *Lauzon v. Menard* (1923), 25 O.W.N. 387 (H.C.).

<sup>13</sup>*Foley v. Canada Permanent Loan and Savings Co.*, *ibid.*

<sup>14</sup>*Davies v. Beynon-Harris* (1931), 47 T.L.R. 424 (K.B.) (infant lessee); *Slator v. Trimble* (1961), 14 Ir. C.L.R. 342 (infant lessor).

<sup>15</sup>*North Western Railway Co. v. McMichael* (1850), 5 Ex. 114, 155 E.R. 49; *Sovereign Bank of Canada, Clark's Matter* (1916), 27 D.L.R. 253 (Ont. C.A.); *Re Central Bank and Hogg* (1890), 19 O.R. 7 (D.C.); *In the Matter of Prudential Life Insurance Co.: Re Paterson*, [1918] 1 W.W.R. 105 (Man. S.C.).

<sup>16</sup>The infant is not, however, liable during infancy for the debts of the firm. See *Goode v. Harrison* (1821), 5 B. & Ald. 147, 106 E.R. 1147; *Lovell & Christmas v. Beauchamp*, [1894] A.C. 607, 63 L.J. Q.B. 802 (H.L.). And see *Woods v. Woods* (1885), 3 Man. L.R. 33 (Q.B.).

<sup>17</sup>*Duncan v. Dixon* (1890), 44 Ch. D. 211; 59 L.J. Ch. 437; *Edwards and Isaacs v. Carter*, [1893] A.C. 360, 63 L.J. Ch. 100 (H.L.).

<sup>18</sup>*E.g.*, *Edwards and Isaacs v. Carter*, *ibid.*; *Murray v. Dean* (1926), 30 O.W.N. 271 (H.C.); *Hilliard v. Dillon*, [1955] O.W.N. 621 (H.C.). Though the right to repudiate and set aside the conveyance may be lost where the minor has induced it by fraudulently misrepresenting his age: *Wilbur v. Jones* (1881), 21 N.B.R. 4 (C.A.); *Gregson v. Law and Barry* (1913), 15 D.L.R. 514, 5 W.W.R. 1017 (B.C.S.C.). *Sed quare*. A preferable explanation for the results in these cases is that third party rights had intervened in that the property had been resold in each case to a *bona fide* purchaser.

<sup>19</sup>With regard to land transactions, see *e.g.*, *The Infants Act*, R.S.A. 1970, c.185, ss.2-8; the *Settled Estates Act*, R.S.B.C. 1960, c.351, ss.3, 20 *et seq.*; *The Child Welfare Act*, R.S.M. 1970, c. C-80, ss.117-121; *The Infants Act*, R.S.O. 1970, c.222, ss.4-10; *The Infants Act*, R.S.S. 1965, c.342, ss.9-19. With regard to marriage settlements see, *e.g.*, *The Infants Act*, R.S.A. 1970, c.185, ss.11-13, and *The Infants Act*, R.S.O. 1970, c.222, ss.13-15.

agreements are void, and hence, cannot be ratified.<sup>20</sup> Although this further refinement of an already complex area of the law has been criticized,<sup>21</sup> it appears to provide, albeit inelegantly, solutions for two quite distinct problems posed by the existing case law. First, the rules relating to repudiation may have the effect of binding an infant to a contract which is harsh and prejudicial if he sleeps on his rights after reaching majority. This cannot happen where the agreement is held void.<sup>22</sup> Similarly, an apparent ratification will be ineffective.<sup>23</sup> Second, some of the difficulties present in the restitutionary rules under which the infant may attempt to recover the value of benefits conferred under the agreement may be ameliorated where the agreement has been held to be void at common law.<sup>24</sup> However, this additional category may operate as a mixed blessing for the infant, by preventing enforcement of the agreement in cases where its advantages are not outweighed, in the opinion of the infant at least, by its disadvantages.<sup>25</sup>

The common law rules relating to the enforceability of minors' contracts were substantially modified in England by the *Infants' Relief*

<sup>20</sup>*Beam v. Beatty* (No. 2) (1902), 4 O.L.R. 554 (C.A.); *Phillips v. Greater Ottawa Development Co.* (1916), 38 O.L.R. 315 (C.A.); *Pyett v. Lampman* (1922), 53 O.L.R. 149, [1923] 1 D.L.R. 249 (C.A.); *R. v. Rash*, *supra*, footnote 8; *McKay v. McKinley*, [1933] O.W.N. 392 (H.C.); *Ivan v. Hartley*, [1945] 4 D.L.R. 142 (Ont. H.C.); *Butterfield v. Sibbit and Nipissing Electric Supply Company Limited*, [1950] O.R. 504 (H.C.); *Re Staruch*, [1955] 5 D.L.R. 807 (Ont. H.C.); *Altobelli v. Wilson*, [1957] O.W.N. 207 (C.A.); *Upper v. Lightning Fastener Employees' Credit Union (St. Catharines) Limited* (1967), 9 C.B.R. (N.S.) 211 (Ont.). And see *R. v. Leduc* (1971), 5 C.C.C. (2d) 422 (Ont.). English authorities supporting the existence of this category may be cited: see, e.g., *Baylis v. Dineley* (1815), 3 M.&S. 477, 105 E.R. 689, and *Viditz v. O'Hagan*, [1900] 2 Ch. 87, 69 L.J. Ch. 507 (C.A.). But see *infra*, footnote 21.

<sup>21</sup>Pollock, for example, argued that the view that some infants' contracts are void is contrary to the weight of modern authority and criticized the distinction between void and voidable contracts as unreasonable. See *Pollock's Principles of the Law of Contracts*, (13th ed.), at 47-48. And see, C. A. Wright, *Note* (1935), 13 Can. B. Rev. 319, at 323 where it is argued that this further category is both undesirable and unnecessary for the protection of the interests of the minor. Pollock's view appears to have prevailed in England. Thus, modern English treatises on the law of contract do not consider a separate category of "void" contracts. In *Chitty on Contracts* (23rd ed.), vol. 1, at 184, note 12, it is suggested that in the earlier cases, "where the word 'void' was used 'voidable' was intended." The void contract doctrine has been abandoned by American courts as well. See, e.g., *Williston on Contracts* (3rd ed.), vol. 2, s.227. The category of voidness would create perils for innocent third parties if, as may be the case, no property passes under a void agreement. See *McBride v. Appleton* [1946] O.R. 17, [1946] 2 D.L.R. 16 (C.A.), *per* Roach, J.A. For this reason, among others, the better view is that property does pass. See *Stocks v. Wilson*, [1913] 2 K.B. 235, 82 L.J. K.B. 598; *Watts v. Seymour*, [1967] 2 Q.B. 647, [1967] 2 W.L.R. 1072, [1967] 1 All E.R. 1044 (C.A.). And see G. H. Treitel, *The Law of Contract* (4th ed.) at 384. And see further, the text at footnote 116 *et seq.*

<sup>22</sup>*Beam v. Beatty* (No. 2); *Phillips v. Greater Ottawa Development Co.*; *Re Staruch*; *McKay v. McKinley*, *supra*, footnote 20.

<sup>23</sup>*Beam v. Beatty* (No. 2); *Phillips v. Greater Ottawa Development Co.*; *McKay v. McKinley*, *supra*, footnote 20.

<sup>24</sup>For discussions of these problems, see *infra*, the text at footnotes 70 to 73.

<sup>25</sup>If the agreement is void, the adult party need not perform his obligations even though the infant affirms the contract after attaining majority. The adult party may thus be afforded an unmeritorious excuse for non-performance never contemplated at the time of formation. See Wright, *supra*, footnote 21, at 324.

Act, 1874.<sup>26</sup> The pertinent provisions of that statute were adopted in only one Canadian jurisdiction, British Columbia. Section 2 of the British Columbia *Infants Act*<sup>27</sup> provides:

All contracts, whether by specialty or by simple contract, entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, are absolutely void; but this enactment shall not invalidate any contract into which an infant may, by any existing or future Statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

The Act goes on to provide, as does the English legislation, that no action shall be brought to enforce "... any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy..."<sup>28</sup> Although the precise effect of this legislation is a matter of considerable dispute,<sup>29</sup> it is clear that certain types of contracts are rendered "absolutely void"<sup>30</sup> by the statute, and, further, that contracts considered voidable at common law, in the sense of not binding the infant until ratification, no longer bind the infant upon ratification.

In sum, a complex set of rules determines the question of the enforceability of agreements entered into with minors. To ascertain which of those rules will apply in a specific case, the transaction must be characterized as belonging to one of the following categories:

- (a) agreements of service which are beneficial to the infant employee, which agreements are binding on both parties;
- (b) agreements for the supply of necessaries to the minor;
- (c) "voidable" agreements which are binding on both parties until repudiated;
- (d) "voidable" agreements which are not binding on the minor unless ratified after attaining majority;
- (e) agreements which are "void" at common law; and

<sup>26</sup>37 & 38 Vict., c.62.

<sup>27</sup>R.S.B.C. 1960, c.193.

<sup>28</sup>*Ibid.*, s.3.

<sup>29</sup>See, e.g. G. H. Treitel, *The Infants Relief Act, 1874* (1957), 73 L.Q. Rev. 194; P. S. Atiyah, *The Infants Relief Act, 1874 — A Reply*, (1958), 74 L.Q. Rev. 97; G. H. Treitel, *The Infants Relief Act, 1874 — A Short Rebuttal*, (1958), 74 L.Q. Rev. 104.

