

SUPREME COURT OF NOTRE DAME

SIMPSON et al. vs CARSON as Admr.
No. 12

Sale—Sale “on Approval”—Conditional Sale—Title in Seller—When Passes—Purchaser Manifesting Approval—Subsequent Sale by Purchaser to Third Person—Not Sufficient Approval to Acquire Seller’s Title—No Title in Third Person—Replevin by Admr.—Instructions Approved.

1. There are three transactions involving sale which are executory in character and do not in themselves operate to transfer title in property from owner or seller to purchaser, namely: (1) a bailment with option in the bailee to purchase; (2) a sale upon condition thereafter to be compiled with by the purchaser; and (3) a sale “on approval” or “on trial,” where the purchaser has an option to buy if property meets his satisfaction or approval.

2. Where goods are sold on trial or approval or if satisfactory to the buyer, property in the goods does not pass until the buyer has expressly or impliedly manifested his approval or acceptance.

3. Where A delivers his horse to B upon the express agreement on the part of B that if the horse suits him he will execute to A his note with approved security, but if the horse does not suit him he will return it, and thereafter A dies and the administrator of his estate is appointed, and then B, without having executed his note to A or to such administrator, sells the horse to C, title to the horse remains in A. B acquires no title to the horse, passes none to C, and the administrator may maintain replevin to recover the horse.

4. The transaction between A and B is a sale “on approval”—it is a conditional sale on approval, and the only option B has under his agreement with A is the option to buy by executing his note with approved security to A or the administrator, and he can manifest his approval or acceptance of the horse in no other way.

5. Instructions in the record correctly stating the law as here outlined.

Action in replevin by the appellee, John D. Carson as administrator of the estate of Ray Stevens, deceased, against the appellants, Charles D. Simpson and Edward Williams. From a judgment in favor of the plaintiff, the defendants appeal. *Affirmed.*

Clarence R. Smith and William A. Miner for Appellants.

Edward J. Dundon and John J. Killilea for appellees.

VURPILLAT, J. The appellee, John D. Carron, as the duly appoint-

ed, qualified and acting administrator of the estate of Ray Stevens, deceased, filed complaint in one paragraph in the action of replevin, against the appellants, Charles D. Simpson and Edward Williams, alleging that, as such administrator, he was the owner and entitled to the immediate possession of a certain described horse, and that the appellants were unlawfully detaining the same. The case was submitted to a jury for trial upon the separate answers in general denial of the defendants, and a verdict was returned by the jury stating the plaintiff, appellee was the owner of the horse therein described, and entitled to the immediate possession thereof. Separate motions of the defendants for judgment *non obstante verdicto* and for a new trial were overruled and judgment entered on the verdict for the plaintiff.

The assignments of error relied on for reversal of the judgment are that the judgment is contrary to the law and the evidence, and that the trial court erred in overruling the separate motions for judgment *non obstante veredicto* and for a new trial.

The facts of the case as disclosed by the record and confirmed by the verdict of the jury are that Ray Stevens, appellee’s intestate, agreed to sell to Charles D. Simpson “on approval” the horse in controversy. As conceded by appellants in their briefs, “the understanding was that Simpson was to take the horse and try him, and if the horse should suit him, give Stevens his note with approved security; but if the horse should not suit him, he was to return the horse to Stevens.” Pursuant to this agreement Stevens delivered the

horse to Simpson. Some time thereafter Stevens died, and in due course the appellee was appointed and qualified as the administrator of his estate. Thereafter, the appellant, Simpson, without having executed his note with approved security as agreed, and without having done anything whatever to indicate his acceptance or approval of the horse delivered to him by Simpson, sold and transferred the horse to his co-appellant, Edward Williams. And at the time of the commencement of this action the appellant, Simpson, had not executed or offered to execute his note as agreed, and neither Simpson nor Williams, at the commencement of this action, had done or said anything whatever to indicate approval or acceptance of the horse in accordance with Stevens' contract to sell, unless the mere sale and transfer of the horse from Simpson to Williams without the knowledge or consent of Stevens or the administrator of his estate constituted such approval and acceptance.

Upon this state of facts appellants contend that Simpson became the owner of the horse and passed title to Williams, and that plaintiff, appellee, therefore cannot maintain this action to recover the horse. Appellants not only contend that the judgment is contrary to law, but that instructions Nos. seven and eight given to the jury by the trial court as the law of the case were erroneous, and that for the giving of either of such instructions it was error to overrule the motion for a new trial.

The instructions are in the record, and if numbers seven and eight complained of together with number six related thereto, correctly state the law applicable to the facts of the case,

then the judgment must be affirmed, otherwise the appeal must be sustained. These instructions are as follows:

Instruction 6. If the jury find that the decedent, Ray Stephens, and the defendant, Charles D. Simpson, entered into negotiations for the sale and transfer of the horse in question, and that it was agreed by and between them that the defendant might purchase the horse upon the condition that he give to the decedent at some future time his promissory note for the horse in the sum agreed upon, and that the decedent delivered the horse upon that express condition, then the court instructs you, such transaction was a conditional sale, and as such did not pass title in the horse to the defendant, Simpson, until such condition was complied with, until said defendant executed and delivered to the deceased or his personal representative in this case the promissory note to be given.

Instruction 7. If the jury find that the deceased, Ray Stephens, and the defendant, Charles D. Simpson, entered into negotiations by which it was agreed between them that said Simpson was to take the horse of plaintiff on approval—that is, was to take the horse with a view to purchase, and if the horse proved satisfactory to defendant, Simpson, said defendant was then to execute and deliver to Stephens his promissory note in the sum agreed upon, and if the horse did not prove satisfactory to defendant, Simpson, then defendant was to return the horse to Stephens, then and in that state of facts, the court instructs you the transaction constitutes a sale on approval, and such sale does not pass title to the defendant, Simpson, until such approval of the horse is actually

made and indicated by said defendant by the execution and delivery of his promissory note as agreed upon.

Instruction 8. If the jury find upon the foregoing instructions that the negotiation and transaction was either a conditional sale or a sale on approval, and that the condition was not complied with; or that the approval of the horse for purchase was not made by the execution and delivery of the note, then, and in either of said events, title to the horse did not pass from the deceased to defendant, Simpson. And if the jury further find that defendant Simpson, without complying with the condition of executing and delivering his promissory note, if a conditional sale, or without indicating his approval of the horse for purchase and sale, if a sale on approval, then said defendant acquired no title by the transaction and agreement with the decedent, and the property remained the property of the decedent and became the property of the plaintiff as administrator upon the death of Stephens.

And if the jury further find that said defendant, Simpson, in that state of facts transferred said horse to the co-defendant, Williams then said co-defendant also did not acquire title to the horse, and the horse remained the property of the plaintiff as against both defendants.

And the court further instructs the jury that such transfer of the horse from defendant, Simpson, to defendant, Williams, was a tortious conversion of the property of the plaintiff for which replevin may be maintained, and in such case, if the jury so find the facts from a preponderance of the evidence, the plaintiff is entitled to a verdict against the defendants, whether a demand was

made for the return of the horse prior to the bringing of the action or not.

There are three transactions involving sale which are executory in character and do not of themselves operate to transfer the title from the owner or seller to the purchaser. One of these is a bailment with the option in the bailee to buy the property. The transaction cannot become a sale and pass title till the option is exercised. *Cloke vs. Shafroth*, 137 Ill. 393-27 N. E. 702. 31 Am. St. Rep. 375; *Barnes vs. McCrey*, 75 Iowa, 267-39 N. 392-9 Am. St. Rep. 473; *Chase vs. Washburn*, 1 Ohio St. 244-59 Am. Dec. 623; *State vs. Stockmaan*, 30 Oreg. 36-46 Pac. 851; *Dunlay vs. Gleason*, 16 Mich. 158-93 Am. Dec. 231; *Lyon vs. Lennon*, 106 Ind. 567-7 N. E. 311. See 43 Cent. Dig., "Sales," Sec. 11. Another is the conditional sale, or the sale and delivery of property upon a stipulated condition thereafter to be complied with, as where a note or security in payment of the price is to be given. 35 Cyc. 326; 43 Cent. Dig., "Sales," Sec. 544; *McCone vs. Eccles*. (Nev.) 181 Pac. 134; *Murray Co. vs. Satterfield*, (Ark.) 187 S. W. 927; *Platter vs. Acker*, 13 Ind. App. 417-41 N. E. 832; *Admundson vs. Standard Printing Co.* 140 Iowa 464-118 N. W. 789; *Bonham vs. Hamilton*, 66 Ohio St. 82-63 N. E. 597; *Wise vs. Collins*. 121 Cal. 147-53 Pac. 640. The third is the so-called sale "on trial" or "on approval." Where goods are sold on trial or approval or if satisfactory to the buyer, the property in the goods does not pass until the buyer has expressly or impliedly manifested his approval or acceptance. 43 Cent. Dig., "Sales," Secs. 557-8; Note to 50 L. R. A. (NS) 808; 35 Syc. 289; *Mechem on Sales*, Vol. 1, Secs. 657-

