CONTRACTS FOR THE SALE OF NON-NECESSARY GOODS; VENDOR'S REMEDIES AGAINST AN INFANT PURCHASER

by

ROBERT W. CLARK*

In this article the author intends to discuss the nature and extent of the remedies available to the vendor of goods sold to an infant. Although this area has been considered in some detail by other writers in several jurisdictions[1] including Australia, it is arguable that several important decisions dealing directly with the controversial issues that abound in this area have not been accorded the respect they merit or have been ignored altogether by academic and judiciary alike.[2] The present writer also feels that several Tasmanian cases are worthy of attention because they show that the provisions of the 1874 Act[3] do not tamper with the older common law and equitable rules which are considerably more advantageous to an adult seller than the leading English case of *R. Leslie* v. *Shiell*[4] would have us believe.

In this article I will, first of all, consider the vexed question of the passing of property under an infant's contract and the possibility that title may at a later date revert to the vendor. The common law rules on tortious liability will be examined as will the rules on equitable restitution. The article will also contain a short discussion of the potential liability of an infant in an action for money had and received.

The Passing of Property Under a Void Contract

At common law contracts for the sale of non-necessary goods were voidable, that is, they were invalid unless ratified by the infant when he

---

* B.A. (*C.N.A.A.*), LL.M. (*Lond.*), Lecturer in Law, University College Dublin, Sessional Lecturer at Osgoode Hall Law School, 1980-81.

1 In canada see J. D. McCamus (1978) 28 *U.N.B. Law Journal* 89; D. A. Percy (1975) 53 *Can. B. Rev.* 1; In Britain see G. Treitel, (1957) 73 *L.Q.R.* 194 and a reply by P. S. Atiyah (1958) 74 *L.Q.R.* 97 and Treitel's rebuttal at 74 *L.Q.R.* 104. See also, Atiyah (1959) 22 M.L.R. 273; in Australia see particularly D. C. Pearce (1968) 42 *A.L.J.* 294 and (1970) 44 *A.L.J.* 269.

2 The authors of Cheshire & Fifoot, *Law of Contract* (3rd Aust. ed. 1974) merely footnote the cases discussed in this article. Pearce overlooks these cases in both the articles cited *supra* n. 1.

3 *Infants Relief Act* (1874) 37 & 38 Vict. c. 62. *The 1874 Act* will be used as a convenient shorthand phrase to describe the various Commonwealth statutes that have adopted the terms of the 1874 British statute; In British Columbia, *The Infants Act* R.S.B.C. 1960, c. 193. In Tasmania see *The Infants Relief Act* 1875 (39 Vict. No. 4). In Victoria, see Victorian *Supreme Court Act* 1958, s. 69. In New South Wales, see now the *Minors (Property and Contracts) Act* S.N.S.W. 1970 No. 60. In New Zealand the *Minors Contracts Act* N.Z. 1969 No. 41.

4 [1914] 3 K.B. 607.

came of age.[5] The effects of subsequent statutory provisions[6] on the common law rule is one of the most controversial questions in this morass. Section 1 of the *Infants Relief Act* 1874[7] provides:

> All contracts, whether by specialty or by simple contract, henceforth 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, shall be absolutely void.

While the language of the Act serves to conceal rather than reveal the intention of Parliament and is consistent with forms of pleading that were obsolete even in 1874[8] the declaration that contracts for non-necessary goods supplied 'shall be absolutely void' seems resoundingly clear to the modern lawyer. A contract that is void cannot confer title upon the recipient of property transferred under that void contract.[9] Had the Act stated that the contract was voidable title would now pass under s. 23 of the *Sale of Goods Act*,[10] but as this phrase was not used property cannot pass in the face of the Statute.