<sup>30</sup>The consequences of absolute voidness are, however, obscure. As to whether property passes, see *infra*, the text at footnote 116 *et seq.* As to the ability of third parties to rely on the voidness, see the conflicting authorities on the question of the liability of a guarantor of a void indebtedness of a minor: *Coutts & Co. v. Browne-Lecky*, [1947] K.B. 104, [1946] 2 All E.R. 207 (guarantor not liable); *First Charter Financial Corporation Ltd. v. Muslow* (1974), 49 D.L.R. (3d) 138 (B.C.S.C.) (*dictum*, guarantor liable). As to the ability of the minor to enforce void agreements, see the Treitel-Atiyah debate, *ibid.* As to the availability of restitutionary remedies, see further, *infra*, the text at footnotes 73 to 77 and 112 to 144.

- (f) in British Columbia, agreements which are "absolutely void" within the meaning of the *Infants Act*.

The task of classification is not an easy matter. The boundaries of each category are elusive, as indeed, in some cases, are the reasons for drawing the distinction in the first place. As a result, the categories overlap and intersect in the reported case law in a somewhat confused fashion.<sup>31</sup> Our concern here is to examine the operation of the restitutionary rules which apply once it has been determined that the agreement is unenforceable. In what circumstances may the minor or the other party recover the value of benefits conferred on the other through performance of the unenforceable agreement? The answer to this question may vary to some extent from one category of unenforceability to the next. However, before turning to these problems, we here consider whether the liability of the minor for necessities is truly contractual or rests on principles of restitution.

### C. THE NATURE OF THE MINOR'S LIABILITY FOR NECESSARIES

It is well established that a minor is obliged to pay the reasonable value of necessary goods and services which have been supplied. Whether the minor will be liable on an executory agreement for their supply will depend on whether the minor's liability is contractual or restitutionary in nature. On this point there is little guidance in the case law. Although a majority of the commentators<sup>32</sup> appear to favour a restitutionary analysis, the present state of the authorities indicates that the point should be regarded as unsettled.

With respect to the supply of necessary goods, a strong argument can be made for the view that the minor is not liable in contract. Modern English and Canadian authorities addressing this point, however, offer conflicting *dicta*.<sup>33</sup> In *Nash v. Inman*,<sup>34</sup> for example, Fletcher Moulton

<sup>31</sup>See, generally, Percy, *supra*, footnote 2, for a useful review of the authorities.

<sup>32</sup>See, e.g., Wright, *supra*, footnote 21; J. D. Payne, *The Contractual Liability of Infants*, (1966) 5 West. Ont. L. Rev. 136, at 139 *et seq*; C. H. C. Edwards, *Infants' Liability in Contract*, in *Isaac Pitblado Lectures* (1970), at 8; P. S. Atiyah, *Introduction to the Law of Contract* (2nd ed.) at 101-102; G. H. L. Fridman, *Sale of Goods in Canada* (1973), at 28; *Anson's Law of Contract* (24th ed.), at 212 *et seq*; *Cheshire and Fifoot's Law of Contract* (9th ed.), at 404 *et seq*. This is the clearly established position in American law. See Williston, *supra*, footnote 21, s.240. And see, J. C. Miles, *The Infant's Liability for Necessaries*, (1927) 43 L. Q. Rev. 389. See, *contra*, Goff and Jones, *supra*, footnote 3, at 309-311; Percy, *Supra*, footnote 2, at 9; Treitel, *supra*, footnote 21, at 370-371.

<sup>33</sup>For Canadian *dicta* in support of the restitutionary view, see *R. v. Rash*, *supra*, footnote 8, at 256, and *Re Oberth and The Hospital Aid Act*, [1936] 3 W.W.R. 474 (Man. K.B.), at 476. In support of the contractual view, see *Beam v. Beatty (No. 2)*, *supra*, footnote 20, at 559, and *Soon and Soon v. Watson et al.* (1962), 38 W.W.R. 503 (B.C.S.C.), at 505.

<sup>34</sup>[1908] 2 K.B. 1 (C.A.), at 8, 77 L.J. K.B. 626, at 631. See also, *Guardians of Pontypridd Union v. Drew*, [1927] 1 K.B. 214 (C.A.), at 220, 95 L.J. K.B. 1030 at 1034, *per* Scrutton L.J.



L.J. suggested that the obligation to pay a fair price for necessities is imposed on the infant by law despite his contractual incapacity. In the same case, Buckley L.J. said that, "The plaintiff, when he sues the defendant for goods supplied during infancy, is suing him in contract on the footing that the contract was such as the infant, notwithstanding infancy, could make."<sup>35</sup> The liability actually imposed on the infant, however, appears to be restitutionary. Canadian sale of goods legislation is patterned on section 2 of the English *Sale of Goods Act*,<sup>36</sup> which provides as follows:

Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Provided that where necessities are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Liability for necessary goods does not attach, then, until they have been actually delivered. Indeed, it is not possible to reach a definite conclusion as to whether the goods are necessities until the time of delivery, for the legislation defines "necessaries" as, "goods suitable to the condition in life of such infant or minor . . . and to his actual requirements *at the time of the sale and delivery*."<sup>37</sup> The price to be paid must be a reasonable one, independently of any agreement reached by the parties, though the infant would be entitled to enforce an advantageous price term since such agreements are, at the option of the minor, binding on the adult party.

In the context of necessary services, an English case, *Roberts v. Gray*,<sup>38</sup> suggests that an executory contract for the provision of necessary services is binding on the infant, and thus supports the view that the minor's liability for necessities is contractual. It is difficult, however, to fashion a rationale for holding the infant to executory commitments of this kind. Indeed, *Roberts v. Gray* itself illustrates the unsatisfactory nature of the proposition.<sup>39</sup> In that case, Gray, an infant, having determined that he wished to become a professional billiards player, agreed to accompany the plaintiff, Roberts, a well-established professional, on a tour. The infant was to receive instruction from Roberts and was to be employed by him during the tour. Roberts expended certain moneys in preparation for the tour, whereupon Gray resiled from his undertaking. Roberts claimed for damages for breach of contract and was awarded £1,500. An appeal taken by Gray was dismissed. The

<sup>35</sup>*Nash v. Inman, ibid.*, at K.B. 12, L.J.K.B. 633.

<sup>36</sup>56 & 57 Vict., c. 71, s.2.

<sup>37</sup>*Ibid.*, s.2 [emphasis added].

<sup>38</sup>[1913] 1 K.B. 520, 82 L.J. K.B. 362 (C.A.).

<sup>39</sup>The Latey Committee tersely remarked that they, "would not wish to see this case followed." See *The Latey Report, supra*, footnote 7, s.314.

Court of Appeal treated the claim as arising from a contract for the supply of necessary services in the form of instruction, and held that as such, it was binding on the infant, even though still executory. Although a number of grounds for distinguishing *Roberts v. Gray* have been suggested by those who favour a restitutionary approach to these problems,<sup>40</sup> its effect, at the very least, is to place the matter in some doubt.

In the face of this uncertainty, a return to basic considerations underlying the rules relating to minors' contractual incapacity is appropriate. The predominant theme struck in the case law is the desirability of granting the infant an option to withdraw from undertakings which he has come to regret. The merits of this policy may be enhanced by the recent reductions of the age of majority in Canadian jurisdictions<sup>41</sup> which have brought the attainment of majority much closer to what is, in practical terms, the school-leaving age for most infants. Moreover, there do not appear to be compelling considerations in favour of holding the infant liable for damages on an executory agreement. One might argue that the imposition of contractual liability would have the effect of encouraging suppliers of necessities to deal with minors. Yet, as the Latey Committee pointed out,<sup>42</sup> there is little evidence to suggest that the elusive distinction between necessities and non-necessaries plays any part in the judgment exercised by a retailer who decides to enter into an agreement with an infant.<sup>43</sup> It may be that the apparent reluctance of the English courts to confirm the restitutionary nature of the liability of minors for necessities is better explained, as Dean Wright has argued,<sup>44</sup> as being linked to their general reluctance to acknowledge the validity of a theory of restitutionary liability which is distinct from contract and tort. If this is correct, further support for a restitutionary analysis of the minors' liability in Canadian law may be drawn from the rejection of the "implied contract" rationale of restitutionary relief effected by the Supreme Court of Canada in the *Degelman* case.<sup>45</sup>

Regardless of the ultimate disposition of this issue, it is clear that once the adult party has relied on the agreement by supplying necessary goods or services, the minor is liable for their reasonable value, or, in cases where the minor affirms the contract in order to enforce an advantageous price term, such lesser amount as has been agreed to by the supplier.

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<sup>40</sup>See, e.g., Cheshire and Fifoot, *supra*, footnote 32, at 406.

<sup>41</sup>See *supra*, footnote 1.

<sup>42</sup>*The Latey Report, supra*, footnote 7, s.318.

<sup>43</sup>The vagaries of this distinction are explored by Percy, *supra*, footnote 2, at 2-6.

<sup>44</sup>Wright, *supra*, footnote 21, at 321.

<sup>45</sup>*Supra*, footnote 5.

## D. RESTITUTION OF BENEFITS CONFERRED UNDER UNENFORCEABLE AGREEMENTS

The case law concerning restitutionary claims for benefits conferred under agreements unenforceable for infancy exhibits characteristics commonly observed elsewhere in the restitutionary case law.<sup>46</sup> Some of the leading English authorities have relied heavily on the "implied contract" theory of restitutionary liability in rejecting claims of this nature. Canadian courts in recent years have departed from a strict application of the rules developed by the English courts and have demonstrated a greater willingness to order restitution of benefits conferred. Two different categories of claims are to be considered; claims brought by the minor, and claims brought by the other party. Each of these categories will be further subdivided in terms of the various enforceability types described above.

