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THE LIABILITY OF AN INFANT STUDENT FOR FLIGHT INSTRUCTION

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Probably no line of endeavor, at least in modern times, has so merited the title "Young Man's Game" as the aviation industry and particularly does this seem true of aircraft operation, maintenance, and repair. Despite its comparatively tender years American aviation is now generally regarded as having outgrown the unfortunate label of "infant industry." Nevertheless, to a great extent it still depends, and no doubt will continue mainly to depend, for its skilled personnel upon those who, at least during their novitiate, are classed as "infants."

During the late war the military pilot above the age of twenty-one was the exception rather than the rule and the records show that the aerial fighting forces of all combatants listed many stripplings of seventeen, eighteen, and nineteen in ranks as high as Captain and Major. Today we have only to examine the Civil Air Regulations to find concrete evidence that this Government still considers youths several years short of attaining their majority as eligible, so far as age is concerned, to undergo training as pilots and mechanics, and to serve, upon the completion of their instruction, as qualified practitioners in positions carrying a heavy burden of responsibility for life and property.

Under the Regulations an applicant for a student pilot or solo pilot rating may be as young as sixteen years of age, provided that he submit with his application the written consent of his parent or guardian. Private pilot, limited commercial pilot and commercial pilot ratings call for a minimum of eighteen years, plus the written

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consent of the parent or guardian if under the age of twenty-one. The ratings of student glider pilot and private glider pilot are issued to applicants as young as fourteen years of age, again provided that the necessary written consent accompany the application, while the aircraft mechanic rating calls for a minimum age of eighteen years.

In the light of these requirements, it is possibly no exaggeration to assert that the several aviation schools scattered throughout the United States maintain enrollments composed largely of students, who, in the eyes of the law are "infants," and are deemed unable to protect themselves in ordinary business transactions and relations.

As a general proposition the law presumes that such infant students are legally incapable of contracting for the highly skilled instruction by which they propose to equip themselves to earn their livelihood in their chosen field and are held liable for the reasonable value of such instruction only if the Court be convinced that the training is a necessary to the particular infant. If, for one reason or another, and the factors influencing such decision appear to be on the increase, it is determined that the instruction be not a necessary, the infant not only is permitted to retain the intangible benefit of his instruction, but may even recover from the school his entire paid tuition, together with interest. The legal anomaly seems complete and has wrought hardship to schools which in all good faith provided the instruction at no little cost and expense, as a decision rendered several months ago by the Supreme Judicial Court of Massachusetts serves to illustrate.¹

Briefly, the facts of the Adamowski case were as follows: On September 25, 1929, the plaintiff, a former resident of New Bedford, Massachusetts, who had gone to New York early in that year, voluntarily enrolled himself in the defendant's flying school located in Valley Stream, Long Island, New York, as a student in the Private Pilot's Course. The school offered various courses in flying instruction designed to prepare its students for eligibility to take the requisite examinations for the several classes of air pilots' licenses prescribed by the United States Department of Commerce, Bureau of Aeronautics. The school was one approved by and under the general supervision of the Department of Commerce, and maintained a large staff of licensed instructors, together with a fleet of licensed training planes for use in student instruction. The courses of training followed the classifications which had been established by the Air Commerce Regulations under the Air Commerce Act of 1926, as amended, the three chief types being Private Pilot's Course, Limited Commercial Pilot's Course and Transport Pilot's Course.

1. *Adamowski v. Curtiss-Wright Flying Service, Inc.*, 15 N. E. (2d) 467 (1938); 1938 U. S. Av. R. 38.

Prospective students were required to provide themselves with a student pilot's permit which was issued by the Department of Commerce only upon proof of physical qualification. The instruction was of two kinds; ground school designed to prepare the student for the written examinations prescribed by the Department for the particular class of license sought and flight instruction, the latter consisting of both dual and solo flying. The courses could be taken successively or in combination, dependent upon the student's choice.