659; 24 R. C. L. 39; *Glascott vs. Hazel*, (N. C.) 13 S. E. 789; *Pierce vs. Cooley*, 56 Mich. 552-23 N. W. 310; *Gates Iron Works vs. Cohen*, (Colo.) 43 Pac. 667; *State vs. Betz*, 207 Mo. 589-106 S. W. 64; *Osborn vs. Francis* (W. Va.) 18 S. E. 591-45 Am. St. Rep. 859; *Mulcahy vs. Dieudonne*, 103 Minn. 352-115 N. W. 636.

Appellants' case involves more than a bailment with option to purchase. A sale was immediately projected by the appellant, Simpson, and the deceased, Stevens, by their transaction, and the trial court, therefore, correctly decided that such transaction constituted a conditional sale or a sale on approval, and accordingly instructed the jury. And the instruction number eight complained is correct in the statement of the law that "If the jury further find that defendant, Simpson, without complying with the condition of executing and delivering his promissory note, if a conditional sale, or without indicating his approval of the horse for purchase, if a sale on approval, then said defendant acquired no title by the transaction and agreement with the decedent, and the property remained the property of the decedent, and became the property of the plaintiff as administrator upon the death of Stevens."

Appellants are relying upon the proposition that in a case of sale on approval, the acceptance and approval to pass title in the goods may be implied from the conduct of the buyer, and they contend that the subsequent sale of the horse constituted such conduct. They invoke the rule, with the cases supporting it, that acceptance may be inferred from conduct of the buyer in treating goods in a manner inconsistent with any other view than that he is the owner of

them, as where he sells or mortgages the goods to a third person after their receipt. This is the rule for determining what constitutes a sufficient constructive delivery and acceptance of goods to take a contract of sale out of the operation of the statute of frauds, and enable the seller to enforce such contract against the buyer. 20 Cyc. 247. The rule has no application for determining what constitutes "approval" in a sale "on approval." Not one of the cases involves such a sale, and such cases are therefore not in point. The case of *Beedy vs. Brawman*, *Wooden Ware Co.*, (Me.) 79 Atl. 721, stressed by appellant, is such a case.

The buyer's manifestation of approval must be made and determined in terms of the agreement, and not by the arbitrary and independent conduct of the buyer himself. Thus where, by the terms of the agreement, an article is sold on thirty days trial, and is to be returned if not satisfactory, time is of the essence of the contract, and where the article is retained by the purchaser without complaint beyond the prescribed time, the sale becomes absolute and the purchaser liable to an action for the purchase price. *O'Donnell vs. Wing & Son*, 121 Ga. 717-49 S. E. 720; *Dewey vs. Erie*, 14 Pa. 211-53 Om. Dec. 533; *International Filter Co., vs. Cox Bottling Co.*, 89 Kan. 645-132 Pac. 180; *Hiltgen vs. Viever*, 162 Wis. 315-156 N. W. 132; *Buckeye Tractor Ditcher vs. Smith*, 158 Iowa, 104-138 N. W. 817; *Wolf Co. vs. Monarch Refrigerator Co.* 252 Ill. 491-96 N. E. 1063-50 L. R. A. (NS) 808 and note. Where no time is stipulated for the trial or approval, the same result follows a purchaser's failure to return the article within a reasonable time after trial. Under-

wood vs. Wolf, 131 Ill. 425-23 N. E. 598-19 Am. St. Rep. 40; Pa. Iron Works vs. Hygeian Ice Co., 185 Mass. 366-70 N. E. 427; Watts vs. Natl. Cash Reg. Co., 25 Ky. L. Rep. 1347-78 S. W. 118; Bostian vs. DeLaval Separator Co., 92 Md. 483-48 Atl. 75; Gurney vs Collins, 64 Mich. 458 31 N. W. 429.

It is held, however, that retention beyond the specified or reasonable time for approval of the purchased article, makes the sale absolute only if the seller so elects. The mere failure to return the property or refusal to accept, or comply with the terms of sale agreed upon, cannot of itself operate to divest the seller of his title and transfer such title to the delinquent purchaser. *Bradford Co. vs. United Leather Co.*, (Del. Ch.) 97 Atl. 620; *Warren et al. vs. Russell* (Ark.) 220 S. W. 831. In the first of these cases, upon the intervening petition of the Turner Tanning Machinery Co., to reclaim machinery placed on trial and kept by the purchaser till he went into bankruptcy, two years later, the Chancery Court held that "the seller could either resume possession of the machine, and so disaffirm the sale, or sue for the price, and so affirm it." The Chancellor says: "Particularly is this true where, as here, there was no limit of time within which the buyer could make the trial. As the counsel for the seller contended, the buyer never having definitely accepted the machine, and the seller never having limited the time within which the trial could be made, continued use of the machine even for nearly two years, could not be construed as an acceptance, and the seller could as against the buyer have chosen to terminate the trial and enforce by replevin a return of the property. This

right he has against the receiver." Continuing, the Chancellor says: "In support of this is the case of *In re George M. Hill Co.*, 123 Fed. 866-59 C. C. A. 354, where a machine sold on trial was used by the buyer until it became bankrupt and with continued refusals to accept, or pay for the machine. When the buyer was adjudicated a bankrupt, the seller sought to reclaim the machine. It was held that there was no acceptance which under the contract was essential to constitute a completed sale to divest the title of the seller, and the (buyer) having refused to accept till bankruptcy, whether, or not, the refusal was justified or made in bad faith, neither the bankrupt nor its trustee, could claim an acceptance as a basis of reclamation of the machine. Applying this principle here, there never was an acceptance of the machine on the part of the buyer and the seller continued to the end to regard it still on trial, which means that it had not been accepted. Though the seller might have regarded the detention and use as unreasonable and chosen to regard it as an acceptance, it may not chose to do so, and it remains unaccepted so far as the seller is concerned. The buyer cannot by his unreasonable detention acquire against the will of the seller a right to the goods sold on trial. The seller may acquire a right against the buyer by the detention, but not the buyer against the seller. This is both a reasonable and just principle. Title did not, therefore, pass to the buyer, even if there had been an agreement as to the prices."

One case seems to lend support to appellants' contention that the subsequent sale by Simpson to the co-defendant, Williams, constituted ap-

proval and passed title. This is the case of *O'Donnell vs. Wing & Son*, 121 Ga. 717-49 S. E. 720. After holding that "by retaining the instrument beyond the time limited, Jones, by his conduct, expressed such satisfaction as to make the sale absolute and entitle the seller to bring action for the price," the court says: "In addition to retaining the piano, it appears that Jones sold it to the defendant. There are cases which hold that under shipments on trial order the fact that the article so received is sold to a third person is itself such an expression of satisfaction as to complete the sale. (If the seller so elects, we say) Title then passes from the seller to him who has obtained possession under a trial order with the right to purchase on given terms if the property proves satisfactory." Although the Court says there are "cases" which so hold, only one is cited, namely: *Delamater vs. Chappell*, 48 Md. 253. We do not have access to this case. It is not reported in the *Selected Case System of Reports*. *Corpus Juris* recognizes it merely as supporting the proposition that "The failure of the buyer to exercise the option within a reasonable time, the article being retained, is equivalent to an acceptance." 35 Cyc. 236-237. And this is all that the main case itself is recognized as authority for holding. 35 Cyc. 290, e, 15. In fact the statement above quoted is nowhere, in case or text, adopted or recognized as the law. The general authorities referred to by the court, following the statement, presumably as supporting it, give it no support, and another case referred to, the case of *Furst vs Commercial Bank*, 117 Ga. 472-43 S. E. 728, is actually *contra*. The statement was wholly unnecessary

to the decision, which had already been declared on the other proposition, and we regard it as *obiter dicta*.