### 1. Claims by Minor

(i) *Voidable Agreements*: Two distinct and conflicting lines of authority have developed in Canadian and English case law dealing with the recovery of benefits conferred by minors under agreements which are voidable on the ground of infancy, either in the sense of being unenforceable until ratified or in the sense of being binding until repudiated. In a number of cases the minor has been held entitled to restitution of the benefit conferred provided that a *restitutio in integrum* of the adult party can be made. The alternative rule to be found in the authorities is that the minor is entitled to restitution only if he has sustained a total failure of consideration. This latter rule is more restrictive, in the sense that it severely limits the range of situations in which the minor can obtain restitution. These two approaches are considered in turn, beginning with the former as it appears to be more consistent with the underlying policy of enabling a minor to avoid a depletion of his own assets through the performance of rashly given or improvident undertakings. Moreover, it is an approach which has been more widely applied in Canada than in England.<sup>47</sup>

The use of the phrase, *restitutio in integrum*, suggests an equitable origin for this doctrine and it is indeed clear that the doctrine will apply where equitable relief, such as the setting aside of a deed, is

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<sup>46</sup>See, e.g. McCamus, *supra*, footnote 3.

<sup>47</sup>It has been suggested that, in English law at least, the total failure of consideration requirement applies to money claims whereas the duty to make *restitutio in integrum* will apply where a minor claims for the restoration of property. See Cheshire and Fifoot, *supra*, footnote 32, at 411-413. This would not be a satisfactory statement of the position in Canadian law, however, for a number of reasons: (a) the modern Canadian cases cannot in fact be reconciled on this basis; (b) the Canadian courts have not explicitly adopted such a rationalization of the case law; and (c) such a distinction has little to commend itself either in terms of logic or underlying policy.

required. In the Ontario case of *Whalls v. Learn*,<sup>48</sup> for example, a young woman sought to recover land which she had conveyed as a minor to the defendants in return for a sum of money and the conveyance to her of other lands owned by the defendant. The plaintiff could not succeed, according to Chancellor Boyd, "... without making complete restoration to the defendants of the specific, or an equivalent, value of that which she has received from the defendants."<sup>49</sup> In the result, the plaintiff was obliged to restore all benefits conferred by the defendants as a precondition of her own restitutionary relief. It should be emphasized that restitution need not be made *in specie*. The courts exercise a broad discretion to award monetary equivalents for benefits which cannot be specifically restored. In *Murray v. Dean*,<sup>50</sup> another Ontario case involving rescission of an agreement to exchange properties, the plaintiff, a minor, was obliged to pay the defendant for the value of certain benefits derived from his occupation of the defendant's land. As well, the plaintiff was obliged to pay the defendant for the value of certain improvements which the defendant had made to the plaintiff's property.

Canadian courts have not restricted the application of this rule to cases involving equitable relief in the full sense, but have applied it in the context of claims to recover money paid,<sup>51</sup> and presumably, it could be extended to claims for the value of goods or services supplied as well.<sup>52</sup> Thus, in *Sturgeon v. Starr*,<sup>53</sup> Prendergast J. of the Manitoba Supreme Court denied a minor's claim for recovery of purchase moneys paid to the defendant for certain chattels on the ground that the defendant, in the rather peculiar circumstances of that case, could not be restored to his former position. The following statement of Prendergast J. has been relied on in subsequent Canadian cases:<sup>54</sup>

... 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.<sup>55</sup>

<sup>48</sup>*Supra*, footnote 12. See also, *Phillips v. Sutherland* (1910), 15 W.L.R. 594 (Man. K.B.). And see, *Butterfield v. Sibbitt and Nipissing Electric Supply Company Ltd.*, *supra*, footnote 20.

<sup>49</sup>*Whalls v. Learn*, *supra*, footnote 12, at 487.

<sup>50</sup>*Supra*, footnote 18.

<sup>51</sup>*Sturgeon v. Starr* (1911), 17 W.L.R. 402 (Man. K.B.); *Lafayette v. W. W. Distributors and Co. Ltd.* (1965), 51 W.W.R. 685 (Sask. Dist. C.); *Bo-Lassen v. Josiassen*, [1973] 4 W.W.R. 317 (Alta. Dist. C.). And see *Nicklin v. Longhurst* (1917), 27 Man. R. 255, [1917] 1 W.W.R. 439 (C.A.).

<sup>52</sup>Although there is no Canadian authority on point, there is no reason in principle to treat these cases differently. See, e.g., *Carpenter v. Grow* (1923), 247 Mass. 133, 141 N.E. 859.

<sup>53</sup>*Supra*, footnote 51.

<sup>54</sup>*Lafayette v. W. W. Distributors and Co. Ltd.*, and *Bo-Lassen v. Josiassen*, *supra*, footnote 51.

<sup>55</sup>*Sturgeon v. Starr*, *supra*, footnote 51, at 404.

In a more recent Alberta case, *Bo-Lassen v. Josiassen*,<sup>56</sup> Buchanan J. drew support for these remarks from early English authorities<sup>57</sup> and went on to allow recovery of purchase moneys paid by a minor for a motorcycle, on the condition that the plaintiff restore the motorcycle to the defendant vendor. In the event that there had been interim enjoyment of the goods, the court could, it is suggested, rely by analogy on the land cases<sup>58</sup> and deduct from the award an amount representing the value to the minor of such use of the goods.

A number of issues remain to be resolved by the courts. It is not clear, for example, to what extent *restitutio in integrum* might be treated not only as a condition of obtaining restitutionary relief, but as a condition of avoiding the agreement in the first place. This issue is considered further in reviewing the general question of the rights of the other party to obtain restitution from the minor.<sup>59</sup>

A second question which remains open is whether Canadian courts, following the *restitutio in integrum* line of authority, would exercise, as do the American courts, a discretion to waive the requirement of full restitution to the other party as a precondition of restitutionary relief for the minor in cases where a strict application of the rule would cause undue hardship to the minor. This might be appropriate where the benefit obtained by the minor has deteriorated in value or has been lost, parted with, or otherwise consumed. In some American cases, for example, minors have been permitted to avoid contracts for the purchase of automobiles and recover the amount paid toward the purchase price upon returning the vehicle in damaged condition.<sup>60</sup> In the absence of overreaching by the other party or severe prejudice to the minor, resulting, for example, from his impecuniosity, such a rule may be unduly prejudicial to the interests of the adult.<sup>61</sup>

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<sup>56</sup>*Supra*, footnote 51.

<sup>57</sup>*Holmes v. Blogg* (1818), 8 Taunt. 508, 129 E.R. 481; *Corpe v. Overton* (1833), 10 Bing. 252, 131 E.R. 901, 3 L.J. C.P. 24.

<sup>58</sup>*Whalls v. Learn*, *supra*, footnote 12; *Murray v. Dean*, *supra*, footnote 18.

<sup>59</sup>See, *infra*, the text at footnotes 78 to 105.

<sup>60</sup>This is the majority rule in American jurisdictions. See, e.g., *Quality Motors Inc. v. Hays* (1949), 216 Ark. 264, 225 S.W. 2d 326; *Hines v. Cheshire* (1950), 36 Wash. 2d 467, 219 P. 2d 100; *Fisher v. Taylor Motor Co.* (1959), 249 N.C. 617, 107 S.E. 2d 94; *Bowling v. Sperry* (1962), 133 Ind. App. 692, 184 N.E. 2d 901. There are a number of jurisdictions in which the infant seeking recovery is obliged to restore the value of benefits received. In others, legislation requiring infants over the age of eighteen years to make full restitution has been enacted. See, generally, Annot., *Infant's Liability for Use or Depreciation of Subject Matter, in Action to Recover Purchase Price Upon His Disaffirmance of Contract to Purchase Goods* (1967), 12 A.L.R. 3d 1174. It is a different question, of course, whether the minor who seeks merely to repudiate may be excused from making a full *restitutio in integrum*. For authorities suggesting that he may be so excused, see *infra*, the text at footnote 88 *et seq.*

<sup>61</sup>See Williston, *supra*, footnote 21, s.238.

Although some support for the *restitutio in integrum* rule can be found in the English cases,<sup>62</sup> the generally accepted view in England is that the infant cannot recover the value of benefits conferred unless there has been a total failure of consideration.<sup>63</sup> This approach has also been taken in a number of Canadian cases in which claims have been brought by infants to recover benefits conferred under voidable agreements. Thus, infant purchasers have been denied recovery of money paid over to the vendor, whether by way of a deposit or as a full or partial payment of the purchase price. This rule has been applied in cases of agreements which are voidable in the sense of being binding until repudiated, such as agreements for the purchase of land,<sup>64</sup> and with respect to agreements which are voidable in the sense of not being binding until ratified, such as agreements to purchase non-necessary goods,<sup>65</sup> on the basis that some interim enjoyment of the benefits of ownership had already occurred. The historical explanation for this doctrine would appear to be that the claims in question are claims for the recovery of money had and received, and as such were thought to be subject to the total failure of consideration requirement which was recognized as a necessary element of *quasi-contractual* money claims in other contexts.<sup>66</sup> Whether this doctrine retains a contemporary vitality, or has now been superseded by the *restitutio in integrum* analysis, must be considered for the present an arguable point. It is suggested, however, that a review of the merits of these competing doctrines indicates that preference should be given to the latter.