On the other hand, an important rule of statutory interpretation requires the words of a statute to be interpreted as if they were being examined the day after those words have passed into law.[11] Several writers have argued that in 1874 the terms 'void' and 'voidable' were not regarded as the terms of art that modern lawyers feel them to be. Pollock[12] viewed the words 'absolutely void' as ambiguous; Guest in *Anson's Law of Contract*[13] notes that difficulties would result from a literal interpretation of these words whilst Cheshire and Fifoot[14] view them as an unfortunate use of technical words and along with Atiyah[15] suggest that Parliament did not intend to alter the common law rules on the passing of property. Treitel[16] however, has argued convincingly that the words are clear and unambiguous and that money paid or property transferred should be recoverable if the contract is 'absolutely void'.

The case law on the meaning of 'absolutely void' is not entirely conclusive as we shall see. In fact, the courts tend to consider the question, not by looking to the *a priori* meaning of the words of Statute but by

---

5 *Burghart v. Angerstein* (1834) 6 Car. & P. 690; *Ryder* v. *Wombwell* (1868) 4 Ex. 32. See also The Ontario case of *R.* v. *Rash* (1923) 53 O.L.R. 245. This issue is considered extensively by Treitel (1957) 73 *L.Q.R.* 194 and Atiyah (1958) 74 *L.Q.R.* 97.

6 *Supra*, fn. 3.

7 37 & 38 Vict. c. 62.

8 See P. H. Winfield, 'Necessaries under the Sale of Goods Act 1893' (1942) 58 *L.Q.R.* 82.

9 *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459.

10 (1893) 56 & 57 Vict. c. 71.

11 Maxwell, *The Interpretation of Statutes* (12th Ed. 1969) at p. 85. But see *Dyson Holdings* v. *Fox* [1975] 3 All. E.R. 1030 and *Helby* v. *Rafferty* [1978] 3 All. E.R. 1016, particularly the judgment of Stamp, L.J. at p. 1026.

12 *Pollock on Contracts* 13th Ed. (1950) at p. 48.

13 24th Ed. (1975) at pp. 199-200.

14 *Law of Contract* (9th Ed. 1976) at p. 417.

15 (1958) 74 *L.Q.R.* 107.

16 (1957) 73 *L.Q.R.* 194 although the learned writer has little enthusiasm for this proposition.

looking to the conduct and intent of the parties to the contract themselves. The judges often conclude that property has passed because it was intended to pass. This in effect means that the words of the Statute are deemed to have no effect in relation to the issue of passing of property: the Statute simply retains the common law rule preventing an infant from being sued for the price in contract.

The leading English case is *Stocks* v. *Wilson*,[17] an action brought against the infant purchaser of non-necessary goods who had disposed of the property. The plaintiff sought to recover the value of the goods from the infant. Although the infant was held liable on grounds that cannot be reconciled with the later decision in *R. Leslie* v. *Sheill*[18] Lush J. considered an argument advanced by the plaintiffs counsel which suggested that following the 1874 Act an infant who repudiated a contract would render himself liable in detinue or conversion because repudiation would prevent property from passing. This curious argument was dismissed by Lush, J. who declared himself,[19] 'satisfied that that view is wrong and that the property passed by the delivery, notwithstanding the fraud, and that the plaintiff has a remedy in equity or none at all'.

The attention of subsequent academic writers has been mainly devoted to considering the interesting but somewhat sterile question of whether Lush, J.'s observation quoted above forms part of the *ratio decidendi* or is merely *obiter dictum*.[20] It is of greater importance to note that Lush, J.'s statement on the passing of property has been applied and developed in later cases. In the Tasmanian case of *In Re Henderson*,[21] decided two years after *R. Leslie* v. *Shiell*, Crisp, J. was directly confronted with this issue, that case involving an action by creditors who sought to recover goods supplied to a deceased infant from the administrators of the estate. Crisp, J. declared:

> I think it is clear that although the infant could not be sued for the price of these goods, yet the property in the goods passed to the infant on delivery; delivery of the goods with intent to pass the property therein operates to vest the property in him notwithstanding the *Infants Relief Act* 1875; see *Stocks* v. *Wilson*.[22]

In the more recent decision of Burbury C.J. in *Hall* v. *Wells*[23] this point was regarded as settled in Tasmania and the Chief Justice regarded the observation by Lush, J. in *Stocks* v. *Wilson* as part of the *ratio decidendi* of the case.