Adamowski secured his Student Pilot's permit, paid the regular \$300 tuition for the Private Pilot's Course, took and completed the training. At its conclusion he attempted the Department examination for his Private Pilot's license but failed to qualify. Instead of attempting a second examination he elected to enroll in the Limited Commercial Course, build up his flying time and then seek his Limited Commercial license. He completed the Limited Commercial Course, paying the requisite tuition of \$1300 and at its conclusion submitted himself to examination but again failed to satisfy the Department of Commerce Inspector as to his flying ability.

On May 6, 1930, he enrolled himself in the Transport Pilot's Course, but failed to complete the course, paid nothing on his tuition and voluntarily withdrew from the school late in May, 1930, returning to New Bedford.

It appears that the books of the school showed a small balance due upon the Transport Pilot's Course at the time of the plaintiff's withdrawal and after futile efforts to collect such balance the claim was placed in the hands of an attorney in New Bedford. The plaintiff denied the debt, asserting that he had been an infant at the time of entering into the contracts for instruction and now having attained his majority he elected to disaffirm. He evidenced his disaffirmance by instituting an action to recover the \$1600 tuition, plus interest at 6% from the respective dates of payment.

At the time of his enrollment in the Private Pilot's Course Adamowski was twenty years and two months of age; was twenty years and seven months of age when he enrolled in the Limited Commercial Pilot's Course and was twenty years and ten months of age when he registered for the third course. He was twenty-two years of age, lacking nine days, when he disaffirmed his two executed contracts.

At the trial he testified that he had enrolled himself in the school "to learn a new trade and earn a good living." He also stated that he had withdrawn from the school not because he was dissatisfied with the instruction or equipment, but solely because of ex-

haustion of funds. The undisputed testimony showed that upon his two completed courses he had had a total of 23 hours and 53 minutes of dual instruction and had actually flown solo for 40 hours and 20 minutes. Testimony showing that the fair and reasonable value of the instruction given equalled the contract price was introduced. All parties agreed that the law of New York governed.

The defendant rested its case upon three principal contentions, namely (1) that the instruction rendered to Adamowski, being vocational training in a trade, constituted a necessary to Adamowski and he, therefore, was bound for the fair and reasonable value thereof; (2) that Adamowski might not disaffirm his fully executed contracts without restoring the consideration which he had received, or accounting to the defendant therefor; and (3) that the plaintiff had failed to disaffirm his executed contracts within a reasonable time after attaining his majority and the failure so to disaffirm constituted ratification.

The issues were tried before a Court without jury and resulted in a decision against the defendant on all three contentions, judgment being granted in favor of the plaintiff for \$1600, plus an additional \$563, which latter sum was composed chiefly of interest at 6%.

In his opinion² the Trial Court held that the vocational instruction rendered to Adamowski was not a necessary as a matter of law, declining to follow the case of *Curtis v. Roosevelt Aviation School, Inc.*,³ a New York decision holding that a course of study in an aviation school to train a student as an aviation mechanic should be classified as a necessary.

The Appellate Division,⁴ while unanimously reversing on the ground that as a matter of law the infant had failed to disaffirm his executed contracts within a reasonable time after attaining majority, also declined to follow *Curtis v. Roosevelt Aviation School, Inc.*, in the matter of necessities on the ground that the opinion of Mr. Justice Bogenshutz contained no citations supplementing his statement that:

"It is my view that the course of study sought was to secure mechanical knowledge to equip plaintiff for a job in that line and should be classified as a necessary,"

and that apparently such language was to be construed as a finding of fact rather than a ruling of law. Upon appeal by the plaintiff to the Supreme Judicial Court, that tribunal reversed the Appellate

2. 1936 U. S. Av. R. 36.

3. (Mun. Ct. N. Y.), 1934 U. S. Av. R. 133.

4. Mass. Appellate Division Reports (1936) Vol. 1—No. 7 p. 569; 1937 U. S. Av. R. 36.

Division and *inter alia* affirmed the Trial Court's ruling that the courses of instruction were not necessities for the plaintiff.

