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Rescission–Minor's Contract Voidable, Not Void–Measure of Damages Upon Disaffirmance (Joseph v. Schatzkin, 259 N.Y. 241 (1932))

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acquires no greater rights than the assignor had at the time of the transfer.³ The default of the vendee was not waived. An insistent ineffectual demand upon performance does not constitute a waiver unless the other party can show an ability and willingness to substantially comply,⁴ or that he was prevented by the acts of the party demanding performance.⁵ As the assignor could not come within these principles the assignee cannot claim to be. This would be a greater right.

When specific performance cannot be actually enforced the court may provide that the property shall be resold and direct that the defaulting party shall be liable for a deficiency, if any, as in a foreclosure action.⁶ Since the order of resale was for seller's benefit, he should not be compelled to perform if he chooses to abandon it. A party invoking the power of a court of equity is bound by its discretion. If a travesty of justice will result, the relief sought will be denied as in the instant case.⁷

P. A. L.

RESCISSION—MINOR'S CONTRACT VOIDABLE, NOT VOID—MEASURE OF DAMAGES UPON DISAFFIRMANCE.—Plaintiff, an infant, opened a stock account with a firm of brokers, which he subsequently transferred to the defendants, who accepted the same by paying a debit amount thereon to the former firm. These shares of stocks were kept by the defendants as a security for the unpaid balance due them from the plaintiff, which was continued with purchases and sales until it was closed by a payment of a small sum. Plaintiff, while still an infant, rescinded his agreement and disaffirmed his entire transaction. In an action to recover the amount which he alleges to represent the value of his interest at the time of his transfer of the stocks

³ Fairbanks v. Sargent, 117 N. Y. 320, 22 N. E. 1039 (1889); Central Trust Co. of N. Y. v. The West India Improvement Co., 169 N. Y. 314, 62 N. E. 387 (1901).

⁴ Fox v. Hutton, 142 Ark. 530, 219 S. W. 28 (1920); Quinn v. Daly, 300 Ill. 273, 133 N. E. 290 (1921); O'Donnell v. Henley, 327 Ill. 406, 158 N. E. 692 (1927); Haddaway v. Smith, *supra* note 2.

⁵ Fox v. Hutton, *supra* note 4; Quinn v. Daly, *supra* note 4; Gladstone v. Warshowsky, 332 Ill. 376, 163 N. E. 777 (1928); Stagman v. Lasson, *supra* note 2; McDonald v. Sautter, *supra* note 2.

⁶ Williams v. Haddock, 145 N. Y. 144, 39 N. E. 825 (1895) (it would seem that the rule of equitable conversion is inapplicable after default); Strauss v. Bendheim, 32 Misc. 179, 66 N. Y. Supp. 247 (1900).

⁷ Fisher v. Hersey, 78 N. Y. 387, 388 (1879) (the courts of equity exercise control over sales made under their decrees which are not always controlled by legal principles, but by its discretion). In Matter of Attorney-General v. Continental Life Ins. Co., 94 N. Y. 199 (1883) (contract while executory is within the power of the court); Westown Realty Co. v. Keller, *supra* note 2 (purchaser not allowed to speculate on property); Leahy v. Leahy, 116 Misc. 330, 189 N. Y. Supp. 897 (1921).

to the defendant firm, minus the sum paid to him on the closing of his account, *held*, that the plaintiff was entitled to his proportionate share of the value of the stocks as of the time of the disaffirmance of the contract, and not as of the time when he entered into the transaction. *Joseph v. Schatzkin*, 259 N. Y. 241, 181 N. E. 464 (1932).

The privilege of infancy is to be used as a shield and not as a sword; and if the infant has had a benefit of a contract sought to be rescinded by him he must account for the benefit or return of its equivalent.¹ An infant may more readily rescind a contract where it is still executory and has not received any benefit thereunder.² An agreement made by a minor is merely voidable and by rescission the contract does not become void *ab initio*,³ although there seems to be contention for the contrary.⁴ The infant's appointment of an agent to sell goods is voidable and not void.⁵ When the sale is voidable no tort is committed until after avoidance.⁶ The plaintiff in this case received no benefit but contracted a loss which he is trying to shift on the shoulders of the defendants, his agents. Up until the infant repudiated the contract, the brokers had obeyed the infant's commands and no tort had been committed by them, since, as agents, defendants were authorized by the infant principal. The loss, if any, should fall on him. The infant should not be placed in a better position after disaffirmance of the agreement than he was in before.⁷ Until the plaintiff avoided the contract, the agreement was valid and all action taken under it by the agents or brokers was wholly regular and therefore until disaffirmance no cause of action arose.

S. S.

SEARCHES AND SEIZURES—GENERAL EXPLORATORY SEARCH—WHEN UNREASONABLE.—Under the allegations of a complaint based on knowledge and information of facts sufficient to justify the accusation, the defendant and another were arrested by federal officers on a warrant for conspiracy to violate the National Prohibition Act. The arrest was made in an office room and the officers, without a search warrant, made a general search of all the desks, cabinets, drawers, etc., in the room and seized practically all the personal property

¹ *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275 (1899).

² *Medbury v. Watrous*, 7 Hill 110 (1843).

³ *Casey v. Kastel*, 237 N. Y. 305, 142 N. E. 671 (1924).

⁴ Dissenting opinion per Crane, J.; *citing* (1 WILLISTON, CONTRACTS, §236; ANSON, CONTRACTS [3rd Am. ed. by CORBIN] §161b, p. 184; MEYER, THE LAW OF STOCK BROKERS AND STOCK EXCHANGE, §125, p. 496; *Myers v. Hurley Motor Co.*, 273 U. S. 18, 21; *Benson v. Tucker*, 212 Mass. 60; *Casey v. Kastel*, 237 N. Y. 305).

⁵ *Casey v. Kastel*, *supra* note 3.

⁶ *Ibid.*

⁷ *Rice v. Butler*, *supra* note 1.