As has already been indicated, the *restitutio in integrum* analysis seems more consistent with the underlying policy of permitting the infant to resile from disadvantageous bargains. The fact that the infant has enjoyed

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<sup>62</sup>See, e.g., *Valentini v. Canali* (1889), 24 Q.B.D. 166, 59 L.J. Q.B. 74, where a contract was held "absolutely void" under the *Infants Relief Act, 1874*, and the infant was denied recovery because, according to Lord Coleridge C.J., at 167 (Q.B.D.), 76 (L.J. Q.B.), he "could not give back... [the] benefit or replace the detandant in the position in which he was before the contract." And see the discussion of the earlier English authorities in *Bo-Lassen v. Josiassen*, *supra*, footnote 51. See also, Treitel, *supra*, footnote 29, at 202-205; Atiyah, *supra*, footnote 29, at 101-103; Goff and Jones, *supra*, footnote 3, at 312.

<sup>63</sup>*Steinberg v. Scala (Leeds) Ltd.*, [1923] 2 Ch. 452, 92 L.J. K.B. 944 (C.A.), and *Pearce v. Brain*, [1929] 2 K.B. 310, 98 L.J. K.B. 559 (contract "absolutely void" under the *Infants Relief Act, 1874*). See also, *dicta* in *Chaplin v. Leslie Frewin (Publishers) Ltd.*, [1966] Ch. 71, [1966] 2 W.L.R. 40, [1965] 3 All E.R. 764, criticized by Cheshire and Fifoot, *supra*, footnote 32, at 413. It may be that this rule will be applied to claims to recover money contributed to a partnership by a minor. See *Ex parte Taylor* (1856), 8 De G. M. & G. 254, 44 E.R. 388, 25 L.J. Bk. 35, denying a minor the right to recover premium paid on entering a partnership. *Sed quaere*. The American rule allows recovery subject to a deduction for amounts received from the partnership. See Williston, *supra*, footnote 21, s.229. Presumably, this rule would be applied in Canada, relying by analogy on the cases dealing with recovery of land.

<sup>64</sup>*Short v. Field* (1914), 32 O.L.R. 395 (C.A.); *Robinson v. Moffat* (1916), 35 O.L.R. 9 (C.A.).

<sup>65</sup>*McDonald v. Baxter* (1911), 46 N.S.R. 149, 9 E.L.R. 316 (S.C.); *Coull v. Kolbuc* (1969), 68 W.W.R. 76 (Alta. Dist. Ct.), *Fannon v. Dobranski* (1970), 73 W.W.R. 371 (Alta. Dist. Ct.).

<sup>66</sup>See, e.g., *Earl of Buckinghamshire v. Drury* (1761), 2 Eden 60, at 72, 28 E.R. 818, at 823, *per* Lord Mansfield.

a modest benefit under the agreement does not seem to be sufficient reason for saddling him with the full measure of his folly. At the same time, it may be quite appropriate to protect the interests of the adult by deducting the value of the benefit received from the amount to be recovered by the infant. By requiring restoration of the *status quo ante* in this way, the *restitutio in integrum* analysis is capable of accommodating the legitimate interests of both parties to the transaction. The total failure of consideration analysis, on the other hand, dictates an all-or-nothing approach. Indeed, the restrictiveness of this doctrine has led to the development of two rather strained interpretations of the total failure requirement which have the effect of allowing restitutionary relief to the infant even though some consideration has already passed. First, in some cases the courts have restated the requirement in a more open-textured fashion, asking whether the infant has derived a real advantage from the consideration passed, and have granted the infant recovery of money paid even though the adult had already performed part of the bargain.<sup>67</sup> In other cases, however, the requirement has been given a very strict reading indeed. In a recent Alberta case, *Fannon v. Dobranski*,<sup>68</sup> an infant purchaser, who drove his new car for some seventy miles, was held unable to resile from the transaction and recover the price or any portion thereof. A second method of narrowing the operation of the doctrine is illustrated by a nineteenth-century English case, *Everett v. Wilkins*.<sup>69</sup> There, the infant plaintiff had agreed to purchase a one-half share of the defendant's business, the operation of a public house. Part of the price was to be paid immediately, the rest at a future point in time. The defendant was to furnish the plaintiff and his wife with board and lodging in the public house and, upon payment of the final instalment of the price, to share with him the proceeds of the partnership. After paying the first instalment, moving into the public house, and sharing in the management of the business, the plaintiff purported to repudiate the transaction and sued to recover the amount of the first instalment as money had and received. The claim was successful. The infant was awarded the amount paid less an adjustment to reflect the value of the board and lodging which had already been consumed by the plaintiff and his wife. The obligation to supply board and lodging was said to be merely collateral; there had been a total failure of consideration on the main obligation and the restitutionary action would lie. A more straightforward method of achieving such a result is offered by the Canadian authorities which have adopted the *restitutio in integrum* analysis.

(ii) *Agreements Void at Common Law*: Where the agreement is void at common law, some support may be found in the Canadian authorities for

<sup>67</sup>See, e.g. *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589, 63 L.J. Ch. 795, criticized on this point in *Steinberg v. Scala (Leeds) Ltd.*, *supra*, footnote 63 and in *Phillips v. Greater Ottawa Development Co.*, *supra*, footnote 20. Cf. *Rowland v. Divall*, [1923] 2 K.B. 500, 92 L.J. K.B. 1041 (C.A.).

<sup>68</sup>*Supra*, footnote 65.

<sup>69</sup>(1874), 29 L.T.R. 846 (Ex.).

the view that the minor is allowed to recover benefits transferred to the adult, or their value, whether or not the minor has enjoyed benefits furnished by the adult and whether or not a restoration of the *status quo ante* is possible.<sup>70</sup> It has been questioned, however, whether a rule so favourable to the minor's position is desirable.<sup>71</sup> In the absence of evidence of an intention to exploit the inexperience of the minor, it would seem to be appropriate to afford restitutionary protection to the adult by deducting from the award made to the infant a sum reflecting the value of benefits received. This could be accomplished simply by applying a *restitutio in integrum* analysis in such cases.<sup>72</sup> An alternative, and for the reasons indicated above, a less satisfactory approach, would be to impose the total failure of consideration requirement as a pre-requisite to restitutionary relief.<sup>73</sup>

(iii) *Agreements "Absolutely Void" by Statute*: The availability of restitutionary relief to minors who have conferred benefits under agreements rendered "absolutely void" by the British Columbia *Infants Act* is a matter yet to be considered by a Canadian court. Nor is any guidance given by the statute itself. Since the underlying considerations of social policy are identical to those present in the cases dealing with agreements which are voidable at common law, it is suggested that the preferable view is that the minor be allowed to recover the value of benefits conferred on the adult party, provided that a *restitutio in integrum* of the adult party can be effected — whether by a return of the benefit received *in specie* or by a reduction in the amount of the award to reflect the value of any benefit which has already been received by the infant plaintiff.<sup>74</sup> It may be, however, that the English cases dealing with agreements nullified by a similar statutory provision and which suggest, though not unequivocally,<sup>75</sup> that recovery of money<sup>76</sup> or chattels<sup>77</sup> is contingent upon a showing of a total failure of consideration, would be considered to be persuasive by a Canadian court confronted with this issue.

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<sup>70</sup>*Re Staruch and Upper v. Lightning Fastener Employees' Credit Union (St. Catharines) Limited*, *supra*, footnote 20.

<sup>71</sup>Percy, *supra*, footnote 2, at 35.

<sup>72</sup>Support for this approach may be drawn from *Butterfield v. Sibbitt and Nipissing Electric Supply Company Limited*, *supra*, footnote 20. There, the infant plaintiff's release of a cause of action against the defendant was held void. The plaintiff was allowed to recover on the original cause of action subject to a deduction for the amount of the payment given for the release.

<sup>73</sup>For *dicta* supporting this approach, see *Phillips v. Greater Ottawa Development Co.*, *supra*, footnote 20, and *Altobelli v. Wilson*, *supra*, footnote 20.

<sup>74</sup>*Supra*, the text at footnotes 50 to 58.

<sup>75</sup>*Supra*, footnote 62.

<sup>76</sup>*Valentini v. Canali*, *supra*, footnote 62.

<sup>77</sup>*Pearce v. Brain*, *supra*, footnote 63.



## 2. Claims By The Other Party

Apart from cases involving the supply of necessities,<sup>78</sup> restitutionary protection is afforded to the other party to some degree by two different means. First, in some situations a duty is imposed on the minor to make restitution — the extent of which is not established with certainty — either as a condition of being permitted to avoid the agreement or as a condition of being permitted to pursue his own restitutionary remedies.<sup>79</sup> Second, the other party has been permitted in some circumstances to assert an affirmative restitutionary claim against the minor. The law relating to both of these matters is in a very unsettled state; the law relating to claims brought by the minor may by comparison appear to be remarkably well ordered.

There are a number of reasons for the more fluid state of the law relating to the rights of the other party. In addition to the conflicting approaches of the *restitutio in integrum* rules — as against the total failure of consideration rules — we are here confronted by a much more delicately balanced policy issue. Whereas it is easily seen that restitutionary relief for the minor is quite consistent with the policy underlying the incapacity doctrine, it is more difficult to discern the correct position with respect to claims by the other party. Would the granting of *in personam* restitutionary relief to the other party subvert the policy of protecting minors from their inexperience? Or, may there not be circumstances where a restoration of the *status quo ante* would effect substantial justice for both parties? Further, the question of the relevance of English case law raises complex considerations in this area. The development of common law restitutionary principles in English law has been hindered by judicial reliance on the implied contract theory. For this reason, among others, there has been a tendency in English writing on the subject to seek a basis for restitutionary recovery in expanded notions of proprietary relief and in equitable claims against the minor based on a broadly construed doctrine of fraud. It may be, of course, that the demise of the implied contract theory in Canadian restitutionary law, when coupled with the fact that most of the modern English cases have been decided in the shadow of legislation<sup>80</sup> which has been adopted in only one Canadian jurisdiction,<sup>81</sup> provides a sound basis for suggesting that this English common law malady, and its equitable cure, need not be considered a part of Canadian law. At the same time it would be unwise to ignore the English jurisprudence in such an area as this where the Canadian doctrine exhibits much instability. Thus, in the following discussion, while emphasis is given to the approach taken in the Canadian

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<sup>78</sup>*Supra*, text at footnotes 32 to 45.