That sale to a third person by one to whom property is sold on approval passes no title to such third person before the original sale has become absolute by manifestation on the part of the original buyer of his approval and acceptance of the property in the terms of the agreement is supported by the following cases: *Warren et al, vs. Russell*, (Ark.) 220 S. W. 831; *Glasscock vs. Hazell*, (N. C.) 13 S. E. 789; *Crocker vs. Gullifer*, 44 Me. 491-69 Am. Dec. 118; *James Bradford Co., vs. United Leather Co.*, 97 Atl. 620; *Gates Iron Works vs. Cohen*, (Colo.) 43 Pac. 667.

As said by the court in *Osborn vs. Francis*, 38 W. Va. 312- 45 Am. St. Rep. 859-862, "If it is a sale on trial (or approval) it is said to be a sale on condition precedent—to buy if satisfied; that is the title does not pass until the condition prescribed is fully performed, although the possession is delivered, being rather a bailment with option to buy than a sale." The appellant, Simpson, having failed to expressly or impliedly manifest his approval or acceptance of the horse, and the appellee not having waived his right thereto, this condition precedent was not complied with, and Simpson therefore acquired no title to the horse.

But there is yet another condition precedent in this case to the passing of title to Simpson, and that is the giving of his note with approved security as expressly agreed by him. His transaction with the decedent, Stevens, was a conditional sale on approval. *Mowbray vs. Cady*, 40 Iowa; *Glasscock vs. Hazel*, (N. C.) 13 S. E. 789. After the first condition, that

is manifesting approval of the horse was complied with, there remained the second condition precedent, the giving of his note with approved security as agreed which was also essential to the passing of the title. 35 Cyc. 281 and 326; 43 Cent. Dig., "Sales," 543; Kutz, vs. Hart, 17 Ind. 329; Platter vs. Acker, 13 Ind. App. 417-41 N. E. 832; Millhiser vs. Erdman, (N. C.) 3 S. E. 521-2 Am. St. Rep. 334; Wise vs. Collins, 121 Cal. 147-53 Pac. 640; Wiggins vs. Snow, 89 Mich. 476-50 N. W. 991; The Drug Co., vs. Teasdale, (Neb.) 72 N. W. 1028. In the case of Glasscock vs. Hazell, (N. C.) *supra*, the court says: "The authorities cited by the defendant do not satisfy us that the plaintiff was precluded from asserting title to the property. The plaintiff testified that Hill & Holden did not buy the wheel, but that it was delivered to them upon the understanding that they might purchase, after testing it, upon paying \$50 cash, and securing the balance. These terms do not seem to have been complied with, and we do not see, under these circumstances, how the title passed out of the plaintiff." In that case a statute was involved making conditional sales void. In appellants' case no such statute applied.

It is repugnant to right reason and the sense of justice that appellants should be permitted to ignore and violate the express terms of the agreement with the deceased, Stevens, and that appellant, Simpson, should be permitted to sell the horse and convert the proceeds of the sale to his own use, and deny to the decedent's estate, both the horse and the note. The sale from Simpson to Williams not only did not pass title, but it constituted such a tortious conversion of the property as gave

to the appellee the right to recover in this action without demand for the return of the property. Crocker vs. Gullifer, (Me.) 69 Am. Dec. 118 and note; Warren et al. vs. Russell, (Ark.) 220 S. W. 831. In the latter case the court, in approving an instruction similar to the one here complained of, said: "The effect of the instruction was to tell the jury that, in the event it found that the sale was on trial, the title to the property did not pass, and that it was the duty of the jury to find for the plaintiff against the defendant, Warren, (third person.) * * * In the present case there was no testimony tending to show that the buyer offered to return the horse, or that the seller waived his right to treat the sale as executory and to declare it an absolute one. The only disputed question of fact in the case was whether or not the sale of the horse was an absolute one, or a sale on trial. If the testimony of the plaintiff was true, and it was practically undisputed, the title to the horse did not pass out of Doyle to Earl Morton, and Warren, who traded for the horse, acquired no other or greater title than Morton. It follows the judgment must be affirmed."

The court's instructions correctly stated the law of the case, the judgment is not contrary to the law and the evidence; there is no error in the record, and the judgment is therefore in all things affirmed.

CARPER vs. WHITCOMB, by Next Friend
No. 14

Infant's Contract—Executed—Purchase Price Recovered—Consideration not Returned, Disposed of and Lost by Infant—Fraudulent Representations as to Age—Issues on Pleading—Instructions in Record Approved.

1. Where the infant, upon his arrival at majority, or at the time he seeks disaffirmance, still has the consideration received or any part thereof, he must, upon his disaffirmance, return it, for the law will not

allow him to repudiate his contract and at the same time retain its fruits as his own; but where he has disposed of, lost or wasted the same during his infancy his right to disaffirm is in no way dependent upon his making good to the other party what he received. 22 Cyc. 614.

2. Even though the infant by his fraudulent representations as to his age induces the other party to enter into the contract, such infant may nevertheless recover what he has paid under the contract if he returns or offers to return the consideration received by him; and an instruction to that effect is erroneous as against the other party to the contract.

3. Instructions stating the law of the case approved.

Civil action by appellee to recover two hundred dollars consideration paid to appellant on a contract executed by appellee as an infant. From a judgment in favor of appellee, plaintiff, the defendant, Carper, appeals. *Affirmed.*

Thos. Spencer McCabe and John F. Heffernan for appellant.

Arthur C. Keeney and Harry E. Denny for appellee.

VURPILLAT, J. The appellant prosecutes this appeal upon the following assignment of errors: (1) the judgment is contrary to the law and the evidence; (2) sustaining appellee's demurrer to the third paragraph of answer; (3) refusing to give to the jury appellant's tendered instruction number five; (4) overruling the motion for a venire *de nove*; (5) overruling the motion for a new trial. The fourth assignment is waived for failure of appellant to present or discuss it in his briefs.

This appeal must be determined largely upon a consideration of the trial court's instructions, which are in the record; and, since these instructions so fully set forth the facts of the case and the issues presented by the pleadings, as well as the law of the case as applied by the court on the trial, we quote in full those instructions material to this appeal, to-wit:

Instruction No. 3. Plaintiff in his complaint, for cause of action against the defendant, alleges that the plaintiff is an infant under the age of twenty-one years, and that he bought from the defendant on or about the 15th day of October, 1920, one horse, one buggy and one set of harness, for which plaintiff paid the defendant \$200; that at the time of such purchase plaintiff worked as a day laborer; that the articles purchased were used for pleasure riding only and were bought for that purpose. Plaintiff further alleges that he sold the harness and buggy, and that the horse was condemned as unfit for use; that plaintiff is not in possession of any of the articles of purchase, nor has he any part of the proceeds of the sale of the harness and buggy. Plaintiff demands a rescission of the contract of purchase made with the defendant and demands judgment for \$200, the purchase money on said contract paid to the defendant.

To this complaint defendant answers first by denying all the allegations of fact made by plaintiff; second by confessing plaintiff's action but avoiding liability on the allegations that plaintiff purchased the articles mentioned in complaint for the use of himself and wife and family and that they were articles of necessity; and third, that to induce defendant to sell said articles the plaintiff falsely represented to defendant that he was twenty-one years of age; that plaintiff was at the time a full grown man with beard and moustache and having the appearances of an adult; that defendant had no means of knowing the facts and relied on the representations of the plaintiff; that plaintiff has not re-

turned or offered to return the articles purchased or any of them.

To the special facts alleged by defendant as a defence to the action plaintiff files reply in general denial.

Instruction No. 4. On these issues as stated the court instructs you that the plaintiff has the burden of establishing the facts of his complaint by a preponderance of the evidence; that evidence, which, after considering all the evidence in the case introduced by both the plaintiff and defendant, most satisfactorily tends to prove to the jury the existence or non existence of the facts upon which plaintiff relies for recovery. The theory of plaintiff's right of recovery in this action is that he was a minor at the time he purchased the articles as alleged and that, therefore, he is liable for the purchase price under the contract only at his option; that, having decided to exercise his option not to recognize the contract, but to rescind the same, he is entitled to recover the \$200 alleged to have been paid to defendant under said contract. On this branch of the case the court instructs you that it is a general rule of law that an infant—that is a person under the age of twenty-one years—is liable on his simple contracts, such as this, only at his own option, and may avoid such liability and rescind such contract.

