

Property Passing under a Void Contract — Minor Difficulties

At first sight it is absurd to countenance that property can pass under a contract declared void by statute. Nevertheless, when a contract is declared illegal because it infringes a statutory norm, this does not preclude the possibility that property may pass if the subject-matter of the contract involves the sale or hire of goods.¹ Similarly, an infant purchasing non-necessary goods on credit may in certain circumstances find that the property has passed, notwithstanding legislative provisions that such transactions are absolutely void.² A recent Canadian decision in this murky area of law illustrates the need for unambiguous legislation on the effects of such transactions. Merely to reduce the number of persons who may be classified as infants or minors (by snipping away at the age of majority) will not solve this problem.³

In *Prokopetz v. Richardson's Marina Ltd*⁴ MacDonal J., in the British Columbia Supreme Court, considered whether property could pass under a contract by an infant to purchase non-necessary goods. Prokopetz was employed as a part-time general labourer by the defendants for a period of two years. He was seventeen years old when he quit this employment.⁵ During the two-year period Prokopetz was treated quite indulgently by his employer. He was permitted to use the marina's facilities to build a boat and, what is more important, to purchase materials on credit. It was estimated that on leaving the defendant's employ Prokopetz's credit account totalled more than twelve thousand dollars. Prokopetz took the

¹ *Sajan Singh v. Sardara Ali* [1960] A.C. 167 (P.C.). Substantial objections to this doctrine are raised in Cheshire and Fifoot, *Law of Contract*, 9th ed. (1976), 346-9. Property can also pass even if delivery of the goods has not taken place: *Belvoir Finance Co. Ltd v. Stapleton* [1970] All E.R. 664 (C.A.).

² See, generally, Cheshire and Fifoot, *supra*, note 1, 413-7; Treitel, *The Law of Contract*, 5th ed. (1979), 423-9; Hartwig, *Infants' Contracts in English Law: with Commonwealth and European Comparisons* (1964) 15 Int'l Comp. L.Q. 780. The Canadian position is discussed by Percy, *The Present Law of Infants' Contracts* (1975) 53 Can. Bar Rev. 1.

³ Despite the *Report of the Committee on the Age of Majority* (1967) (Latey Report), Cmnd 3342, no substantive law reforms have been enacted in English law.

⁴ (1979) 93 D.L.R. (3d) 442 (B.C.S.C.).

⁵ The age of majority in British Columbia is nineteen years: *Age of Majority Act*, S.B.C. 1970, c. 2, s. 2(1)(a).

vessel with him but it broke down, and so he left it with a third party. Richardson's Marina learned the whereabouts of the vessel and, as unpaid vendors, seized valuable equipment, including materials purchased from the defendants which had not been paid for. The defendants also seized material that Prokopetz had purchased from the defendants and paid for, as well as goods purchased from third parties. Prokopetz sued the defendants in trespass and conversion.

The defendants pleaded that as unpaid vendors they could repossess goods in exercise of an equitable lien. Although this plea would have substantially deflected the action, as the bulk of the property seized was sold on credit by the defendants, MacDonald J., ruled that no such lien could arise.⁶ The defendants also sought to plead that no property in the goods could pass to the plaintiff by reason of his infancy. Section 2 of the *Infants Act* declares:

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.⁷

Under English law the effects of section 1 of the *Infants Relief Act*,⁸ which is substantially the same as section 2 of the B.C. Act, have been considered unfortunate, and it has been suggested that the phrase "absolutely void" should not be given a literal interpretation.⁹ It is argued that these unfortunate consequences are illustrated by hypothetical situations which would preclude an infant from enforcing the contract, or would prevent a third party who, *bona fide*, purchases goods from an infant from resisting an action in trover or detinue brought by the original owner. Judicial authority in England also favours the view that title to non-necessary goods may pass by delivery to the infant purchaser.¹⁰

⁶ *Foll'g Transport & General Credit Corp. v. Morgan* [1939] 1 Ch. 531; see *Sale of Goods Act*, R.S.B.C. 1960, c. 344, s. 47.

⁷ R.S.B.C. 1960, c. 193.

⁸ 37 & 38 Vict., c. 62.