<sup>79</sup>This latter aspect has been considered in detail in the preceding section and therefore need be considered only very briefly in this context.

<sup>80</sup>The *Infants Relief Act* (1874), 37 & 38 Vict., c.62.

<sup>81</sup>British Columbia. See the *Infants Act*, R.S.B.C. 1960, c.193.

material, reference is also made to the English material where it appears to provide either additional remedial doctrines or alternative models of analysis. We return, then, to a consideration of the various categories of enforceability with a view to ascertaining the restitutionary rights of the other party to the agreement.

(i) *Voidable Agreements*: If the agreement in question is one which is voidable in the sense of being binding until repudiated by the minor, the act of repudiation will revest in the original owner property transferred under the agreement.<sup>82</sup> Additionally, where the minor is seeking the restoration of the property transferred, he will be required to repay the value of benefits he has received, whether through use of the other party's property or otherwise.<sup>83</sup> Whether this duty to make a full *restitutio in integrum* would be imposed more generally on the minor as a condition of disaffirming such an agreement is doubtful.<sup>84</sup>

There is some authority for the view that a minor will be permitted to recover moneys paid to the other party only if he can establish failure of consideration.<sup>85</sup> Paradoxically, this would go well beyond restitutionary protection of the other party; it would permit him to profit from the unenforceable agreement, perhaps handsomely and unexpectedly, by retaining benefits conferred by the minor without being required to account for their value. It is argued here that preference ought to be given to a conflicting line of authority which would permit the minor to succeed in a restitutionary claim only if he can make restitution to the other party.<sup>86</sup>

If the agreement is voidable in the sense of being not binding until ratified, the minor who avoids the agreement and seeks restoration of benefits conferred may be required to make a full *restitutio in integrum* to the other party.<sup>87</sup> Where the minor is not actively seeking restitution the other party's position is less secure. Since the agreement is not binding on the minor *ab initio*, it is theoretically not necessary for him to come forward and repudiate the agreement to escape his obligations. Further, property in any goods supplied will pass to the minor under the

<sup>82</sup>*Williams on Vendor and Purchaser* (4th ed.), at 847, and Goff and Jones, *supra*, footnote 3, at 313.

<sup>83</sup>See, e.g., *Whalls v. Learn*, *supra*, footnote 12, and *Murray v. Dean*, *supra*, footnote 18. See also, *supra*, text at footnote 48 *et seq.*

<sup>84</sup>Some Canadian courts, dealing with contracts which are generally classified as not binding until ratified, have suggested that such a duty is to be imposed as a condition of disaffirmance. See *infra*, footnote 90. See also, *Lemprière v. Lange* (1879), 12 Ch. D. 675, 41 L.T.R. 378 (C.A.).

<sup>85</sup>*Short v. Field and Robinson v. Moffat*, *supra*, footnote 64.

<sup>86</sup>*Supra*, the text at footnote 47 *et seq.*

<sup>87</sup>*Ibid.*

agreement.<sup>88</sup> Hence, a minor who purchases non-necessary goods, for example, may take delivery, refuse to pay, and await suit. If, in the face of the minor's refusal to pay, the other party demands a return of the goods supplied, there is authority for the view that this will have the effect of revesting property in the supplier and will provide a basis for an action in detinue.<sup>89</sup> Alternatively, the other party may bring an action to enforce the agreement. The court may in such circumstances afford restitutionary protection to the other party by requiring the minor to make restitution to some extent as a condition of being permitted to raise the defence of minority. Some Canadian cases suggest that a voidable contract can only be avoided if the minor returns the property he has received "or its value."<sup>90</sup> These statements have been criticized by one judge of the Ontario High Court<sup>91</sup> as being "too broad," and indeed, a strict rule requiring full restitution by the minor as a condition of avoidance could do much to undermine the protection afforded minors by the unenforceability rules. It is clear, however, that, at the very least, the minor can be called upon to restore whatever remains *in specie* of the benefit received.<sup>92</sup> Further, where the benefit has deteriorated in value, or has been lost, wasted, consumed or otherwise disposed of after attaining the age of majority, the former minor may be required to pay the remaining value of the benefit as of the time of his reaching majority.<sup>93</sup> Thus, in an Ontario case, *Louden Manufacturing*

<sup>88</sup>The other party is under a binding obligation to pass property. Property in goods supplied by the minor would pass as well. See, e.g., *McGaw v. Fisk* (1908), 38 N.B.R. 354 (C.A.); *Chaplin v. Leslie Frewin (Publishers) Ltd.*, *supra*, footnote 63. Cf. the question of property passage under absolutely void agreements discussed *infra*, at footnote 116 *et seq.*

<sup>89</sup>*McGaw v. Fisk*, *ibid.* The difficulty with this position is that it may run afoul of the rule that actions in tort cannot be employed as a means of indirect enforcement of the minor's undertaking. See, e.g., *Ballett v. Mingay*, [1943] 1 K.B. 281, [1943] 1 All E.R. 143 (C.A.) (detinue sustained against a minor in breach of the terms of bailment because on these facts the tortious conduct is independent of or outside the contract). We agree, however, with those writers who have suggested that detinue should generally be permitted since the thrust of the action is not to enforce the agreement but to effect a restoration of the *status quo ante*. See Payne, *supra*, footnote 32, at 150, and P. S. Atiyah, *The Liability of Infants in Fraud and Restitution* (1959), 22 Mod. L. Rev. 273, at 281.

<sup>90</sup>*Re Hutton Estate et al.*, [1926] 3 W.W.R. 609, at 611, [1926] 4 D.L.R. 1080 (Alta. S.C.) at 1082-1083. And see *Blackwell v. Farrow*, [1948] O.W.N. 7 (H.C.).

<sup>91</sup>*Butterfield v. Sibbitt and Nipissing Electric Supply Company Limited*, *supra*, footnote 20, at 510, *per* Ferguson J.

<sup>92</sup>*Louden Manufacturing Co. v. Milmine* (1907), 14 O.L.R. 532, *aff'd* 15 O.L.R. 53 (D.C.); *Butterfield v. Sibbitt and Nipissing Electric Supply Limited*, *supra*, footnote 20; *Noble's Ltd. v. Bellefleur* (1963), 37 D.L.R. (2d) 519 (N.B.C.A.), relying on Williston, *supra*, footnote 21, s.298, and 31 *Corpus Juris*, at 1070-1071. The cases do not clearly establish whether the duty imposed here is *in rem* on the theory, presumably, that property has revested in the plaintiff. If it is, it would appear that the duty does not extend to cover the case of a resale or barter which occurs prior to the plaintiff's attempt to revest property in himself. Property in the original goods having passed to the minor by this point, the plaintiff would have no proprietary right to assert against the minor and therefore could not trace at common law into the proceeds or substitute goods. As to the potential relevance of equitable tracing rules, see *infra*, footnotes 96 and 127. See also, Atiyah, *supra*, footnote 89, at 290.

<sup>93</sup>*Louden Manufacturing Co. v. Milmine*, *ibid.*; *Great West Implement Co. v. Grams* (1908), 8 W.L.R. 160 (Alta. C.A.); *Molyneux v. Traill*, *supra*, footnote 8; *Noble's Ltd. v. Bellefleur*, *ibid.*

*Company v. Milmine*,<sup>94</sup> a defendant, who had purchased non-necessary goods as a minor, was held liable to pay to the seller the value of that portion of the goods which he had retained at majority and subsequently resold to a third party. This rule also applies to money paid to the minor and retained at majority.<sup>95</sup>

Application of these various strands of Canadian case law to the question of the rights of a lender who has advanced money to an infant borrower poses similar problems. Presumably, to the extent that the moneys remain traceable,<sup>96</sup> a duty to restore them to the lender would be imposed.<sup>97</sup> To the extent that the moneys advanced have been spent by the minor on necessities<sup>98</sup> or on the purchase of land<sup>99</sup> the lender would be permitted to obtain restitution on the basis of the doctrine of subrogation. Whether a duty to make full restitution would be imposed in the absence of these factors is another matter. If the contract of loan were harsh and oppressive, and so held to be void rather than merely voidable, it seems very likely that the minor would not be burdened with a general duty to make full *in personam* restitution.<sup>100</sup> If the contract of borrowing were merely voidable, however, reliance might be placed on those Canadian authorities which suggest that the minor must make a full *restitutio in integrum* as a condition of avoiding the agreement.<sup>101</sup> At the least, it would appear that the lender is entitled to claim for such of the moneys advanced as were retained at majority.<sup>102</sup>

In sum, then, the Canadian case law in this context again suggests two alternative and conflicting rules. A duty to make full *in personam* restitution is suggested by some cases. Other cases suggest that the minor can only be called upon to restore benefits retained *in specie*

<sup>94</sup>*Supra*, footnote 92.

<sup>95</sup>*Molyneux v. Traill*, *supra*, footnote 8. The defendant was an infant seller who had improperly retained a deposit paid by the plaintiff purchaser. The court held that recovery of the amount of the deposit was warranted on the authority of *Louden Manufacturing Co. v. Milmine*. There was no evidence to show that the moneys paid over by the plaintiff were traceable in the defendant's hands.