Instruction No. 5. And the court instructs you that as a general rule of law an infant may rescind his simple contract and recover back such money or property as he has parted with thereunder. The court instructs you that where such contract is an executed one, and the infant plaintiff has the consideration passed to him, he should return or offer to return the same if within his power to do so; but that, if he has not the con-

sideration which he received, even though he may have wasted or lost the same, then he is entitled to recover without having returned or offered to return the consideration received by him. Plaintiff alleges that he did not have the articles at the time he began his action; that the horse had been taken and condemned, and that the harness and buggy had been sold and that he also did not have the proceeds of such sale. If you find by a preponderance these facts and the other facts alleged by plaintiff, then your verdict should be for the plaintiff in such sum as the evidence shows the real purchase price to be which plaintiff paid to defendant; unless you should find the facts to be as alleged by defendant in either his second or third paragraphs of answer.

Instruction No. 6: Defendant first alleges that the articles purchased by the plaintiff were necessities for the use of plaintiff and his family. On this issue the defendant has the burden of proving such facts by a preponderance of the evidence in the case. Necessities or necessities are such things as are reasonably required for the board, lodging, education, clothing and sustenance of the infant according to his status or condition in life and society. And if the infant is a married man, as alleged in this case, then the requirements for the support of the family and all the members thereof must be considered as necessities along with those of the infant himself. The court instructs you that a horse, buggy and harness may or may not be considered a necessity, depending upon the means of livelihood, the mode of living, the conditions and demands for the use of such articles, those for whose use they may be required,

whether needed for actual use in the living conditions of the minor and his family or whether constituting a mere pleasure and apparently serving no other purpose. The court instructs you that it is a question of fact whether the horse, buggy and harness contracted for in this case were or were not necessities in the situation and conditions of the plaintiff, as a minor, and is therefore for the jury to determine from a careful consideration of all the evidence in the case, that introduced as well by the plaintiff as by the defendant.

Instruction No. 7. The court instructs you that if you should find from a preponderance of the evidence in the case that the articles in question were procured by the fraudulent or false representations of the plaintiff as to his age made for the purpose of so procuring them, and that the defendant had no knowledge of such fact of plaintiff's infancy but relied upon the false statements of the plaintiff in entering into the contract, then before the plaintiff could recover he would have to return or offer to return the property received under the contract, and if you find that such false representations were made and relied upon by defendant as alleged, and you further find that plaintiff did not return or offer to return the horse, buggy and harness, then plaintiff would be barred in this action because, although he may rescind his infancy contract and recover his consideration, he may not do so in a case where, as alleged by defendant, the infant procured such consideration by fraud, for in this case the consideration must be returned or offered to be returned before he can avoid or rescind such infancy contract. If, however, the defendant has failed to establish by a

preponderance of the evidence the false representations of the plaintiff alleged as a defence, then plaintiff is entitled to recover whether he returned or offered to return the property or not, provided you find as alleged by plaintiff that he did not have and does not now have the property, as you have heretofore been instructed.

By the fifth of appellant's instructions, refused by the court, the court was requested to instruct the jury that "If you find that plaintiff misrepresented his age to the defendant, thereby inducing defendant to contract with him, then the verdict should be for the defendant." This instruction was properly refused for four reasons. (1) It does not state the facts constituting the elements of fraud which the jury must find, namely, that plaintiff falsely stated the fact of his age, with an actual or imputed knowledge that it was false, with intention to deceive the defendant, and that defendant relied and had reason to rely on such statements, and was thereby deceived and induced to enter into the contract with plaintiff. As to these elements of fraud, see *Anson on Contracts* 199; *Chapin on Torts*, 396 *Eaton on Equity* 288; *Cobby vs. Buchannon*, 48 Neb. 391-67 N. W. 176; *Watkins vs. Billings*, (Ark.) 42 Am. Rep. 1; *Putnal vs. Walker*, (Fla.) 55 So. 844-36 L. R. A. (NS) 33 and note; *Sewell vs Sewall*, 92 Ky. 500-18 S. W. 162-36 Am. St. Rep. 606; *Damron vs. Com.*, 110 Ky. 268-61 S. W. 459-96 Am. St. Rep. 453; Note to 18 Am. St. Rep. 636. (2) The law does not preclude or estop an infant from avoiding or disaffirming his contract on the ground of his fraudulent representation that he was of age when entering into such contract. 22 Cyc.

611; 27 Cent. Dig., "Infants," Sec. 100; 14 R. C. L. 241, Sec. 22; Annotation, 6 A. L. R. 416; *Burdette vs. Williams*, 30 Fed. 697; *Raymond Motorcycle Co. vs. Adams*, 230 Mass. 54-119 N. E. 359; *Laundry Co. vs. Adams*, (Ky.) 208 S. W. 68; *Wieland vs. Kobic*, 110 Ill. 16-51 Am. Rep. 676; *Book Co. vs. Connelly*, 206 N. Y. 188-99 N. E. 722-42 L. R. A. (NS) 1115; *Ridgway vs. Herbert*, 150 Mo. 606-51 S. W. 1040-73 Am. St. Rep. 464; *Tobin vs. Spann*, (Ark.) 109 S. W. 534-16 L. R. A. (NS) 672; *Carpenter vs. Carpenter*, 45 Ind. 142; *Price vs. Jennings*, 62 Ind. 111; *Conrad vs. Lane*, 26 Minn. 389-4 N. W. 695-37 Am. St. Rep. 412; *Whitcomb vs. Joslyn*, 51 Vt. 79-31 Am. Rep. 678. In some states the infant is estopped by statute. Decisions applying such statutes are not in point here. Nor are those decisions in point which deny the infant relief in equity for violating two maxims in seeking equity with unclean hands and without doing equity. (3) the tendered instruction was properly refused because the proposition of law applicable to the case was correctly stated to the jury in instruction number seven, *supra*. Indeed, the trial court's instruction is more favorable to appellant than some courts are willing to approve, in that the infant's right to recover from appellant was stated to be upon condition that the infant offer to return the property received by him. (4) the issue whether or not the appellee made fraudulent representations as to his age and thereby induced the appellant to make the contract was clearly presented to the jury by the trial court's instructions, particularly number seven, and was decided adversely to appellant. The jury having found no fraud on ap-

pellee's part, the instruction refused would have had no application, and the refusal to give such instruction was therefore harmless.

There was no error in sustaining plaintiff's demurrer to the appellant's answer that the plaintiff had not returned or offered to return the property or consideration received for the purchase money sought to be recovered by the plaintiff. These facts constitute no bar to plaintiff's cause of action. We think the trial court's exposition of the law on this branch of the case was clearly and correctly stated. In support thereof we are content to rely on the statement contained in Sec. 5 of 22 Cyc. 614, as follows: "Where the infant, upon his arrival at majority, or at the time he seeks disaffirmance, still has the consideration received or any part thereof, he must, upon his disaffirmance, return it, for the law will not allow him to repudiate his contract and at the same time retain its fruits as his own; but where he has disposed of,, lost or wasted the same during his infancy his right to disaffirm is in no way dependent upon his making good to the other party what he received, for the privilege of repudiating the contract is accorded to an infant because of the indiscretion incident to his immaturity; and if he were required to restore an equivalent where he has wasted or squandered the property or consideration received, the privilege of repudiating would be of no avail when most needed. There have been distinctions attempted to be made between executory and executed contracts and between seeking relief at law and in equity, but with only a few exceptions the rule stated has governed the decision regardless of the facts relied on as distinguishing." See also 14

R. C. L. 238, Sec. 20; 27 Cent. Dig., "Infants," Sec. 157. The following are some recent cases sustaining this statement of the law: *Perelson vs. Podolsky*, 191 Ill. App. 589; *Waller vs. Chuse Grocery Co.*, 241 Ill. 398-89 N. E. 796-132 Am. St. Rep. 216 and note,- 28 L. R. A. (NS) 128; *Bank vs. Casey*, 158 Iowa 349-138 N. W. 897; *Gray vs. Grimm*, 157 Ky. 603-163 S. W. 762; *Barr vs. Carr Co.*, 172 Mich. 299-137 N. W. 697; *Chandler vs. Jones* (N. C.) 90 S. E. 580; *Lambrecht vs. Holsaple*, 164 Wis. 465-160 N. W. 168; *Turner vs. Ry. Co.*, 127 Tenn. 673-156 S. W. 1085; *Fassett vs. Seip*, 249 Pa. 576-95 Atl. 273; *McGuckian vs. Carpenter*, (R. I.) 110 Atl. 402; *McGraal vs. Taylor*, 167 U. S. 688-17 Sup. Ct. 961-42 L. Ed. 326; *Blake vs. Harding* (Utah) 180 Pac. 172.