---

17 [1913] 2 K.B. 235.

18 [1914] 3 K.B. 607.

19 [1913] 2 K.B. 235, at pp. 246-7.

20 G. H. Treitel, *The Law of Contract* (5th Ed. 1979) at p. 428 views the observation as *obiter dicta*; Cheshire & Fifoot, Pollock, Anson, treat *Stocks* v. *Wilson* as conclusive on the issue. A. T. Lawrence J. in *R. Leslie* v. *Shiell* clearly viewed the observation as part of Lush, J.'s reasoning: [1914] 3 K.B. 607, at pp. 626-7.

21 (1916) 12 Tas. L.R. 40.

22 Ibid, at pp. 41-2.

23 [1962] Tas. S.R. 122.

It should be noted that for property to pass the act of delivery to the infant is not the sole criterion by which this will be tested. It is also an essential requirement that the parties intend that property should pass on delivery. This requirement is illustrated by the New Zealand case of *Nelson Guarantee Corp.* v. *Farrell*.[24] Farrell purchased a motor vehicle under a conditional sale agreement which provided that property was not to pass until the final instalment was paid. The infant repudiated the contract and refused to return the vehicle, denying that the vendor or his assignees had a right to repossess. The plaintiffs pleaded that the contract gave a right of repossession in the event of non-payment but the status of this term was in doubt given that s. 12 of the New Zealand *Infants Act* 1908[25] declared the contract 'absolutely void'. The Magistrate held that property in the goods had passed but even if property had not passed an action in tort could not succeed in this case. On appeal, Adams, J. approached the issue of recoverability by regarding the finding of passing of property as crucial. *Stocks* v. *Wilson* was said to be a case where the parties clearly intended property to pass on delivery. Adams, J. held that although the contract in this case was 'absolutely void' for the purpose of enforcing any of its terms, including the repossession clause, the agreement could serve an evidentiary function. The agreement plainly indicated that property was only to pass some time after delivery had taken place. Although this approach looks suspiciously like enforcing the terms of the bargain, Adams, J. defended his view by arguing that any other conclusion could only be reached by interpreting the statutory provision as if it vested title in the infant independently of the intention of the parties: 'The section merely avoids contracts, saying nothing about the passing of property'.[26]

The view that s. 1 of the 1874 English Act and its Tasmanian and New Zealand clones do not affect the common law rules on passing of property is supported by the Canadian case of *McGaw* v. *Fisk*.[27] The Supreme Court of New Brunswick held that an infant could not maintain trespass against the vendor of a carriage,[28] the contract providing that property was only to pass when promissory notes were paid. Although New Brunswick does not have the equivalent of s.1 of the Act of 1874, *McGaw* v. *Fisk* is consistent with the writers views on the limits of s. 1.

The English, Australian and New Zealand cases then present an intelligible line of authority in an area of law that generally defies any attempt to mould the case-law into a schematic and orderly body of rules. The recent decision of the Supreme Court of British Columbia in *Prokopetz* v. *Richardson's Marina*[29] however, is incompatible with this exposition on the effect of s. 1. Prokopetz brought an action in trespass and conversion against his former employers who had permitted him to

24 [1955] N.Z.L.R. 405. The New Zealand *Minors Contracts Act* 1969 41.
25 See now statute cited above n. 24.
26 [1955] N.Z.L.R. 405 at p. 408.
27 [1908] 38 N.B.R. 354.
28 Held not to be necessaries.
29 (1979) 93 D.L.R. (3d) 442.

obtain goods and services which were used to build a boat. Most of the goods were obtained on credit. The defendants, who had taken possession of the vessel were held to be protected from liability in tort, at least in relation to the goods that had been sold on credit terms by the *Infants Act*, s. 2.[30] British Columbia is the only Canadian Province to have adopted the terms of the English Act of 1874. MacDonald, J. refused to follow the English cases preferring the view that, 's. 2 of the Infants Act ought to be interpreted in a way that gives full effect to the words "absolutely void".'[31] If property had not passed to Prokopetz he could not show ownership or a right to possession sufficient to maintain trespass or conversion.