<sup>96</sup>There appears to be no Canadian authority on point. To the extent that the funds are traceable at law, recovery is supported by the authorities referred to, *supra*, footnotes 89 and 92. The recoverability of funds traceable only in equity will turn on the extent to which Canadian courts are willing to depart from the requirement of English law that there be a fiduciary relationship between the parties, or to "find" a fiduciary relationship present in these situations (see *infra*, footnote 127).

<sup>97</sup>Relying, by analogy, on *Molyneux v. Traill*, *supra*, footnote 8.

<sup>98</sup>*Marlow v. Pitfield* (1719), 1 P Wms. 558, 24 E.R. 516; *Glass v. Munsen* (1865), 12 Gr. 77 (Ont.); *Lewis v. Alleyne* (1888), 4 T.L.R. 560, 32 S.J. 486 (C.A.).

<sup>99</sup>*Nottingham Permanent Benefit Building Society v. Thurstan*, *supra*, footnote 11 (H.L.) (lender subrogated to vendor's lien).

<sup>100</sup>*Supra*, the text at footnotes 70 to 73.

<sup>101</sup>*Supra*, the text at footnote 47 *et seq.*

<sup>102</sup>*Molyneux v. Traill*, *supra*, footnote 8 (money paid as a deposit held recoverable). And see the authorities cited, *supra*, footnote 93.

during his minority, but can be compelled to make full *in personam* restitution of benefits retained at majority, whether or not they have deteriorated or have been disposed of by the time of the action. Although the weight of authority may be said to favour the latter approach, the matter has not been the subject of a clear pronouncement by a Canadian court of high authority and may be regarded as open.

A rather different approach has been taken by the English courts, though, again, the task of ascertaining the present position is a daunting one. Since the modern English law has been rendered in the context of agreements "absolutely void" under the *Infants' Relief Act*, the problems are canvassed below with reference to that category of unenforceability.<sup>103</sup> It is sufficient for the present to note that where the agreement has been induced by fraud<sup>104</sup> on the part of the minor, an equitable duty to make restitution has been imposed on the minor. This may provide an additional avenue of relief for the other party.<sup>105</sup>

(ii) *Agreements Void at Common Law*: The question of the other party's ability to obtain restitution of benefits conferred under agreements void at common law has not been directly addressed in the Canadian case law. With regard to money borrowed by the minor, however, the lender would be granted restitution with regard to moneys used by the minor to purchase land or necessaries on the basis of the doctrine of subrogation.<sup>106</sup> Further, it is arguable that the minor is subject to a duty to restore identifiable money or goods retained by the minor either upon the occasion of a suit brought by the other party to enforce the contract during his minority<sup>107</sup> or upon attaining majority.<sup>108</sup> Again, the English doctrines based on fraudulent conduct by the minor may afford relief.<sup>109</sup>

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<sup>103</sup>*Infra*, the text at footnotes 115 to 144.

<sup>104</sup>The proper definition of the term in this context is a question of some nicety. See *infra*, the text at footnotes 128 to 140.

<sup>105</sup>Although it appears that the Canadian case law considered in the text would extend recovery in all situations covered by the English fraud doctrines, regardless of whether or not fraud in the requisite sense can be established, the unsettled nature of the Canadian authorities suggests that counsel for the other party may do well to maintain a few English strings for his bow. Cf. Percy, *supra*, footnote 2, at 43.

<sup>106</sup>*Supra*, footnotes 98 and 99.

<sup>107</sup>By analogy to the case law on voidable agreements; see *supra*, footnotes 92, 96 and 97. Alternatively, it is arguable that proprietary relief is available on the theory that property would revert in the other party upon a demand for its return. See discussion, *supra*, footnote 89. A further alternative would be to place proprietary relief on the basis that property would not pass at all under a contract void at common law. Indeed, it appears to have been assumed by Roach J. dissenting in *McBride v. Appleton*, *supra*, footnote 21, that property would not pass. The contrary view is, however, preferable, both on authority (see *infra*, footnote 116) and on principle (see, *infra*, the text at footnotes 141 to 142).

<sup>108</sup>Additionally, there would be a duty to account for deterioration, loss or other disposition of the goods occurring after majority has been attained; see discussion *supra*, footnote 93.

<sup>109</sup>*Infra*, the text at footnotes 128 to 140.

Beyond this it is doubtful that a general duty to make restitution would be imposed. Certainly, it has been held in some cases that the minor can seek restitution even though he can no longer effect a *restitutio in integrum* of the other party.<sup>110</sup> Further, in situations where the contract is held void because it is harsh and oppressive it may be reasonable to deprive the other party of the protection of the unjust enrichment principle, in order to provide a disincentive for those who would take advantage of the immaturity and inexperience of a minor. In the absence of evidence of such oppression, it is arguable that restitutionary duties could be imposed on the minor to the same extent as if the contract were considered merely voidable.<sup>111</sup>

(iii) *Agreements "Absolutely Void" by Statute*: The British Columbia *Infants Act*<sup>112</sup> is silent on the question of whether benefits conferred by the other party under an agreement rendered "absolutely void" by its provisions are recoverable. Moreover, the question has not been considered by a Canadian court. As a matter of general principle, it might be suggested that the underlying considerations of policy are identical to those present in the case of an agreement which is voidable at common law.<sup>113</sup> Inasmuch as the statute does not indicate an intention to diminish the restitutionary rights of the other party, it is arguable that the remedies available to the other party under Canadian law dealing with voidable agreements should be available in this context as well.<sup>114</sup>

In the absence of Canadian authority directly on point, however, it is likely that our courts would seek guidance from the English case law considering agreements rendered "absolutely void" by the *Infants' Relief Act, 1874*.<sup>115</sup> It is therefore necessary to review the English position in some detail, even though the modern English cases in this area are inconsistent with the principles of Canadian restitutionary law. First considered are the rights of the other party at common law, and then under doctrines of equity.

The common law remedies available to the other party are, in the absence of tortious conduct on the minor's part, virtually non-existent. It appears to be accepted that property in goods will pass to the minor

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<sup>110</sup>*Re Staruch, and Upper v. Lightning Fastener Employees' Credit Union (St. Catharines) Limited, supra*, footnote 20. Cf. *Butterfield v. Sibbitt and Nipissing Electric Supply Company Limited, supra*, footnote 20.

<sup>111</sup>See, generally, Percy, *supra*, footnote 2, at 32 *et seq.*

<sup>112</sup>R.S.B.C. 1960, c. 193.

<sup>113</sup>Many of the transactions rendered void by the statutory provision would be held voidable at common law.

<sup>114</sup>*Supra*, the text at footnote 82 *et seq.*

<sup>115</sup>37 & 38 Vict., c.62.

and, hence, that proprietary remedies are precluded,<sup>116</sup> though it has been suggested by Professor Atiyah that property in moneys paid to the minor may not pass and that they are, therefore, amenable to recovery in an *in rem* claim in money had and received so long as they remain traceable.<sup>117</sup> The *in personam* quasi-contractual claims appear to be barred by application of the implied contract theory. The minor cannot be liable *ex contractu*, it is said,<sup>118</sup> and this precludes any liability in money had and received, or in any other common count, where the substance of the claim is *ex contractu* rather than *ex delicto*. In *Cowern v. Nield*,<sup>119</sup> a minor who traded in hay and straw undertook to supply the plaintiff with clover and hay. The minor delivered rotten clover which was properly rejected by the plaintiff, and failed to deliver the hay. The plaintiff sued to recover moneys paid as a partial payment of the contract price, either as damages for breach of contract or as money had and received. The minor successfully raised his infancy as a defence to both claims. Only in circumstances where the defendant was guilty of fraud, and was therefore liable *ex delicto*, could the claim have succeeded.<sup>120</sup> Similarly, in *R. Leslie Ltd. v. Sheill*,<sup>121</sup> the English Court of Appeal denied a claim brought by a moneylender in money had and received to recover moneys lent to a minor who had fraudulently misrepresented that he was of full age. Moreover, it was held by the Court that any attempt to recover in a tort action for deceit would run aground on the principle that, "Although an infant may be liable in tort generally, he is not answerable for a tort directly connected with a contract which, as an infant, he would be entitled to avoid."<sup>122</sup> Although writers have strongly criticized both the reasoning and the result of each of these cases,<sup>123</sup> it is evident that they create a serious

<sup>116</sup>*Stocks v. Wilson, and Watts v. Seymour, supra*, footnote 21. Cf. *McBride v. Appleton, supra*, footnote 21.

<sup>117</sup>Atiyah, *supra*, footnote 89, at 283-285, relying by analogy on the proposition advanced by Lord Haldane in *Sinclair v. Brougham et al.*, [1914] A.C. 398, at 420 L.J. Ch. 465, at 476, to the effect that the proprietary remedy at law for money lent under an *ultra vires* agreement would persist, so long as the money were traceable, until a debtor/creditor relationship intervened. The sole virtue of this approach is that it provides for at least some recovery — albeit anomalously only for identifiable money — in the context of rules which are generally perceived as being too hostile to claims by the other party. A more satisfactory approach, it is suggested, would be to hold that all property passes to the minor but that in appropriate circumstances, *in personam* claims against the minor are allowable. See *infra*, the text at footnotes 141 to 142.