Early decisions in some states adopted the contrary rule here invoked by appellant. Some of these decisions have been overruled, some modified. Thus *Bartleet vs. Cowles*, 15 Gray (Mass.) 445 is expressly overruled by the case of *Bartlett vs. Drake*, 100 Mass. 174-97 Am. Dec. 92-I Am. Rep. 101, and the new rule has been adhered to in recent decisions. See *McGuckian vs. Carpenter*, *supra*. *Bingham vs. Barley*, 55 Tex. 281-40 Am. Rep. 801, and other Texas cases to the same effect are practically overruled in *Bullock vs. Sproules*, 93 Tex. 188-54 S. W. 661-78 Am. St. Rep. 849-47 L. R. A. 326. The case of *Taft vs. Pike*, 14 Vt. 405-39 Am. Dec. 228 and other cases are clearly modified by the case of *Price vs. Furman*, 27 Vt. 268-39 Am. Dec. 194. The great weight of authority and the trend of modern decisions are

against the rule invoked by appellant.

The doctrine stated in Reeve's *Domestic Relations* pg. 254, Ch. 2, followed by some courts, to the effect that where the infant's contract was clearly beneficial to him, the consideration must be returned, can have no application to appellant's case, for here the infant's contract was decidedly detrimental to him and secured him no benefits..

Three cases considered by us are strikingly analagous in point of fact to appellant's case, and all three are adverse to appellant's appeal and sustain the right of appellee to recover. In *Whitcomb vs. Joslyn*, 51 Vt. 79-31 Am. Rep. 678, where an infant by misrepresenting his age bought a wagon, it was held that the infant was not estopped to avoid his contract and recover the money paid. In *McGuckian vs. Carpenter* (R. I.) 110 Atl. 402, the infant's fraud was not an issue, but recovery of the purchase price of a wagon, horse and harness was sustained where the infant had disposed of the wagon and harness and the horse had become worthless. In *White vs. Branch*, 51 Ind. 210, where the horse purchased by the infant had become of no value, return was held unnecessary to the right of recovery.

The trial court's instructions correctly state the law of the case, and the judgment is ththerefore not contrary to the law. The verdict is amply supported by the evidence and the motion for new trial was properly overruled. There is no error in the record and the judgment is affirmed.

BRIEF OF THOS. SPENCER McCABE IN CASE OF CARPER vs. WHITCOMB.

State of Indiana
County of Joseph
In the Notre Dame Supreme Court
Marshall Carper, appellant,

vs.

James Whitcomb, by next friend, ap-
pellee.

Brief for appellant.

1. NATURE OF THE ACTION

This was an action brought by James Whitcomb an infant altho married and father of a child. The plaintiff, represented in the action by his next friend, Thomas Rees, seeks to rescind a contract entered into with one Marshall Carper, in which Whitcomb purchased for a consideration of two hundred dollars a horse, a buggy and a set of harness. Prior to the bringing of the action the plaintiff has disposed of the buggy and harness and the horse has been condemned by the officers of the Humane Society. Plaintiff asks for a return of the consideration paid by him to the defendant in the sum of two hundred dollars.

2. ISSUES PRESENTED

The plaintiff filed a complaint in two paragraphs alleging fraud in the first as a ground for rescision and infancy in the second. The defendant demurred separately and severally to the complaint and the demurrer to the first paragraph was sustained and to the second paragraph overruled. The plaintiff's cause then went to trial on the single paragraph of complaint alleging infancy. The defendant filed an answer in five paragraphs viz: 1st, A general denial; 2nd, Confession and Avoidance, alleging that the articles in question

were proper items of family expense; 3rd, confession and avoidance, claiming that a return of consideration was a prerequisite to avoidance of an infant contract; 4th, Estoppel, alleging that plaintiff had made false representation in regard to his age and thus induced defendant to contract with him; 5th, Set-off, alleging that the depreciation of the articles in question by reason of plaintiff's use and misuse of them and the value of the benefit he received from them should be deducted from the sum asked by the plaintiff.

The plaintiff's demurrers to paragraphs three and five of the answer were sustained and accordingly those paragraphs were stricken out of the answer. Trial was had by jury and a verdict of two hundred dollars for the plaintiff was returned by them. Before judgment was entered the defendant made motion for a venire do novo which the court overruled. Defendant then filed a motion for a new trial which motion the court also overruled whereupon the defendant prays for an appeal which is granted. The defendant then filed an appeal bond with approved sureties and also filed a bill of exceptions.

3. ERRORS RELIED ON FOR REVERSAL

1. The judgment is contrary to the law and evidence.

2. The court erred in refusing to give to the jury defendants instruction numbered five.

3. The court erred in overruling appellants motion for a venire do novo.

4. The court erred in overruling appellants motion for a new trial.

SYNOPSIS OF THE EVIDENCE

The plaintiff took the stand and his testimony was substantially as follows: That he was a minor, married and the father of one child; that he bought the horse, harness and buggy from the defendant for a consideration of two hundred dollars; that the horse was found to be of little or no use; that he sold the harness and buggy; that his sole income was his wages earned as a day laborer; that he had neither horse harness nor buggy at the time the action was begun. In corroboration of this evidence the plaintiff introduced Mr. Edward Dundon, who said that he purchased the buggy and harness in question; Mr. Fred Dressel, an alleged officer of the Humane Society who had taken the horse into custody; Mr. Marcus Healy, who testified that he treated the horse for heaves prior to its seizure by the officers; Mr. James Murphy, who testified that the plaintiff, James Whitcomb, worked for him as a day laborer at the rate of twenty dollars per week.

The defendant's case consisted substantially in showing thru the testimony of Marshall Carper defendant, that the sale had been culminated only after the plaintiff's representations of majority, upon which he relied and acted. Other evidence brought out by Messrs. Brady, Hughes and Foley adduced the fact that the plaintiff had grossly abused and mistreated the horse, that he still had it in his possession. These gentlemen together with Mr. James Shaw set forth evidence establishing the plaintiff to be a man of moderately wealthy circumstances with an income independent of his wages. The testimony of Mr. C. B. Foley, the only duly qualified horse expert in-

troduced during the trial, showed the horse to be in perfect condition at the time of the sale by defendant to plaintiff.

5. POINTS AND AUTHORITIES.

The important points involved in the decision in this case may be summarized as follows:

1. The trial court should have given defendant's instruction No. 5 to the jury.

Commander vs. Brazile, 9 L.R.A. N.S. 1117.

International Land Co. vs. Marshall, 19 L.R.A. N. S. 1056.

County Board of Educators vs. Hensley, 42 L.R.A. N.S. 643.

2. The plaintiff's failure to return or offer to return any of the consideration should have been available as a defense to the defendant hence the court below erred in sustaining plaintiff's demurrer to third paragraph of answer.

Ruling Case Law, Vol. 14, page 240
Parson's Contracts, Vol. 1, page 347.

Reeves Domestic Relations, Chap. 2, page 254.

Taft vs. Pike, 39 Am. Dec. 228.

Hall vs. Butterfield, 47 Am. Rep. 209.

Engleberg vs. Pritchett, 26 L.R.A. 177.

Johnson vs. Northwestern Mutual Ins. Co., 26 L.R.A. 187.

Craig vs. Van Beboee, 100 Mo. 584

Riley vs. Mallory, 33 Conn. 206.

Shurtleff vs. Millard, 34 Am. Rep. 640.

Valentine vs. Canali, L.R. 24 Q.B. Div. 166.

6. ARGUMENT

The counsel for the appellant believes firmly that there are a number of errors in the judgment rendered in this case below, any of which are sufficient to sustain a reversal but for various causes we shall here discuss, analyze and consider only two of the many outstanding features

which make this case reversible. They are, first: the refusal to give defendant's instruction numbered five, and secondly the sustaining of the defendant's demurrer to the defendant's third paragraph of answer.