While the result in *Prokopetz* may not be unpalatable (the plaintiff was denied substantial damages in tort mainly because little sympathy can be aroused for an infant who abandons goods he has not paid for) the legal position under s. 1 of the 1874 Act is again in doubt after *Prokopetz*. It would be unsatisfactory to hold *Prokopetz* applicable only where the infant sues on the 'absolutely void' contract because MacDonald, J. rested his judgment on the meaning of 'absolutely void' rather than the specific facts of *Prokopetz*. The better view would seem to be that *Prokopetz* is wrongly decided on this point and that s. 1 has no effect on the common law rules governing the non-contractual liability of an infant for non-necessary goods.[32]

Revesting of Title to the Seller

If property passes upon delivery of the goods — providing a contrary intention is not expressed in the contract — it is clear that an action in conversion is not possible against the infant transferee. The rationale behind *Stocks* v. *Wilson* is so stated by Crisp, J. in the case of *In Re Henderson*: the learned judge said he saw in Lush, J.'s statement of the law 'the design not so much to secure the infant's hold on the goods as to prevent him being sued in an action of conversion'.[33]

If this line of reasoning is taken further it can be argued that *Stocks* v. *Wilson* does not decide that property passes for all purposes and that the vendor loses all right to recovery of the goods, regardless of the circumstances. It is decided however, that an adult vendor does not have an equitable lien over goods transferred.[34] There is however, a fragile line of authority for the proposition that an unpaid seller may, upon demanding the return of the goods revest title in himself. This attractive proposition, whilst it may possess an almost mystical quality jurisprudentially, would provide a convenient solution to many problems in this field. The view that title revests upon demand is first expressed

30 R.S.B.C. 1960 c. 193, substantially the same as s. 1 of the English Act of 1874.

31 (1979) 93 D.L.R. (3d) 442 at p. 448.

32 R. W. Clark, 'Passing of Property Under a Void Contract — Minor Difficulties' (1980) 26 *McGill L.J.* 110.

33 (1916) 12 Tas. L.R. 40 at p. 42.

34 *Prokopetz* v. *Richardsons Marina* (1979) 93 D.L.R. (3d) 442.

in Benjamin's *On Law of Sale of Personal Property*. In the 8th edition of that work, published in 1950 the opinion is expressed that[35]

> [i]t may be that while the goods remain in existence the seller can by demanding them back revest the property in himself and sue the infant in detinue.

The only authorities cited are cases of bailment and not sale.[36] While the absence of any English authorities on this point no doubt contributed to dropping this speculative proposition from *Benjamin's Sale of Goods*[37] the Tasmanian case of *In Re Henderson*[38] is based upon express acceptance of what we may call the 'revesting by demand' theory. In that case, Crisp, J. followed *Stocks* v. *Wilson* and held that title to the goods had passed on delivery. Nevertheless, if the goods or a portion of them remained identifiable and in the possession of the infant the creditors could recover them after demanding their return. Furthermore, because the Public Trustee sold the goods after the demand was made the creditors could share the proceeds of sale on *a pro rata* basis.

Although Burbury, C.J. in *Hall* v. *Wells*[39] confessed that he had difficulty in understanding how such a right could exist if property had already passed it is clear that Crisp, J. considered that title would revest upon the making of the demand. This would enable the creditor to maintain detinue. In the Canadian case of *McGaw* v. *Fisk*[40] the same proposition in *Benjamin* is also cited with approval. It is clear then that the proposition was not destitute of authority in 1950 when the last edition of that work appeared.