Unfortunately, it is difficult to determine from this latter opinion whether the Supreme Judicial Court was of the view that vocational training in aviation is not to be included within the list of infancy necessities or whether upon the particular facts of the case the instruction was not a necessary to Adamowski. The Court said in part:

"In this country, as the judge found in substance, any stratification of society is transient and shifting. Many a young man without capital or influential connections attains education and advancement in life through his own labors. It would be hard to say that education in aviation was less necessary for the plaintiff than it would have been for another more affluent. But the law still guards the interests of minors against their own assumed improvidence and want of sound judgment. The judge found that the courses in instruction were not necessities for the plaintiff. That finding was proper, though possibly not required as matter of law."

Thus it would appear, at least so far as the State of New York is concerned, that the question of vocational instruction in a trade as a necessary is still undecided. The writer has been informed that following the decision in *Curtis v. Roosevelt Aviation School, Inc.*, members of the New York Bar interested in infancy contracts, generally regarded that decision as reliable authority for the proposition that vocational training in a trade, given to an infant who is compelled to earn his living, and lacks a parent or guardian willing and financially able to defray the cost of such instruction, is a necessary as a matter of law, and it would seem that Professor Williston is inclined to the same view.⁵ The Adamowski decision, however, seems to cast considerable doubt upon the reliability of the Curtis case as a precedent in New York.

Where did the concept that vocational training is a necessary originate?

We read in Coke on Littleton,⁶ the following, written in the quaint language of the day:

"And it is to be understood, that when it is said, that males or females bee of full age, this shall bee intended of the age of twenty-one years; for if before such age any deed or feoffment, grant, release, confirmation, obligation, or other writing, be made by any of them, Etc., or if any within such age bee baylife or receiver to any man, Etc., all serve for nothing, and may bee avoided. Also a man before the sayd age shall not bee sworne in an enquest, Etc."

5. 1 Williston Contracts (Rev. Ed.) sec. 241.

6. Co. Litt. 172 A.

To this generality Coke carved out the following exception:

"Here by this Etc. is implied some exceptions out of this generality * * * as an infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards; but if he bind himselfe in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him."

Hargrave in his note to the foregoing says:

"But Lord Coke's words imply that a single bond, that is one *without a penalty*, being given for necessaries, may be good against an infant, and so it hath been frequently adjudged."

It seems clear that Coke intended to include within the list of common law necessaries what we today term vocational training in a trade, and the English decisions interpreting his words have construed the statement more liberally than American Courts. Typical of the English decisions is *Walter v. Everard*.⁷ In that case an action was brought by the master of an infant auctioneer apprentice, upon a covenant in the apprenticeship deed, for payment of the balance of the premium which the apprentice had obligated himself to pay. Involved in the case was the question of whether the particular training was a necessary. Lord Esher wrote:

"Then what are necessaries for an infant? Food and clothing always are necessaries, if the infant cannot obtain them in any other way. Is education a necessary for an infant? Looking at it independently of authority, I should say that education in a trade with a view to making an infant a useful citizen must always in this working country have been thought of the greatest importance, and must always have been considered a necessary for an infant. But on this point we have the authority of the passage in Coke upon Littleton, p. 172 (A), in which Lord Coke lays it down in effect that education in a trade is a necessary for an infant, or rather I should say one of that class of things which may be a necessary. What will make it a necessary? If the infant can obtain the education which he requires in another way, it may not be a necessary. You must have regard to the condition of the infant in life—whether, for instance, he is a young man who will have to earn his living by his own exertions. In the present case the infant was in a condition of life which made it reasonable that he should earn his living by means of the trades to learn which he was apprenticed."

Fry, L. J., interpreted Coke's language in an even broader sense, thus:

"I think that 'teaching or instruction,' though it includes instruction in a trade, is not necessarily confined to that. I should be sorry to conclude that literary instruction likely to lead to the infant's success in a learned profession is not within the observations of Lord Coke; the interests of the State

7. (1891) 2 Q. B. 369.

require that an infant should be able to bind himself for instruction of that kind."

An interesting discussion on necessities is also found in *Roberts v. Gray*.⁸ It seems that an infant contracted to embark upon a venture as a billiard player, in company with one John Roberts, who, apparently was a leading billiard professional of his day. The agreement provided that the parties would undertake a world tour, Roberts to pay all hotel and travelling expenses; that there should be an equal division of all receipts and emoluments and that Roberts was to defray initially the tour expenses, reimbursing himself from Gray's share of the profits.