The instruction in question merely stated that if the plaintiff had misrepresented his age to the defendant thereby inducing the defendant to contract with him then the judgment must be for the defendant. Clearly this is a well founded statement of the law in this case. It has long been the rule that the doctrine of estoppel is applicable to infants who make false statements as to their age thus inducing others to contract with them.

In the decision of *Commander vs. Brazile*, 9 L.A. N.S. 1117, the facts are similar to those of the case at bar. An infant in order to induce another to enter into a contract with him, made false assertions to the effect that he was of full age. It was held that such infant was estopped from disaffirmance of the contract.

In reading the opinion on this case we find the following dictum:

"Infants are shielded from their own improvidence and their contracts as to them are of no force except as to necessities, *but* when a minor whose appearance justifies belief in such statement, induces a contract which is reasonable by false assurance that he is of the age of majority, he should be and is estopped to repudiate it and should be and is compelled to carry it out or to fully restore the status quo by returning what he got or making compensation if he has wasted it."

Can the learned court refuse a reversal in the face of such a decision? This is not an isolated case as there

are others to the same effect. In the case of *The International Land Co., vs. Marshal*, 19 L.R.A. N.S. 1065, where a minor had represented himself as being of age in entering a contract and later sought to have it set aside, it was held that such a person may disaffirm only by restoring the status quo. If this can not be done then no disaffirmance may take place. Of like import is the case of the *County Board of Education vs. Hensley*, 42 L.R.A. N.S. 643. These decisions are by no means extraordinary or far fetched. They simply state the only logical and common sensible solution to the question involved. Surely this court shall not do otherwise than follow these universally accepted rulings.

The second question here to be considered is nothing more nor less than that of the necessity for restoring the other party to status quo before recovery may be had by the infant. On this point there is such an unlimited abundance of authority and decisions in appellant's favor that it is difficult indeed to select the ones most applicable. We shall first consider a statement laid down almost a century ago and widely adhered to ever since. It is that of the Honorable Judge Reeve, a superior judge in the Connecticut court and later a state chief justice. In his carefully prepared work on *Domestic Relations* on Page 254 he says:

"It is a universal rule that all executory contracts which are voidable on the grounds of infancy may be avoided during as well as thereafter."

To this general rule the judge makes these exceptions, viz:

1. "Contracts for necessities."
2. "Contracts to effect what the

infant is compellable to do in chancery as the execution of a trust, etc.”

3. “Contracts under which the infant has so enjoyed or availed himself of the consideration that the parties cannot be restored to their original position.”

This third class fits the case at bar exactly. The appellee has so availed himself of the property as to be unable to return or restore it as is seen in the foregoing review of the case. This view is well supported by a long line of decisions among which we find *Johnson vs. Northwestern Mutual Life Insurance Company* in 26 L.R.A. page 187. Here an infant rescinded a contract of life insurance and sued to recover the consideration by him paid. The court held that where the personal contract of an infant is fair and reasonable and free from any fraud or over-reaching on the part of the other person, and has been wholly or partly executed on both sides, so that the infant has enjoyed the benefit thereof, but has parted with what he received, or when the benefits are of such a nature that they cannot be restored, then he cannot recover back what he has paid. This theory is certainly applicable to the case in hand. It is accepted and supported by no less an authority than Parsons in his *Law of Contracts* where on Page 347 he says:

“If an infant advances money on a voidable contract which he afterwards rescinds he cannot recover this money because it is lost to him thru his own act and the privilege of infancy does not extend so far as to return this money unless it was obtained by fraud.”

We see this line of reasoning evidenced in the case of *Taft vs. Pike*, 39 Am. Dec. 228. Here an infant

seeks to rescind an agreement and recover money paid thereon without returning the consideration he had received. It was held that where an infant has executed a contract on his part by delivery of property or payment of money he may not disaffirm the same without restoring to the other party what he has received from him.

“To protect infants from fraud and improvisation,” said the court in the decision of *Hall vs. Butterfield*, 47 Am. Rep. 209, “which from their want of understanding and immaturity of judgment they are exposed, they are permitted to allege their want of capacity to make a contract. But this privilege is to be used as a shield rather than a sword; not to do injustice but to prevent it.”

Let it be said here that the counsel is fully aware of the various disabilities of infants to make binding contracts but we can see, as suggested in the foregoing opinion, the disastrous results that would be forthcoming if a liberal construction of the rule prevailed, thus permitting the promiscuous and wholesale disaffirmance of minority contracts, recovery had by the infant without repaying his consideration. This is precisely what an English judge had in mind when he said in the case of *Valentini vs. Canadi*, L.R. 24 Q.B. Div. 166.

“Where an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money he has paid.”

However it is scarcely necessary that we refer to foreign opinion when we find the same view upheld in so many of our own decisions. For instance in the decision of this question

in the case of *Riley vs. Mallory* in 33 Conn. 206, we read as follows:

"The privilege of an infant to avoid contracts which are injurious to him and rescind those which are not, is not an exception to a general rule but rather a general rule with exceptions."

The court proceeds at some length to point out these exceptions naming as the third:

"Executed contracts where the infant has enjoyed the benefit and can-

not restore the other party to his original position."

In this action as heretofore suggested the appellant has proved that the appellee did enjoy the benefits of his executed contract and he himself admits a failure to restore the property, therefore let us say in conclusion that because of the rules pointed out and the various authorities cited thereon we feel that this honored court should and will reverse the decision in the court below.

Respectfully submitted,

T. SPENCER McCABE.

BRIEF OF ARTHUR C. KEENEY IN CASE OF CARPER vs. WHITCOMB.

State of Indiana
In the Notre Dame Supreme Court,
Marshall Carper, appellant,
vs.

James Whitcomb, by his next friend,
appellee.
Brief for appellee.

1. NATURE OF ACTION

This was an action brought by James Whitcomb, an infant, thru his next friend, Thomas Rees, to recover two hundred dollars paid by the infant on a contract entered into with Marshall Carper, an adult, for a horse, buggy, and harness. These articles of personalty were bought for pleasure purposes by the infant and used for that purpose. The infant was a day laborer and worked for the support of himself and family. The infant at the time of bringing the action had sold the buggy and harness to effect a cure on the horse which was defective. The horse was subsequently condemned by the Society for the Prevention of Cruelty to Animals, and shot. At the time of the bringing of the action the infant was in possession of no part or any

of the consideration received by him under the contract. Wherefore the infant asked a rescission of the contract and the return of the consideration paid by him to Marshall Carper.

2. ISSUES PRESENTED

(The parties from here on are designated as to their relation in the court below).

The plaintiff filed a complaint in two paragraphs. In the first paragraph the plaintiff alleged infancy and incapacity on the part of the plaintiff, that the articles purchased were used and were bought for pleasure purposes only, and that the plaintiff sold the buggy and harness and used the proceeds to effect a cure on the horse, which horse was defective and was condemned and that the plaintiff at the time of bringing the action was in possession of no part nor any of the articles of personalty aforementioned or their proceeds.

In the second paragraph the plaintiff alleged fraud.

The defendant demurred separately and severally to the complaint, and

the demurrer as to the first paragraph was overruled and as to the second it was sustained. The petition was amended to contain but the first paragraph, on which latter petition, the cause was tried.

The defendant filed an answer in four paragraphs, viz: 1. A General Denial; 2. Confession and Avoidance, alleging that the plaintiff was a married man and not entitled to the disabilities of an infant in contracting; 3. Confession and Avoidance, claiming that a return of the consideration was a prerequisite to the avoidance of a contract entered into by an infant; 4. Estoppel, claiming that the defendant did not know that the plaintiff was an infant and that the plaintiff made false representations.

The plaintiff demurred separately and severally to paragraphs two, three and four of the defendant's answer. The demurrer as to the second and third paragraphs was sustained and as to the fourth paragraph it was overruled.

The defendant then filed an amended second paragraph of answer, Confession and Avoidance, claiming that the articles in question were proper items of family expense. And, an additional, a fifth, paragraph, Set Off, alleging that the depreciation of the articles in question by reason of plaintiff's use and misuse of them and the value of the benefit he received from them, should be deducted from the sum asked by the plaintiff.

The plaintiff demurred separately and severally to the additional fifth paragraph and the amended second paragraph. The demurrer was sustained as to the fifth paragraph and overruled as to the second amended paragraph.

The defendant went to trial then,

on the first paragraph, the amended second paragraph and the fourth paragraph of their answer.