It should be noted that this remedy is not predicated upon a finding that the infant has fraudulently obtained the property and for this reason it may be important to plead this distinctive but uncertain restitutionary remedy rather than to confuse this plea with the established equitable restitutionary remedies.

Liability in Deceit

If an infant signs a contractual document without stating his age this does not amount to a misrepresentation.[41] Despite the obvious attractiveness of holding an infant liable in tort because he misrepresents his age, thereby inducing an adult to contract with him it is established by *R. Leslie* v. *Sheill*[42] that an infant in those circumstances is not obliged to compensate the adult by paying damages in deceit. In the Victorian

35 At p. 53.

36 (1916) 12 Tas. L.R. 40 citing the 5th Ed. (1906) at p. 45. This case is described in 3d Australian edition Cheshire & Fifoot as 'Curious' which it undoubtedly is. It remains a more than useful authority however.

37 38 are missing although nos. are in text (*Spondo*)

39 [1962] Tas. S.R. 122, at pp. 128-9.

40 (1908) 38 N.B.R. 354 citing 5th ed. (1906) at p. 45.

41 *Bird* v. *Wilson* (1851) 4 Ir. Jur. Rep. 58.

42 [1914] 3 K.B. 607.

case of *Watson v. Campbell (No. 2)*[43] it was held that a minor who misrepresents that he is of age and asks another to marry him cannot be liable on the misrepresentation.

The Position of the Bona Fide Purchaser for Value

Should the unpaid seller of non-necessary goods find that the infant purchaser has in turn disposed of them to a third party the success of any action brought against the adult purchaser in detinue will hinge on the passing of property between plaintiff and infant.

If the 1874 Act and its direction that such sales are 'absolutely void' are read literally the infant, who receives no title to goods at all could not in turn pass title to any purchaser: *Cundy* v. *Lindsay*.[44] MacDonald, J. in *Prokopetz* v. *Richardson's Marina*[45] preferred this approach when interpreting the British Columbia statute:

> This difference in interpretation [contrasting the English view] will, in the case at bar, diminish the protection given the infant in that he will not obtain title to the goods covered by the void transaction. It will also have the consequence of adding to the risk of adults dealing with infants in that third persons purchasing goods from them which they obtained pursuant to a void transaction would acquire no title.

The present writer has elsewhere[46] criticised this interpretation as regressive given that the movement away from the principle of *caveat emptor* in consumer sales is virtually complete. Happily, MacDonald, J.'s view of the law has not prevailed in Tasmania. The approach taken to this problem in *Hall* v. *Wells*[47] is to be preferred. Wells sold a caravan to an infant, payment being made by post-dated cheque. The infant, when of age sold the caravan to Hall for a cash sum. Eight days later the infant's cheque was presented but it was dishonoured. As we have seen it would have been futile to seek damages in deceit against the infant so Wells obtained possession of the caravan which at that time was in the hands of Hall's agent. Hall brought detinue against Wells. Burbury, C.J. held that the sale by the defendant to the infant was not 'absolutely void' despite the Tasmanian *Infants Relief Act* 1875[48] s. 1 and that Hall obtained a good title from the infant by virtue of s. 23 of the *Sale of Goods Act* 1896.[49] The Chief Justice ordered Wells to return the caravan to Hall.