⁹ See Cheshire and Fifoot, *supra*, note 1, 415-7; Treitel, *supra*, note 2, 424-6; Waddams, *The Law of Contracts* (1977), 408-13. The discussion between Treitel (*The Infants, Relief Act, 1874* (1957) 73 L.Q.R. 194, *The Infants Relief Act, 1874 — A Short Rebutter* (1958) 74 L.Q.R. 104) and Atiyah (*The Infants' Relief Act, 1874 — A Reply* (1958) 74 L.Q.R. 97) should also be examined. See also *Latt v. Booth* (1852) 3 Car. & K. 292; 175 E.R. 560.

¹⁰ *Stocks v. Wilson* [1913] 2 K.B. 235, 246 *per* Lush J.; *Watts v. Seymour* [1967] 2 Q.B. 647.

As Treitel has observed,¹¹ the argument which suggests that property can pass under a contract of this nature does a great injustice to the statutory provisions in question which, no matter how undesirable, are unequivocal. Nonetheless, in *Prokopetz MacDonald J.* seems to have considered a literal interpretation desirable, for, after refusing to follow the English authorities,¹² he concluded:

s. 2 of the *Infants Act* ought to be interpreted in a way that gives full effect to the words "absolutely void". This difference in interpretation 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.¹³

MacDonald J. was prepared, however, to consider that the plaintiff was entitled to recover in relation to goods seized by the defendants which Prokopetz had purchased from the defendant and third parties. Prokopetz was said to have spent some two thousand dollars but that his accounts with the defendant and third parties were fifteen thousand dollars in arrears. Because of section 2, of course, the creditors would not be able to recover. Nevertheless Prokopetz was permitted to recover one thousand dollars in damages.

The implications of this decision are considerable. First, the English and Canadian courts have reached quite incompatible conclusions on the words "absolutely void" in their respective statutes. This will no doubt prejudice the innocent third party who unwittingly purchases goods from an infant purchaser who himself has obtained the goods on credit. It is perhaps undesirable to return to the strict *caveat emptor* position at a time when the movement away from the doctrine seems virtually complete.

Second, the reasoning in *Prokopetz* is internally inconsistent. If a contract for the sale of goods is made with an infant, its enforceability should depend on the nature of the goods sold. If the goods are necessities, this indicates that the contract is advantageous to the infant. Mere items of luxury should not be classified as necessities and a motor boat would fall into this category. Section 2 of the *Infants Act* does not provide that in contracts for non-necessary goods title shall pass if consideration moves from the infant: the statute declares that "all contracts ... for goods

¹¹ Treitel, *The Infants' Relief Act, 1874*, *supra*, note 9, 200 and *A Short Rebutter*, *supra*, note 9, 106.

¹² *Supra*, note 10.

¹³ *Supra*, note 4, 448-9 [italics added].

supplied or to be supplied . . . (other than contracts for necessities) . . . are absolutely void". Thus, MacDonald J. should not have permitted recovery for those goods obtained by Prokopetz which he had paid for. The Act says nothing about the infant purchaser obtaining property in the goods when the infant pays the purchase price. Thus, under English law an action in tort will depend on whether the goods have been delivered to the infant: in British Columbia the success of an action will depend on whether the consideration has been paid by the infant.

While it is easy to point out the flaws in this judgement, it is also necessary to note that MacDonald J. prevented an infant plaintiff from suing in tort and recovering damages in circumstances that would clearly be unjust. If property passed on delivery the infant would recover damages, yet he could not be sued in contract or in tort¹⁴ for the contract price, or even for a reasonable sum. One possible remedy would be to permit the adult to set-off the amount of the debt which he himself cannot recover, against the damages recoverable by the infant, or indeed, to stop the infant from pleading the statute and permit an action for the contract price. Such judicial solutions, while flirted with by certain judges,¹⁵ should perhaps be incorporated into statutory provisions dealing not only with the legal status of the agreement but also the consequences of such an abortive bargain. The difficulties inherent in this area of contract law cannot be resolved merely by characterizing the status of the contract involved as valid, void or voidable.

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¹⁴ Even if guilty of deceit: *R. Leslie, Ltd v. Shiell* [1914] 3 K.B. 607.

¹⁵ See *Savage v. Foster* (1723) 9 Mod. 35, 88 E.R. 299 (K.B.); *Levene v. Brougham* (1909) 25 T.L.R. 265 (C.A.); *Phillips v. Gunnell* [1953] C.L.Y. 1759 (Ct Ct); *McBride v. Appleton* [1946] O.R. 17 (C.A.).

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