Subsequently, a dispute arose between the parties as to the type of billiard hall to be used and the infant Gray repudiated the contract. Roberts sued Gray for damages for breach of contract and the latter counterclaimed for rescission. The infant claimed in effect that although the contract might have been profitable to him it was not one for necessities and was voidable at his option since executory in part. One of the questions involved was whether instruction in billiards constituted a necessary and the opinions of the judges on that score indicate little doubt of their views.

Farwell, L. J., said:

"This is clearly a contract for necessities within the meaning which that phrase has had attached to it in the course of many centuries since Lord Coke wrote. It is in effect for board, lodging, travelling and employment all found at the plaintiff's expense for the infant and involved in the employment, and the education which a billiard player of receptive capacity could not fail to obtain from playing continually month after month with a great billiard player like John Roberts. Every item which goes to make up necessities in the sense of a labour and education contract, except the express term to give the education, which would be necessary if it were an apprenticeship deed, is in this particular contract as much so as though, instead of finding the board and lodging on board ship and in various hotels, Roberts had found it in a house of his own where he gave exhibitions. I cannot doubt that this is a contract for necessities."

and Hamilton, L. J., wrote thus:

"The first question is whether this was a contract for necessities, or, in the words of Lord Coke,—Co. Litt. 172 A—whether it was a contract for the infant's 'good teaching or instruction whereby he may profit himself afterwards.' I think it is quite clear, as a matter of law, that this contract as framed was capable of being, and was rightly held to be, such a contract for necessities. * * * Whether the contract is one for necessities in this sense must depend upon its substance and not upon its form, and there was abundance of evidence here upon which it could be found by the learned

8. (1913) 1 K. B. 520.

Lord Chief Justice, who was, by agreement, the tribunal of fact, so far as the facts were involved, as well as of the law on this point, that a part and most important part of this contract was the instruction that would be received by the defendant from playing constantly with the plaintiff, and also from playing under the conditions of a world-wide tour, a thing which a distinguished billiard player apparently contemplates as part of his career."

Similarly, Cozens-Hardy, M. R., gave it as his opinion that playing billiards in company with a noted player like Roberts must be instruction of the most valuable kind to an infant who desired to make playing billiards the occupation of his life.

A comparison between the Roberts and Adamowski cases is interesting. Adamowski was a young man whose condition in life rendered it necessary for him to earn his own livelihood. He had worked since he was sixteen years of age and apparently was not equipped in any skilled trade, as his previous employments indicated. While in New Bedford he had worked as a plumber's helper, car washer and a laborer, and while in New York as an upholsterer and as a dishwasher while attending school. His stated purpose and design in the flying school were "to learn a new trade," and to follow commercial flying as his occupation.

In the Roberts case the infant Gray apparently intended to earn his livelihood by playing billiards, and the Court seemed to have no doubt but that his instruction on tour under a master of the art would materially advance his ambition. Adamowski's flying instruction was provided by one of the oldest flying schools in the country, operating with the Government's approval and under its supervision, providing training by a licensed and highly skilled corps of instructors and employing the latest flying equipment. But the Trial and Appellate Courts seemed unable to find any benefit or advantage whatsoever accruing to the infant from his instruction. The Trial Court apparently was strongly influenced by the fact that Adamowski had failed to pass his examinations and had been unable to obtain work in any commercial flying service as a result of having taken the courses, ruling, as a matter of law, that the quondam infant was not chargeable "for the benefit, if any, received from such instruction." The Appellate Division failed to mention specifically the question of benefit, while the Supreme Judicial Court in its discussion, not of necessities, but of the quondam infant's right to disaffirm his executed contracts said:

"It is to be noticed that the contract was wholly executed, and that there is no evidence that an earlier disaffirmance would have benefited the defendant or saved it from harm. It is to be further noticed that the plaintiff has made no use of his education in aviation, which has been of no apparent benefit to him."