This case indicates that the sale of non-necessary goods to an infant will be regarded as voidable despite the words of the statute, at least for the purpose of subsequent litigation between persons other than the infant. Should the adult vendor repudiate the sale by attempting to

43 [1920] V.L.R. 347.
44 (1878) 3 App. Cas. 459.
45 (1979) 93 D.L.R. (3d) 442 at pp. 448-9.
46 *Supra*, n. 32.
47 [1962] Tas. S.R. 122.
48 39 Vict. No. 4.
49 60 Vict. No. 14.

repossess before the infant subsequently resells the goods it should follow that no title will pass from the infant.[50]

It can be argued however, that while this hypothesis is consistent with principles applicable to mistake and misrepresentation this proposition *need* not follow from *Hall* v. *Wells*. It can be argued that the *ratio decidendi* of this case[51] is in fact the old chestnut that dictates that, "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it'.[52] This rule of law was cited with approval by Burbury, C.J. It is therefore, arguable that if Wells had repudiated the sale *before* the infant sold the caravan to Hall the equities of the case remain the same and Hall would still have recovered possession. Wells, in taking a post-dated cheque would still be responsible for placing the infant in the position of being able to defraud Hall. Given that Denning, M.R. in the most recent English case[53] on this point has implicitly suggested that the *Lickbarrow* v. *Mason* principle should be seen as a rule of law[54] and given that the 1874 Act states that the contract is 'absolutely void' it is difficult to predict how the courts will deal with this problem. It can be argued that this kind of problem is incapable of being satisfactorily resolved by the courts without legislative guidance.[55]

The Equitable Right of Restitution

The arguments and views that have been expressed on the scope of the obligation equity will place upon an infant to make restitution have been well rehearsed elsewhere.[56] Suffice it to say that the decision in *Stocks* v. *Wilson*,[57] based upon a liberal interpretation of the older cases[58] is not reconcilable with the Court of Appeal's judgment in *R. Leslie* v. *Sheill*.[59] Both cases suggest that if an infant retains property he has acquired as a result of a fraudulent act, then he will be obliged to make restitution.[60] If he has parted with the goods it has been argued that in limited situations a right to trace the proceeds may be possible.[61] *R. Leslie* v. *Sheill* decides however, that the restitutionary remedy is not a remedy *in personam* and that an infant who fraudulently acquires prop-

50 *Car and Universal Finance Co.* v. *Caldwell* [1965] 1 Q.B. 525.
51 Using the term *ratio decidendi* to mean the rule of law underpinning the judge's decision in the precedent case: See J. L. Montrose, 'The Ratio Decidendi of a Case' (1957) 20 *M.L.R.* 587.
52 Ashurst, J. in *Lickbarrow* v. *Mason* (1787) 2 T.R. 64 at p. 70.
53 *Lewis* v. *Averay* [1972] 1 Q.B. 198.
54 Ibid, at p. 207A where Denning, M.R., without citing *Lickbarrow* v. *Mason* enunciates a similar principle which is said to be a presumption of law (irrebutable).
55 See Sutton, 'Reform of the Law of Mistake in Contract' (1976) 7 *N.Z. U.L.R.* 40, at pp. 57-65 where the problem is considered.
56 See in particular the excellent article by J. D. McCamus, 'Restitution of Benefits Conferred under Minors Contracts' (1978) 28 *U.N.B. Law Journal* 89.
57 [1913] 2 K.B. 235.
58 Principally, *Re King, Ex Parte Unity Joint Stock Mutual Banking* (1858) 3 De G. & J. 63.
59 [1914] 3 K.B. 607.
60 [1913] 2 K.B. 235, [1914] 3 K.B. 607.
61 Atiyah (1959) 22 *M.L.R.* 273.

erty and then disposes of it cannot be liable in equity to pay the value. Pearce has suggested that the cases can be reconciled by holding the obligation to pay financial compensation should be limited to the value of the goods at the time of contract.[62] Damages will not be awarded so as to secure the adults expectation interest, thereby enforcing the contract. This attractive theory is incompatible with *R. Leslie* v. *Sheill* because just such a compromise,[63] attempted by Horridge, J. at first instance, was rejected by the Court of Appeal which ruled emphatically that no remedy *in personam* is available.