The plaintiff filed a reply in general denial to the defendant's answer and the issues were closed.

Trial was had by a jury and a verdict of two hundred dollars for the plaintiff was returned by them.

Before judgment was entered the defendant made a motion for a venire de novo, which the court overruled. The defendant then filed a motion for a new trial, which motion the court overruled, whereupon the defendant prays for an appeal which is granted.

3. EVIDENCE

The statement of the evidence in the Appellant's brief is excepted to in parts that follow, because of unwarranted presumptions of truth and because of variance. A reference to the trial record, Pages ten to thirty, will disclose and substantiate this information. We feel it is our duty to point out these discrepancies to the learned court to avoid inevitable deception by the artful phrasing and that justice may be best served.

The plaintiff took the stand and his testimony was as follows: That he lived in the basement of an apartment in South Bend, Indiana; that he did chores about the apartment, and paid ten dollars per month for rent; that he was married on October 1, 1919, and had one child; that he worked as a day laborer, receiving eighteen dollars per week for his services and that this was his only source of income. That he entered into a contract with the defendant; that he relied on the defendant's honesty and that he was urged by the defendant to buy defendant's horse, buggy, and harness, for which articles the plaintiff paid defendant his

life's savings, two hundred dollars; that he bought the articles for pleasure purposes; that no inquiry was made as to his status nor did he proffer any information in that regard; that the horse proved defective on an attempt to use it; that he had the horse in his possession two weeks; that he sold the harness and buggy to obtain funds to effect a cure on the horse and did actually expend the funds for veterinary services on the horse; that the horse was condemned on the recommendation of a Cruelty Prevention officer and the veterinary who had treated it; that he was in possession of no part nor any of the articles he had received nor the proceeds of the sale of any of them.

Mr. Schwertley a witness to the transaction fully corroborated the testimony of the plaintiff.

Mr. Dundon testified that he bought the buggy and harness from the plaintiff because of a sympathetic motive, to allow the plaintiff to make an attempt to save his horse.

Mr. Healey, a veterinary, testified that he was called upon to effect a cure upon the horse in question and found it impossible after working a week on it. That the horse was so affected before the purchase of it by the plaintiff and that he recommended its destruction.

Mr. Dressel, an officer of the S. P. C. A. testified that he inspected the animal aforementioned and recommended that it be condemned. The board passed on the condemnation and on their order it was shot. That he had orders to condemn the horse while in the possession of the defendant, but did not because the defendant said he could effect a cure on the horse.

Mr. Murphy, the plaintiff's em-

ployer, testified that the plaintiff was his employee and that the plaintiff received eighteen dollars per week for his services, and that grown, adult, men received twenty-five and thirty dollars per week.

Mr. Miller, recorder of vital statistics, testified, that plaintiff was born October 1, 1901, from the county records introduced in evidence.

The defendant took the stand and testified as follows: That he was a farmer, living on a farm and dealt in horses; that he entered into the contract with the plaintiff because he thought that the plaintiff was actually not a minor but an adult. That he had made public exhibition of the horse from time to time. That he did enter into the contract with the plaintiff as aforementioned.

Mr. Hughes, a student, testified that he knew the plaintiff for ten years. That the plaintiff abused the said horse, and that the plaintiff still had the horse in his possession.

Dr. Foley, a judge of horses, testified that he judged horses at exhibitions and that he had judged this horse and found him to be sound. That he saw said horse but once, some two years previous to this trial and identified the horse by a picture of it, defendant's exhibit No. 1 and answered the question saying: "It looks very much like the horse I saw at the exhibition."

Mr. Brady, testified that he saw said horse standing outside on the street, uncovered on a cold day, and that the horse was suffering.

Mr. Hilkert, a barber testified that the plaintiff had whiskers.

Mr. Shaw, administrator for the estate of R. B. Whitcomb, testified that he paid to James Whitcomb fifty thousand dollars. That he was appointed by the Superior Court of

St. Joseph County, state of Indiana. He identified a receipt, defendant's Exhibit No. 2, alleged to have been signed by the plaintiff.

In Rebutal the plaintiff testified that he had three uncles who were living and none dead, and these uncles were poverty stricken. That he had not received money from any source except his wages.

The signature on the receipt (defendant's Exhibit No. 2) was proven by expert testimony not to be that of the plaintiff.

4. POINTS AND AUTHORITIES

1. That the articles were not necessities.

Goodman vs. Alexander, 55 L. R. A. 781.

Guthrie vs. Murphy, 28 Amer. Dec. 681.

Price vs. Sanders, 60 Ind. 30.

2. Marriage is not such emancipation that changes the status of an infant as to his contract liability.

Beichler vs. Guenther, 96 N. W. 895.

Ryan vs. Smith, 43 N. E. 109.

House vs. Alexander, 105 Ind. 109.

3. As between different classes of contracts; and the legal effect on an infant; disadvantageous contracts were void; beneficial, i. e., a gift, were binding; necessities, binding; not clearly beneficial or harmful were voidable at the infant's option.

Wheaton vs. East, 26 Amer. Dec. 251.

Forda vs. Van Horn, 30 Amer. Dec. 77.

N. & C. R. R. vs. Ell, 78 Amer. Dec. 506.

4. The right of an infant to disaffirm and recover is not dependent on the return of consideration.

Dill vs. Bowen, 54 Ind. 204.

Carpenter vs. Carpenter, 45 Ind. 142.

White vs. Branch, 51 Ind. 210.

Price vs. Furman, 65 Amer. Dec. 194.

Walsh vs. Young, 110 Mass. 396.

That the Court below was correct in sustaining the demurrer to the de-

fendant's third paragraph of answer.

5. Misrepresentation as to age does not estop an infant from suing and is no defense to his action.

Hayes vs. Parker, 7 Atlan. 581.

Conroe vs. Birdsall, 1 Amer. Dec. 105.

Keen vs. Coleman, 80 Amer. Dec. 524.

Bendett vs. Williams, 30 Fed. 697.

Int'l Text Book Co. vs. Connelly, 42 L. R. A. (N.S.) 1115. (1912).

Whitcomb vs. Joslyn, 31 Amer. Rep. 678.

Sims vs. Eberhardt, 102 U. S. 300.

Albrey vs. Calbert, 93 C. C. A. 517. (1909).

All states rule the same as does England and Ireland.

The trial court properly refused the defendant's instruction numbered Five.

5. ARGUMENT

The counsel for the appellant has in his excellent brief confined the argument in support of his contention to two theories, in addition showing some general law. These two theories are two of four cited in appellant's brief in the appellant's grounds for reversal. These two issues are: First, That the lower court erred in refusing the appellant's instruction numbered Five. This instruction stated: That if the plaintiff had misrepresented his age to the defendant thereby inducing the defendant to contract with him, then the judgment must be for the defendant.

Second: That the lower court erred in sustaining plaintiff's demurrer to defendant's third paragraph of answer which was accordingly stricken from the answer. This paragraph stated: That although the plaintiff was an infant he must return the consideration received by him before he could recover on the contract and avoid it.

The instruction as stated above should have been refused, first: be-

cause it is not the law; second, because it is incomplete; third, because it does not state facts sufficient to constitute a good defense and fourth, because of the lack of evidence on the proposition.

In this case the defendant had a reasonable opportunity to ascertain the age of the plaintiff from appearance and association and even though such a misrepresentation was grounded in evidence the plaintiff would not be precluded from recovery. The infant could have said that he was fifty years of age and that would not relieve the defendant of the duty to know his age or from liability. The plaintiff was smooth-faced, small in stature and of a very juvenile character. The plaintiff in this case sat on the witness stand and was beside his counsel throughout the trial and was in such a position that the jury not only knew his appearance, but knew some of his habits. The jury decided that the plaintiff was an infant.

The defendant's refused instruction number Five cited above as a ground for a new trial is asking the learned court to remand this case to conclude an issue of fact that has already been decided, for when the jury found for the plaintiff they necessarily found the reverse of the defendant's object in submitting instruction numbered Five.

As to the law, the concern of this learned court, the instruction would be unfair.

The law brought up-to-date on this point may be framed in the form of an instruction given in this case, which was:

Even though you find that the plaintiff at the time of entering into this contract fraudulently misrepresented his age to the defendant and by this act caused the

defendant to enter into this contract; nevertheless you must find for the plaintiff because fraudulent misrepresentation of age by an infant does not act as a bar to the rescinding of the contract made possible only through such act.