Quite properly Courts give great weight to the advantages or disadvantages to an infant of a particular contract, for in fact the theory of an infant's incapacity to bind himself by contract is predicated upon the view that infants must be shielded from the consequences of their worldly inexperience and protected against the follies and improvidence of youth. Adult imposition upon juvenile inexperience has, unfortunately, been all too frequent, but, it does seem a harsh rule to predicate an absence of benefit upon a student's failure initially to pass his examinations and to secure employment at the conclusion of his courses. If the school had guaranteed to ensure him possession of his pilot's license and employment in the industry, admittedly, the situation would be different. But, there was no suggestion of any such inducement in the case under discussion. To the contrary, the plaintiff testified that he had withdrawn from the school not because he was dissatisfied either with the instruction or the equipment, but solely due to exhaustion of funds. It is a matter of serious doubt whether any approved or responsible flying school in the United States, either today or during the past ten years, has held out to prospective students either the guaranty of a successful examination or the assurance of future employment.

From another point of view it is not easy to decide that Adamowski's courses were wholly without advantage to him. He enrolled in the school to learn to fly and learn to fly he did, for the undisputed testimony proved that he had some forty hours of solo time to his credit. Reasonable minds concededly may disagree on the precise value of learning to fly, but it does seem difficult to conclude that the knowledge which he had gained and demonstrated by his ability to fly solo was of no benefit simply because his initial efforts at examinations resulted in failure and that at the time of trial he had apparently abandoned his ambitions in aviation. It would be interesting to examine the statistics of the Department of Commerce and the Civil Aeronautics Authority with reference to the percentage of unsuccessful initial attempts at license examinations. Prophecy is invariably hazardous, but it would be indeed surprising if the figures did not reveal the percentage of first failures to be substantially high.

If, as seems entirely possible, the Adamowski case will be cited in future litigation for the proposition that a flying school must show successful student examinations and subsequent employment as essential elements to establish a binding obligation for instruction, the results will be most unfortunate for, in effect, a flying school operat-

ing in a State which provides neither judicial nor statutory protection will be held insurer not only of the student's proficiency, but apparently even of economic conditions in the industry.

In marked contrast to the liberal interpretation of the English Courts, American judges have construed the words of Coke in a much narrower sense. The trend of American decisions has been substantially to limit instruction or education as a necessary to the three R's in the absence of strong factual circumstances demanding the contrary, although there are a few decisions extending the doctrine to the trade schools.

In *Pardey v. American Ship-Windlass Co.*,⁹ it was held that a contract of apprenticeship to a pattern maker entered into by a minor with the approval of his father, was binding and constituted a contract for necessities.

In *Mauldin v. Southern Shorthand & Business University*,¹⁰ the Court indicated that a course in stenography would be a necessary to a young lady of seventeen years if it appeared suitable to her particular sphere in society or calling in life which her previous education and attainments had prepared and fitted her to occupy or fill.

In *Kilgore v. Rich*,¹¹ the term was extended to include a board bill contracted by an infant to enable him to attend school.

On the other hand, in the oft cited case of *Middlebury College v. Chandler*,¹² it was held that a full course of collegiate study was not a necessary, as tending more to be an adornment of personal character and a source of private enjoyment rather than an actual necessity. But, even in this case, the Court strictly limited its decision thus:

"I would not be understood as making an allusion to professional studies, or to the education and training which is requisite to the knowledge and practice of mechanic arts. These partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy. I speak only of the regular and full course of collegiate study; for such was the course upon which the defendant professedly entered."

In *Turner v. Gaither*,¹³ it was held that a professional education is not a necessary, and in *International Text Book Co. v. Doran*,¹⁴ a course in electricity was ruled to be in a similar category.

The New York Court of Appeals in *International Text Book Co. v. Connelly*¹⁵ decided that a five year correspondence course of instruction in steam engineering was not a necessary as a matter of

9. 20 R. I. 147 (1897).

10. 126 Ga. 681 (1906).

11. 83 Me. 305 (1891).

12. 26 Vt. 683 (1844). See also *Moskow v. Marshall*, 271 Mass. 302 (1930).

13. 83 N. C. 357 (1880).

14. 80 Conn. 307 (1907).