The decision in *R. Leslie* v. *Sheill* has been almost universally vilified and it is to be hoped that future Australian courts will not follow it.[64] It should be pointed out that *R. Leslie* v. *Sheill* is in fact irreconciliable with a nineteenth century Australian case which clearly states that the equitable obligation to make restitution applies *in personam* to the fraudulent infant. In *Campbell* v. *Ridgely*[65] an infant fraudulently misrepresented that he was of age thereby inducing the plaintiff to do work for the defendant and supply him with building materials for £382. 15s.

The defendant by way of payment accepted bills of exchange drawn by the plaintiff. The bills were dishonoured by the defendant. The plaintiff sued for (1) £382 15s. or in the alternative, (2) return of so much of the materials still in possession and (3) an inquiry into the value of the goods not in possession. The defendant challenged ground (3) and an issue of law was set down for the Supreme Court of Victoria. Counsel for the plaintiff, citing the English cases[66] argued that, 'the point had practically been decided'. Higinbotham, C.J., referring to these cases held such an inquiry to be a permissible remedy whilst Holroyd, J. decided the case by analogy with a married woman's liability for misrepresentations.

Such an important precedent should not be forgotten and it should prove an important foundation for any attack mounted upon *R. Leslie* v. *Sheill.*

The Retention of Title Clause

It may be possible to insert a retention of title clause into a standard form agreement which will entitle the vendor to repossess non-necessary goods. This may prove to be a useful device in motor vehicle sales concluded with young persons. If the contract provided that should the purchaser be under the age of majority title would remain with the seller

62 'Fraudulent Infant Contractors' (1968) 42 *A.L.J.* 294 at pp. 296-8.

63 The initial claim was for £475, being the £400 loaned plus interest. Horridge, J. ruled that £400 was recoverable.

64 *Watson* v. *Campbell* [1920] V.L.R. 317 is based on the proposition that deceit is not available against an infant.

65 (1887) 13 V.L.R. 701. In the Australian edition of Cheshire & Fifoot this case is accorded one footnote reference and is regarded as an authority on tortious liability, not liability in equity.

66 *Re King, Ex Parte Unity Joint Stock Mutual Banking* (1858) 3 De G. & J. 63; *Nelson* v. *Stocker* (1859) 4 De G. & J. 458; *Strickeman* v. *Dawson* (1847) 1 De G. & Sm. 90; *Wright* v. *Snow* 2 De G. & Sm. 90; *Cornwall* v. *Hawkins* 41 L.J. Ch. 673; Ex Parte Jones (1881) 18 Ch. D. 109.

until final payment was made or the cheque cleared, as the case may be the right to repossess goods still in the infant's custody would not have to depend on fraud. It is not certain how fraud is defined in relation to an infants contractual or tortious liability. Atiyah has argued, somewhat against the authorities, that,[67] 'for an infant to obtain something for nothing is, in effect, fraud in equity'. This may well be the case but it can be argued that by utilizing the retention of title clause the seller of goods would be on safer ground by asserting his right of ownership rather than an optimistic demand for restitutionary relief.

This view on the potential of a reservation of title clause is supported by the New Zealand case of *Nelson Guarantee Corporation* v. *Farrell*[68] where such a clause was given evdientiary value in a contract which itself was absolutely void under statute. In that case the infant did not misrepresent his age or deceive the seller. He simply attempted to retain the motor vehicle while repudiating the obligation to pay the price. While this case may indeed be consistent with a wider view of equitable fraud the action for recovery was brought in detinue, the seller relying on his own title.[69]

A Moneylenders Quasi-Contractual Relief Against Infant Borrowers

Apart from any right to trace monies which remain in the hands of an infant[70] and the possibility of obtaining relief should the sums be spent on necessaries[71] it can be questioned whether there is any obligation to make restitution of money spent. Again, *R. Leslie* v. *Sheill* indicates that the English courts take a view of this question which is unduly favourable to the infant.