Treatise 6 A. L. R. 420.

There was no material evidence in this case to support a fraudulent misrepresentation. (Pages 10 to 30). But, to obviate the necessity of further controversy, the following ruling will show that the law contained in the defendant's instruction is fundamentally wrong.

If the allegation that an infant represented that he was of full age were ever permitted to destroy an infant's right of avoiding contracts, not one in a hundred of his contracts would be placed in his power to avoid, for nothing would be easier than to prevail upon the infant to make a declaration which might be shown evidence of deliberate imposition on his part, though prompted solely by the person intended to be benefited by it. This is fully and amply supported by *Conroe vs. Bird-sall*, 1 Amer. Dec. 105.

In the case of the *International Text Book Co. vs. Connelly*, a recent decision reported in 42 L. R. A. (N. S.) at page 1115, the facts in brief were these:

An infant contracted with a correspondence school and represented himself to be of age. He was held not to be estopped to plead infancy in an action on the contract because of having misrepresented that he was of age, in the subscription paper, the court said:

It is well settled in this state that in an action upon a contract made by an infant, he is not estopped from pleading his infancy by any representation as to his age made by him to induce an-

other person to contract with him. In the case of *Whitcomb vs. Joslyn*, 31 Amer. Rep. 678, the theory is carried to a case in point. An infant represented to be of age and entered into a contract and bought a wagon, he paid part of the purchase price and failed to pay the balance. The vendor sold the wagon on this default. It was held that the infant was not estopped to avoid the contract and sue for the money he had paid.

The authorities are all one way, an estoppel in pais is not applicable to infants and a fraudulent representation of capacity cannot be an equivalent for actual capacity. This is supported by *Keen vs. Coleman*, 80 Amer. Dec. 524.

The courts take care to make clear their position on this question. At law it is conclusively presumed that a person within the age of twenty-one is unfitted for business, and that every contract into which he enters is to his disadvantage, and that he is incapable of fraudulent acts which will estop him from interposing the shield of infancy against its enforcement. *Hayes vs. Parker*, 7 Atlan. 581, is quite in point in this connection.

The cases cited by the appellant in his brief on this point are to be considered by the appellee with some misgiving. Three cases are cited in support of defendant's instruction numbered Five.

Commander vs. Brasile, 9 L. R. A. N. S. 1117

Int'l. Land Co. vs. Marshall, 19 L. R. A. N. S. 1056.

County Board of Education vs. Hensley, 42 L. R. A. N. S. 643.

The law of the first cast is conditioned on the premise that the infant receive and use the benefits and that he was benefitted by the contract. In

this case he was put to a detriment. Too the case holds:

"We do not hold that any contract may be enforced against an infant at any time on account of a false assertion that he is of age, unless age and appearance indicate such years of maturity as may well deceive the person with whom he deals."

The second case is cited for the purpose of summary and will be treated after the third case.

In the third case, the age was inserted in the contract a much stronger case than the one under consideration, but there was no proof of it having been inserted or allowed there with the intent to defraud and does not relieve the disability or change the character of the action. The court said:

"It is well settled that in an action upon a contract made by an infant, he is not estopped from pleading his infancy by any representation as to his age made by him to induce another person to contract with him."

The second case sets out that the infant must fraudulently, willfully and intentionally misrepresent his age so as to give it a tortious character. There is no tort in this case, nor is there any evidence to that effect, and the action is *Ex Contractu*. But, there is evidence to show the good faith of the plaintiff. (Page 12)

From the decisions and authorities cited, there can only be one conclusion as to the law and that the Defendant's instruction numbered Five was properly refused.

The second theory of the appellant is that the lower court should not have sustained the Plaintiff's demurrer to defendant's third paragraph of answer.

The whole list of cases cited on the return of consideration by the appellant in support of his contention presume a valid consideration received and a wilful intent to defraud which are not basic in this case because they do not exist.

This paragraph of the defendant's answer does not state facts sufficient to constitute a good defense.

There was no return of the property made in this case:

1. Because of the consideration having been removed from his possession and out of his control.

2. Because his status as an infant did not require him to make a return of the consideration under the circumstances and acts of this case.

The authorities on this point concur that a failure to return consideration does not preclude recovery.

The case of *Green vs Green*, 85 N. Y. 553 is very clear on this point. That court held:

"The right to repudiate is based on the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are spent or lost or otherwise disposed of during minority, the infant should not be held responsible for an inability to restore them. To hold him for the consideration would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether."

The *Lemon Case*, 15 N. E. 476 is strictly in accord, the court said:

"An infant may, before or on arriving at age, disaffirm a purchase of personalty, other than necessities, made by him during his minority, and recover back the consideration paid, without restoring the property sold and delivered

to him where it has been taken from him, or it is sufficient that the property ceases to be in his possession or subject to his control."

In the same class is the case of *Wallace vs. Leroy*, 110 Amer. St. Rep. 777, the case holds:

"That in an action against an infant to recover the purchase money of property sold to him, part of the proceeds he still retains, he is entitled to the plea of infancy as a defense, without having returned or offered to return such property or proceeds. The successful intervention of such plea confers upon the person who made the sale to the infant only the right to reclaim his property or such part of it as remains in the possession of the infant."

It is admitted that the plaintiff made no return of the consideration received by him, but, it must be remembered, that since the property was not in his possession at the time of rescinding, he is under no compulsion to return the property or place the defendant in 'status quo' before rescinding the contract. Sustained by *Morse vs Ely* 154 Mass. 458, *Price vs. Furman* 65 Amer. Dec. 194.

These laws as to the return of consideration by an infant have been consistently and universally adopted. In the state of Indiana the reports running from forty-five to one-hundred and nineteen adopt the following law in substance in every case:

When an infant disaffirms a contract, he is not bound to restore the consideration, where such consideration has been wasted or lost during his minority, or has become absorbed in other property; but so much of the specific considera-

tion as remains in his hands may be reclaimed by the party.

In the case under consideration the infant neither spent nor did he waste the consideration received, but made a bonafide attempt to keep it in tact, and thru no fault of his own it passed out of his hands. Such an infant is certainly and surely entitled to rescind the contract without making restitution of the consideration received.

Not only where the consideration is lost or wasted can the infant rescind without return of consideration, but, as in the case of *White vs. Branch* 51 Ind. 210, where an infant received a horse under a contract and so abused and misused the horse and depreciated its value to worthlessness and he recovered the consideration he had paid.

In the case of *Carpenter vs. Carpenter*, 45 Ind. 143—That it is not necessary to give effect to the disaffirmance of a deed for contract of an infant, that the other party should be placed in 'status quo.'

The consideration received by the infant in this case was inferior, that he acted in good faith, that the consideration could not be returned by him thru no fault of his own, that under such facts and circumstances he was not required to make a return the articles received by him.

The plaintiff's demurrer to the defendant's third paragraph of answer was properly sustained by the lower court; first, because the paragraph did not state facts sufficient to constitute a good defense, and second, because the law contained therein is unfair and incorrect.

To sum up the law of this case the appellee offers the following, in addition to the propositions given above. That if this contract gave

any advantage either way it was in favor of the defendant and the legal effect either way if not clearly beneficial to the infant in regard to consideration received, is that the infant may avoid the contract at his option and recover the consideration he has paid. *N. & C. R. R. vs. Ell*. 78 Amer. Dec. 506.

That marriage is not such emancipation that changes the status of an infant as to his contract liability in this case. *Beichler vs. Guinher* 96 N. W. 895, *Ryan vs. Smith*, 43 N. E. 109.

The articles received by the infant in this case were for pleasure purposes and must necessarily be for pleasure purposes and must necessarily be for pleasure purposes because of his station in life, and therefore were not necessities and the word is construed in an infant's contract. *Goodman vs. Alexander*, 55 L. R. A. 781.

6. CONCLUSION

In conclusion the appellee believes that the decision of the lower court was correct on both its rulings in rejecting the appellant's instruction numbered Five, because of its embodiment of misstated law and because it was not supported by evidence; and the sustaining of the Appellee's demurrer to appellant's third paragraph of answer, because of its unfairness, erroneousness, and because of the lack of facts sufficient to constitute a good defense.

The infant contracted, paid a consideration, received a consideration that passed out of his possession and control, and was not a necessary, and there being no tortious bar to his recovery, and because he had a right to rescind because of his status, he