15. 206 N. Y. 188 (1912).

law in the absence of proof of the factual circumstances of the infant, the Court holding that a common school education is doubtless a necessary in this country, as essential to the transaction of business and the adequate discharge of civil and political duties and that even a classical or professional education might become a necessary as a matter of fact under certain circumstances.

In *Crandall v. Coyne Electrical School*¹⁶ it was held that a contract by an infant, who had neither parents nor guardian, for a course of electrical instruction is not a contract for a necessary of life either as a matter of law or fact in the absence of proof of further circumstances of the infant's state and condition in life, or what was suitable to his condition, estate and needs.

However, in *Wallin v. Highland Park Co.*¹⁷ it was conceded that a course in pharmacy was a necessary and the infant was held liable for the reasonable value of the instruction actually received.

It would therefore seem that, so far as vocational training is concerned, the English Courts are more inclined to consider such instruction within the list of necessities and in effect to cast upon the infant the burden of showing that by reason of his particular circumstances the instruction was not essential to his well being, either because he was well equipped in other fields to wage the battle of life, or because he took the instruction merely for his own pleasure and enjoyment.

For instance, in *Hamilton v. Bennett*¹⁸ it was held that flying lessons given to a law student while he was studying for his law examinations was not a necessary. It is of interest to note that in this case the Court apparently gave some consideration to the "dangers of flying" and to the fact that the infant's parents were unaware of his flight instruction.

On the other hand, with respect to training and instruction the American Courts still indicate a marked reluctance to extend the field of necessities beyond the common school education. While in a few instances vocational training in a trade school has been ruled a necessary, the Courts have apparently hesitated to enlarge the category of "trades" and are not easily persuaded that our highly mechanized modern life, with its attendant severe economic competition, requires judicial expansion of instruction and training into fields which in the past were regarded either as foolhardy or the extravagance of a wealthy youth.

Instruction beyond the common school still seems presumptively

16. 256 Ill. App. 322 (1930).

17. 127 Ia. 131 (1905).

18. 74 Sol. J. 122; 94 Just. Peace 136 (1930).

unnecessary in the absence of convincing proof by the adult that the training given was essential to the infant's economic welfare and that he lacked a parent or guardian ready, able and willing to supply such instruction. However, it will be noted, that the Supreme Judicial Court, perhaps because of the increasing prominence into which, by reason of world conditions, aviation is being pushed, voiced its doubt that the Trial Court should have ruled as a matter of law that Adamowski's instruction was not a necessary. Certain jurisdictions¹⁹ have solved the troublesome problem of necessities by adopting, either through decision or by statute, the so-called "Provident Rule," which binds an infant on his contracts for instruction or education if the contract was beneficial to the infant and reasonable and provident when made.

While considerations of space do not admit of extended discussion on the second contention advanced by the defendant in the Adamowski case, the Court's disposition of the question does provide food for thought to flying schools located and operating in States which have not corrected, either by decision or statute, the inequities inherent in the legal concept of infancy contracts.

Here we find a young man in the twenty-first year of his age, who, between September and the following June, took and completed two courses, including ground school, and enjoyed a total of some sixty-four hours of flight time under defendant's tutelage and in its equipment. This instruction represented to the defendant a substantial capital investment and one which, by the nature of the activity, was fraught with financial hazard. Instructors were highly paid and the cost of flying equipment, insurance, etc., was excessive, one of the most serious items of the school expense being maintenance and repair of training planes, which necessarily were subjected to harsh treatment and, on occasion, even to complete destruction at the unskilled hands of student pilots. Not the least of the cost lay in the upkeep of the flying field and the property taxes thereon. While it might be argued, at least so far as a student's solo time is concerned, that a proportionate part of the tuition shall be considered rent or hire of flying equipment,²⁰ the fact remains that what the infant primarily received was instruction and imparted skill which in the nature of things being intangibles were incapable of restoration upon disaffirmance. Nevertheless, he was permitted to demand and to receive the return of his entire tuition with interest.

19. In New Hampshire and Minnesota by decision; in California, Idaho, Iowa, Kansas, Tennessee, Virginia, Washington, by statute, cf. Oklahoma and Montana.