<sup>118</sup>See, e.g. *Bristow v. Eastman* (1794), 1 Esp. 172 at 173, 170 E.R. 317; *Cowern v. Nield*, [1912] 2 K.B. 419 at 423, 81 L.J. K.B. 865 at 867; *R. Leslie Ltd. v. Sheill*, [1914] 3 K.B. 607, at 612-613, 83 L.J. K.B. 1145, at 1149 *per* Lord Sumner, at 621-622 (K.B.), 1154 (L.J. K.B.) *per* Kennedy J., and at 626 (K.B.), 1157 (L.J. K.B.) *per* A. T. Lawrence J.

<sup>119</sup>*Ibid.*

<sup>120</sup>A new trial was ordered on the issue of whether the minor had obtained the money by fraud.

<sup>121</sup>*Supra*, footnote 118.

<sup>122</sup>*Ibid.*, at 611 (K.B.), 1148 (L.J. K.B.), *per* Lord Sumner. And see *ibid.*, at 620 (K.B.), 1153 (L.J. K.B.) *per* Kennedy J., and at 625 (K.B.), 1156 (L.J. K.B.), *per* A. T. Lawrence J.

<sup>123</sup>See, e.g., Goff and Jones, *supra*, footnote 3, at 22-23 and 313-314.

impediment to the granting of *in personam* restitutionary relief at common law. To summarize, the other party probably has no proprietary remedy at common law, except, perhaps, in the case of money paid to the minor, no remedy in tort unless the tort is not "directly connected" with the contract, and no *in personam* remedy in quasi-contract except in cases where the liability is in substance *ex delicto* and it is appropriate to waive the tort and sue in *assumpsit*.<sup>124</sup>

The rules of equity afford a greater measure of relief for the other party. In the first place, money lent which is used by the minor to purchase necessities or land may be recoverable under the doctrine of subrogation.<sup>125</sup> Second, if the suggestion that property in money does not pass to the minor under an "absolutely void" agreement be accepted,<sup>126</sup> it is arguable that the equitable tracing rules may be applied in aid of the other party's claim to follow the money into its product.<sup>127</sup> Third, and perhaps most importantly, there is authority for the granting of an equity of restitution<sup>128</sup> to the other party in situations where the minor has acted fraudulently. In *Stocks v. Wilson*,<sup>129</sup> Lush J. put forward an interpretation of this doctrine in terms very favourable to the interests of the other party. The defendant minor had induced the plaintiff to supply him with non-necessary goods on credit by misrepresenting his age. Having taken delivery of the goods, the defendant then resold a portion of them and granted a bill of sale on the rest as security for a loan. He then refused to pay the contract price. After the defendant had attained his majority, the plaintiff sued to recover, *inter alia*, the reasonable value of the goods supplied. Lush J., allowing recovery of the proceeds of the resale and the borrowing, remarked:<sup>130</sup>

What the Court of Equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages or compensation for the loss of the other party's bargain. If the infant has obtained property by fraud he can be compelled to restore it; if he has obtained money he can be compelled to

<sup>124</sup>See *Bristow v. Eastman*, *supra*, footnote 118 (minor who embezzled his master's money held liable in money had and received). On waiver of tort generally, see Goff and Jones, *supra*, footnote 3, c. 33.

<sup>125</sup>*Supra*, footnotes 98 and 99.

<sup>126</sup>*Supra*, footnote 117.

<sup>127</sup>Professor Atiyah argues persuasively on several grounds against the orthodox view that a fiduciary relationship is required in English law to permit the application of equitable tracing rules: (i) there is no reason to require the relationship in any case where property at law has not passed (*semble* on the theory that, *a fortiori*, property would not pass in equity); (ii) in any event the fiduciary requirement may be met by impressing the funds in the minor's hands with a resulting trust; (iii) it may not be necessary to establish a fiduciary relationship if fraud can be established. See Atiyah, *supra*, footnote 89, at 288 to 290.

<sup>128</sup>It is clear that the remedy is restitutionary in nature only and would not enable enforcement of the contract. See *Levene v. Brougham* (1909), 25 T.L.R. 265 (C.A.).

<sup>129</sup>*Supra*, footnote 21.

<sup>130</sup>*Ibid.*, at 242-243 (K.B.), 602 (L.J. K.B.).



refund it. If he has not obtained either, but has only purported to bind himself by an obligation to transfer property or to pay money, neither in a Court of Law nor a Court of Equity can he be compelled to make good his promise or to make satisfaction for its breach.

Moreover, Lush J. was of the view that Equity's jurisdiction was *in personam* in nature rather than proprietary and, hence, that the minor could be called upon to account for the proceeds out of his general assets.<sup>131</sup>

If Mr. Justice Lush's remarks can be coupled with the traditionally broad view of the nature of fraud taken by the courts of equity, the equitable *in personam* restitutionary claim would afford relief to the other party in a wide range of circumstances. Certainly, a misrepresentation of age will be considered fraudulent for these purposes.<sup>132</sup> Indeed, despite the existence of modern *dicta* restricting the rule to such cases,<sup>133</sup> support may be found for the view that the mere fact that the minor wishes to retain the property which he has obtained while at the same time pleading infancy as a defence to a claim for its value, is fraudulent conduct in the requisite sense. In an earlier case, *Clarke v. Cobley*,<sup>134</sup> a minor had given a bond to a creditor in return for a surrender by the creditor of promissory notes issued by the minor's wife. The bond being unenforceable, the creditor was permitted to recover the notes even though the report of the case does not expressly indicate that a fraudulent misrepresentation of age had been made.<sup>135</sup> Although it has now been

<sup>131</sup>*Ibid.*, at 247 (K.B.), 604 (L.J. K.B.). Lush J. relied, *inter alia*, on *Re King, Ex parte Unity Joint Stock Mutual Banking Association* (1858), 3 De G. & J. 63, 44 E.R. 1192, 27 L.J. Bk. 33, in which an infant bankrupt who had obtained a loan from the claimant banking association by fraudulently misstating his age, was held liable for repayment of the debt. The claimant did not obtain a priority over the general creditors and the case therefore suggests that an *in personam* duty to pay can be imposed. And see, *Maclean v. Dummett* (1869), 22 L.T. 710 (P.C.). *Re King* was doubted by the Court of Appeal, though not overruled, in *R. Leslie Ltd. v. Sheill, supra*, footnote 118, at 616-617 (K.B.), 1151-1152 (L.J. K.B.), *per* Lord Sumner. See also, *Miller v. Blankley* (1878), 38 L.T.R. 527. For authority indicating that although the infant ought not be held liable for the debt (as in *Re King*), a duty to make restitution would nonetheless be imposed, see *Bartlett v. Wells* (1862), 1 B. & S. 836, 31 L.J. Q.B. 57, 121 E.R. 924 *De Roo v. Foster* (1862), 12 C.B. (N.S.) 272, 142 E.R. 1148. *Cf. Lempriere v. Lange, supra*, footnote 84, in which it was held that a lessor could bring an action to avoid a lease induced by a misrepresentation of age by the infant lessee, but could not recover the value of use and occupation up to the time of avoidance; *semble*, because this would permit the lessor to approbate and reprobate. On the contrary, it is submitted that allowing such recovery would merely effect restitution.

<sup>132</sup>See, e.g., *Nelson v. Stocker* (1859), 4 De G. & J. 458, 45 E.R. 178; *Maclean v. Dummett, ibid.*; *Bartlett v. Wells, ibid.*; *DeRoo v. Foster, ibid.*; *Goyer v. Morrison* (1878), 26 Gr. 69 (Ont.); *Jewell v. Broad* (1909), 19 O.L.R. 1 (H.C.), *aff'd* (1909), 20 O.L.R. 176 (D.C.); *Noble's Ltd. v. Bellefleur, supra*, footnote 92.

<sup>133</sup>*Stikeman v. Dawson* (1847), 1 De G & Sm. 90 at 103, 63 E.R. 984, at 990, 16 L.J. Ch. 205 at 212; *Ex parte Jones* (1881), 18 Ch.D. 109, 50 L.J. Ch. 673 at 678; *Re Hodson*, [1894] 2 Ch. 421, at 427; *Confederation Life Association v. Kinnear* (1896), 23 O.A.R. 497 at 499, *per* Haggarty C.J.O.

<sup>134</sup>(1789), 2 Cox 133, 30 E.R. 80.

<sup>135</sup>Atiyah, *supra*, footnote 89 at 273 to 276 relies on the following as authority for the view that equity will take a broader approach to fraud than law in dealing with infants: *Savage v. Foster* (1723), 9 Mod. 35; 88 E.R. 299; *Watts v. Cresswell* (1714), 2 Eq. Ca. Ab. 515, 22 E.R. 435; *Earl of Buckinghamshire v. Drury, supra*, footnote 66; *Cory v. Gertcken* (1816), 2 Madd. 40, 56 E.R. 250; *Overton v. Bannister* (1844), 3 Hare 503, 67 E.R. 479; *Wright v. Snowe* (1848), 2 De G. & Sm. 321, 64 E.R. 144. Further support for this view is to be found in *Salmond and Williams on Contracts* (2d ed.), 319.

clearly established that a mere nondisclosure of age which is not accompanied by an enrichment of the minor will not be considered "fraudulent" in the broader equitable sense,<sup>136</sup> there is much force in Professor Atiyah's submission that, "There is nothing in the later cases which detracts from the authority of the earlier cases, and these clearly show that for an infant to attempt to obtain something for nothing is, in effect, fraud in the eye of equity."<sup>137</sup>

Even if this broader view of the meaning of fraud in this context is to be accepted, it must be considered whether, or to what extent, Mr. Justice Lush's view of the breadth of the equity of restitution, which is contingent on the finding of fraud, survives the decision of the English Court of Appeal in *R. Leslie Ltd. v. Sheill*.<sup>138</sup> Although the Court did not overrule *Stocks v. Wilson*, Lord Sumner did say that Mr. Justice Lush's statement of the equitable jurisdiction to require restitution was "open to challenge." Further, his Lordship had, "difficulty in seeing what liability to account [for the proceeds] there can be."<sup>139</sup> In any event, he would not apply such a doctrine to the facts of the case at hand, since the money borrowed by the defendant minor had apparently been used by him, and thus, "no question of tracing it, no possibility of restoring the very thing got by the fraud," remained. Similarly, A. T. Lawrence J., in the course of reviewing the authorities, commented, "If when the action is brought both the property and the proceeds are gone, I see no ground upon which a Court of Equity could have founded its jurisdiction."<sup>140</sup> Although the reasoning of the court may be considered *obiter* insofar as it treats of matters beyond the case at hand — the borrowing of money by a minor followed by dissipation of the proceeds of the loan — it is clear that in the opinion of the Court, the equity of restitution relied on by Lush J. is to be considered proprietary in nature.