Section 1 of the 1874 Act declares contracts for monies lent to be 'absolutely void'. As we have seen this proscription does not make it impossible to suggest that an obligation exists to make restitution which stops short of enforcing the contract in the case of contracts for the sale of non-necessary goods so why should money be treated differently? One problem that arises here is the basis of the action to recover the value of money transferred to an infant. An action for money had and received is an action which is *in form* contractual and the action should fail on this ground.[72] Nevertheless, another neglected Tasmanian authority suggests that an action for money had and received may be successful. In *Peters* v. *Tuck*[73] the plaintiff, fearing an action was about to be brought against him by a third party transferred £100 into the bank account of the defendant, an infant. The defendant paid over part of the money when the plaintiff so demanded but used £35 for her own

67 (1959) 22 *M.L.R.* 273 at p. 275.
68 [1955] N.Z.L.R. 405.
69 *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* [1945] K.B. 65.
70 See Atiyah (1959) 22 *M.L.R.* 273.
71 *Marlow* v. *Pitfield* (1719) 1 P. Wms. 558; *Lewis* v. *Alleyne* (1888) 4 T.L.R. 560; see the Irish case of *Bateman* v. *Kingston* (1880) 6 L.R. (Ir.) 328.
72 *R. Leslie* v. *Sheill* [1914] 3 K.B. 607.
73 [1915] 11 Tas. L.R. 30.

ends. The action was brought for recovery of £35, the actual funds themselves being untraceable. It was objected that an action for money had and received, being *in form* contractual whilst *in substance* tortious, could not lie against an infant. Crisp, J. dismissed these objections and found by analogy with *Bristow* v. *Eastman*[74] (which had been heavily criticized in *R. Leslie* v. *Sheill*)[75] that the wrongdoing consisted of appropriation of funds after the contract had been formed. The cause of action was thus independant of contract and could succeed.

This spirited defence of the *Bristow* v. *Eastman* line of authorty is to be welcomed for here the court is being asked to restore the plaintiff to the *status quo ante*. The case itself however, could be easily distinguished on its facts from *R. Leslie* v. *Sheill* should a court choose to follow the English position. The desirability of following a line of authority that relies heavily on archaic distinctions founded on the old causes of action, particularly the basis of *indebitatus assumpsit* counts may be questioned.

Conclusions

Although several legislatures have swept away this uncertain and unsatisfactory body of case law judges in many other jurisdictions will have to make do with the common law and equitable rules that have evolved through litigation. It is submitted that, notwithstanding s. 1 of the *Infants Relief Act* 1874, the following propositions can be advanced as based on authority.

(1) Where an infant purchases non-necessary goods title in those goods possess upon delivery unless it is clear that the parties intended it to pass at some other time.

(2) There is authority for the view that the seller, by demanding their return may revest title to non-necessary goods in the possession of an infant to himself. He may also be entitled to trace the proceeds of any later sale by the infant or his representatives. It is unnecessary to show fraud by the infant in order to exercise this right.

(3) An infant cannot be liable in deceit for fraudulently misrepresenting his age, thereby inducing someone to contract with him.

(4) Although the law in British Columbia is otherwise a third party purchasing goods from an infant acquires a good title to those goods if he purchases before a prior owner seeks to take possession of those goods. It remains to be seen what the position is should the purchase from the infant take place *after* the prior owner attempts to repossess, the purchaser from the infant being unaware of this development.

---

74 (1794) 1 Esp. 172.

75 Particularly by Kennedy L.J. at [1914] 3 K.B. 607 at p. 621.

(5) The Victorian case of *Campbell* v. *Ridgely* suggests that a right to restitution in equity will exist in *personam*. This position is to be preferred to the prevailing English rule limiting the remedy *in rem*.

(6) A title retention clause will be given effect and an adult will be able to repossess non-necessary goods transferred to an infant by relying upon his right of ownership.

(7) An action for money had and received will lie against an infant for wrongful appropriation of moneys pledged with him even if the notes themselves cannot be traced.