20. *Boardwalk Corp. v. Littman*, 164 Misc. 124. (1937) and authorities cited therein to the effect that an infant is liable for the fair and reasonable value of the use and occupation of premises.

What then of the oft-quoted rule of Kent?²¹

"If an infant pays money on his contract and enjoys the benefit of it and then avoids it when he comes of age he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other."

In New York the cases on restoration of consideration are, as Judge Lummus points out, difficult of reconciliation. Upon analysis it would seem that there are two main lines of decisions stemming from *Green v. Green*²² on the one hand, and on the other from the later and more equitable decision of *Rice v. Butler*.²³ *Green v. Green* dealt with real property; *Rice v. Butler* with tangible personal property, and it is interesting to note that the New York infancy decisions relating to real estate have mainly followed the black letter law of *Green v. Green*, while those relating to personal property have grouped themselves under *Rice v. Butler*.

In *Green v. Green* it was held that an infant who conveyed real property to his father and dissipated the \$400 consideration which he had received, thereafter could disaffirm his conveyance and regain the property after attaining majority, irrespective of his inability to repay the purchase price. However, the close relationship and the parties and the presumption arising therefrom was clearly a factor in the decision, and the opinion of the Appellate Division in *Rice v. Butler*²⁴ directed attention to the fact that the Court of Appeals in the *Green* case—

"was careful to state that it was not designed that the rule there adopted should be extended beyond the particular facts of that case * * *"

Nevertheless, *Green v. Green* has been followed in subsequent New York infancy cases involving real estate.²⁵

In *Rice v. Butler*, where an infant, who purchased a bicycle on the instalment plan, sought to disaffirm the contract of purchase and recover the instalments which she had paid, the Court of Appeals applied the principle of Kent and held that she must account to the adult for the reasonable use of the bicycle or its deterioration in

21. Kent's Commentaries Vol. 2 (5th ed.) sec. 239.

22. 69 N. Y. 553 (1877).

23. 160 N. Y. 578 (1899).

24. 25 A. D. 388 (1898).

25. *Kane v. Kane*, 13 A. D. 544 (1897); *New York Building Loan Banking Co. v. Fisher*, 23 A. D. 363 (1897); cf. *Wyatt v. Lortscher*, 217 A. D. 224 (1926); also *McCarthy v. Bowling Green Storage and Van Co.*, 182 A. D. 18 (1918); contract of lunatic; also *Casey v. Kastel*, 237 N. Y. 305 (1924) to the effect that the appointment of an agent by an infant is voidable not void; quaere, is the Court's discussion of *Green v. Green* dictum in *Casey v. Kastel*?

value, holding that in the absence of wanton injury to the property, the value of the use would include deterioration in value. This equitable rule has been followed repeatedly.²⁶ Just why a distinction should be drawn between real and personal property is not apparent, unless it be due to the historical importance which the common law has always attached to land.

Perhaps a further distinction between the two lines of judicial thought may lie in this: that in the cases applying the equitable rule of *Rice v. Butler* the infant had paid or committed himself to pay money for property, either tangible (bicycle, piano, etc.) or, intangible (labor performed, services rendered, or the use and enjoyment of tangible property) and then sought to recover the money so paid or to avoid his obligation to pay, after enjoying the benefits of his executed contracts, while on the other hand, under the reasoning of *Green v. Green*, the infant had parted with property, had received money which he had squandered or lost, and then sought to recapture his former property.²⁷ However, even in such latter cases, if the quondam infant still retained part of the money or consideration which he had received, he was obliged to restore it, but, if his money had been dissipated, and experience teaches that money does not cling to the fingers of an infant, he was not required to do the impossible and was permitted to disaffirm with impunity.

True, the Courts have stated that the infant's legal right of disaffirmance does not depend upon his ability to place the adult *in statu quo*, but, should not the rule properly be limited to cases where the infant lost, wasted, dissipated, squandered or parted with the consideration which he had received and that in the cases where he continues to retain all that he initially gained, even though it be an intangible, his right of disaffirmance be denied.