Restricting the other party to proprietary remedies has the obvious merit of protecting the impecunious or irresponsible minor who has dissipated or lost the value of the benefit conferred. Moreover, artful application of the equitable tracing rules may go some considerable distance in the direction of affording a remedy against any minor who has money in hand.<sup>141</sup> However, it is submitted that the proprietary approach to restitutionary relief in this context is unsatisfactory for a number of reasons. It would have the effect of giving priority, in the case of the insolvency of the infant, to a supplier of non-necessary

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<sup>136</sup>*Stikeman v. Dawson*, and *Ex parte Jones*, *supra*, footnote 133. And see Atiyah, *supra*, footnote 89 at 275.

<sup>137</sup>*Supra*, footnote 89, at 275.

<sup>138</sup>*Supra*, footnote 118.

<sup>139</sup>*Ibid.*, at 619 (K.B.), 1153 (L.J. K.B.).

<sup>140</sup>*Ibid.*, at 637 (K.B.), 1157 (L.J. K.B.).

<sup>141</sup>*Supra*, footnote 127.

goods over a supplier of necessities. Further, it places recovery on the ground of traceability and leaves open the question of whether a fiduciary duty and/or fraud of some unspecified nature must be established in order to trace under the equitable rules.<sup>142</sup> Finally, if accepted, it would draw anomalous distinctions between traceable benefits, such as goods, and untraceable benefits, such as services.

Goff and Jones<sup>143</sup> have attempted to preserve the broader views expressed by Lush J. in *Stocks v. Wilson* by restricting the rationale of *R. Leslie Ltd. v. Sheill* to the case of loans to minors, on the theory that the ordering of repayment of moneys borrowed would constitute a more direct attack on the underlying policy of protection of minors than would an *in personam* duty to account for proceeds of a re-sale of goods supplied. However, there appear to be difficulties with this suggestion. Although this writer would view sympathetically any attempt to restrict the scope of *R. Leslie Ltd. v. Sheill*, it is difficult to see any basis in policy for distinguishing between an *in personam* duty to repay money borrowed from the plaintiff and an *in personam* duty to repay money acquired at the plaintiff's expense by taking delivery of his goods and re-selling them. If the proprietary theory were to be accepted in one context, it would seem to be dispositive of the other as well. A sound rationalization of the English law of restitution in this area awaits an abandonment of the "implied contract" fiction and an adoption of the proposition suggested by some Canadian courts, to the effect that in appropriate circumstances a duty to make *restitutio in integrum* can be imposed on a minor who wishes to rely on the unenforceability of his undertaking and, at the same time, retain benefits conferred by the other party. Certainly, if the *dicta* expressed in *R. Leslie Ltd. v. Sheill* are to be considered authoritative, English courts are much less accommodating of the restitutionary interests of the other party than are their Canadian counterparts.<sup>144</sup>

## E. CONCLUSION

It has been correctly said that the law of minors' contracts, "is complex, and the complexities of the law are not related to the needs of persons affected by it."<sup>145</sup> The intricate and unsettled nature of the rules on

<sup>142</sup>*Supra*, footnote 127.

<sup>143</sup>*Supra*, footnote 3, at 319-320. Goff and Jones have expressed as their preferred view, however, that the policy against unjust enrichment ought to prevail in these circumstances and they therefore favour the over-ruling of *R. Leslie Ltd. v. Sheill*.

<sup>144</sup>*Supra*, the text at footnote 138 *et. seq.* Ironically, the one modern Canadian appellate decision which appears to accept the view that *R. Leslie Ltd. v. Sheill* has over-ruled *Stocks v. Wilson*, adopts a position, relying on American authority, which goes considerably beyond the proprietary theory advanced in *R. Leslie Ltd. v. Sheill*. See *Noble's Ltd. v. Bellefleur*, *supra*, footnote 92 (*dictum*: infant liable *in personam* for the value of benefits retained upon attaining majority whether or not they have been subsequently wasted or disposed of.)

<sup>145</sup>*The Laley Report*, *supra*, footnote 7, s.273.

enforceability and restitution evidence the extreme difficulty encountered by the courts in their attempt to develop a mechanism for adjusting the conflicting interests of inexperienced youth, on the one hand, and the supplier in good faith of money, goods or services, on the other. Some observers have taken the view that the law in this area is beyond judicial repair and that a sound restatement of the law can be effected only by legislative enactment. A review of the Canadian case law suggests, however, that some steps toward a modern restatement of the doctrine have already been taken by our courts, and it may be that recognition of the doctrine of unjust enrichment as the underlying principle in this area will facilitate both a further rejection of the difficulties presented by the English analyses of these problems and a continued development of a more workable set of rules.

The problem of the minor's right to restitution is easily solved. There is no reason consistent with underlying policy considerations for denying relief. The difficulty presented by the English case law is that money cannot be recovered by the minor unless there has been a total failure of consideration. Canadian courts, on the other hand, have moved toward acceptance of a general principle that the minor is entitled to restitution, provided that he makes restitution to the other party.<sup>146</sup>

Analysis of the restitutionary rights of the other party who has supplied money or non-necessary goods or services presents a more intractable problem. The alternative approaches which may be derived from the English cases present something of a dilemma. To restrict the other party to proprietary relief, as the English Court of Appeal suggested in *R. Leslie Ltd. v. Sheill*, is consistent with the policy of protection of minors but has seemed to a number of courts to unfairly prejudice the other party. Moreover, as has been indicated, there are a number of anomalies inherent in rules premised on a proprietary theory of restitutionary relief. On the other hand, the adoption of a general rule permitting *in personam* recovery against the minor would appear to undermine the concern to protect minors. No doubt it is this consideration, in league with the implied contract theory, which has led the English courts to be — apart from the exceptions and inconsistencies canvassed above — generally unreceptive to these claims. Yet, the understandable impulse to afford *in personam* relief in some cases has produced doctrine which is, even for the law of restitution, remarkably unstable and capricious in its application. A much more satisfactory approach is indicated by those Canadian cases which suggest a jurisdiction to require the minor to make *restitutio in integrum* to the other party, provided that the jurisdiction, presumably equitable in nature, need not be exercised where it would

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<sup>146</sup>*Supra*, the text at footnote 47 *et. seq.*

be inequitable to do so.<sup>147</sup> If the conceptualism of the earlier authorities can be set aside, it will be seen that the courts have been willing to impose a duty to restore upon a minor who seizes on his minority as an excuse for profiting at the expense of the other party, but will refuse to impose that duty, or will at least restrict the duty to one of restoring only benefits retained *in specie*, where the minor has lost or dissipated the benefit or where the other party is guilty of oppressive conduct. It is submitted that these themes derived from the existing case law offer guidelines for the exercise of an equitable jurisdiction to require the minor to make a *restitutio in integrum* in appropriate cases.<sup>148</sup> To put the point in modern dress, the duty ought not to be imposed in a particular case where the policy underlying the rules rendering the transaction unenforceable also requires denial of restitutionary relief. In such cases, it may be said, the enrichment of the minor is not unjust.

A more workable and just remedial mechanism for this area of the law thus appears to be gradually evolving in the Canadian case law. The prospects for a thoughtful judicial rationalization of these rules ought not, however, be considered a basis for avoiding statutory reform of the law of minors' contracts, though in the interim, it may facilitate a more even-handed and just disposition of individual cases. This would not be an insignificant achievement. The leisurely pace of reform in matters of private law suggests that the "interim" may be a very long time indeed.

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<sup>147</sup>The Supreme Court of Canada has indicated the existence of a discretion to excuse the party lacking contractual capacity from making full restitution in the analogous context of contracts unenforceable on grounds of mental incompetency. See *Wilson v. The King* [1938] S.C.R. 317, [1938] 3 D.L.R. 433. Clearly, recovery would not be allowed where the minor had, pursuant to the agreement, rendered a benefit in return for the benefit received. See *Toronto Marlboro Major Junior "A" Hockey Club et al. v. Tonelli et al.* (1977), 18 O.R. (2d) 21, 81 D.L.R. (3d) 403 (H.C.) at 36-37 (O.R.), 418 (D.L.R.), *per* Lerner J. (hockey-playing contract held not beneficial to minor and therefore unenforceable; hockey club's claim in *quantum meruit* for value of training dismissed as the considerations were "mutual").

<sup>148</sup>*Cf.* the proposals of the Lately Committee, Cmnd. 3342, ss. 306-309, and of the Law Reform Commission of British Columbia, in its *Report on Minors' Contracts* (1976), at 31-32.