In *Wallin v. Highland Park Co.*,²⁸ the infant repudiated a contract for instruction in pharmacy, but the Court held that he was liable for the reasonable value of the instruction actually received and permitted recovery only to the extent of the excess of his tuition over the reasonable value. However, as heretofore pointed out, in that case the course of instruction was conceded to be a necessary, a factor undoubtedly influencing the decision.

26. *Joseph v. Schatzkin*, 259 N. Y. 241 (1932); *Lown v. Spoon*, 158 A. D. 900 (1913); *Washington Street Garage v. Malloy*, 230 A. D. 266 (1930); *Wantsch v. Wuertz*, 79 Misc. 610 (1913); *Sparandera v. Staten Island Garage*, 117 Misc. 780 (1921); *Egnaczyk v. Rowland*, 148 Misc. 889 (1933); See also *Myers v. Hurley Motor Co., Inc.*, 273 U. S. 18 (1927).

27. But see *Sternlieb v. Normandie National Securities Corp.*, 263 N. Y. 245 (1934) where an infant who had fraudulently represented himself to be an adult in purchasing stock was permitted to disaffirm the contract of purchase upon his unsuccessful speculation in the market and to recover the money paid upon tender of the worthless stock.

28. 127 Iowa 131 (1905).

In *Neilson v. International Text Book Co.*,²⁹ the minor was permitted to disaffirm a contract for a course in electrical engineering and recover his tuition after return of the books of instruction supplied to him, and in *International Text Book Co. v. Connelly*, the text books were likewise returned by the quondam infant.

But, there were no books for Adamowski to return; what he had received was knowledge and a developed ability to do that which theretofore he could not do. He had not lost, wasted, squandered, dissipated or parted with that which he had received from the defendant; upon disaffirmance he still retained what he had gained. Manifestly he was unable to divest himself of the intangible which he had secured and continued to hold, but still he was deemed under no obligation to account. This would seem to be an extension of judicial solicitude for the presumed disability of youth beyond the essential demands of modern jurisprudence and serves to focus attention upon a condition which can best be remedied by prudent legislation. The Courts themselves, although constrained to follow precedent, clearly are not in sympathy with the conclusions they, perforce, are compelled to draw³⁰ and have recognized that the maturer youth of nineteen and twenty, in this day and age, is apparently qualified to assume, in his commercial dealings with adults, the same responsibilities and liabilities which the common law decreed he is capable of bearing on the dawn of his twenty-first birthday. In the absence of such legislation the Courts have even invoked the injunction, a weapon seldom employed against an infant. For example, in *Mutual Milk and Cream Co. v. Prigge*,³¹ a nineteen year old infant entered into a written agreement with his employer not to solicit orders from the latter's customers within the three years next succeeding his departure from such employment. Subsequently, the infant severed his connection, entered the employ of a rival milk dealer and thereupon embarked upon a campaign of solicitation of business from his erstwhile employer's customers. The plaintiff instituted an action to restrain the infant from soliciting business from or delivering milk to the former's customers within the three year period. The defendant pleaded infancy at the time of entering the agreement. An injunction was granted, the Court saying:

"This is not a question of the liability of an infant for damages for a breach of contract. The question presented is whether an infant shall be permitted to repudiate his contract without restoring what he has received

29. 106 Me. 104 (1909).

30. *Joseph v. Schatzkin*, 259 N. Y. 241; *Sternlieb v. Normandie National Securities Corp.*, 263 N. Y. 245.

31. 112 A. D. 652 (1906).

thereunder, and, if restoration cannot be made, without being enjoined from making use of the knowledge he gained, to the disadvantage and damage of his employer.

The ordinary rule is, that although an infant may rescind an executed contract at will, he must restore or offer to restore to the party with whom he contracted what he received thereunder. (*Rice v. Butler*, 160 N. Y. 578; *Pierce v. Lee*, 36 Misc. Rep. 870.) This principle is applicable to the case at bar. Here he cannot surrender to the plaintiff the knowledge he acquired while in its employ concerning its customers and his acquaintance with them, which doubtless enables him to receive greater compensation from a rival dealer, and, therefore, as a substitute for restoration he should be enjoined from making use of that information in violation of his agreement made at the time when he desired and obtained employment and upon the faith of which he obtained the information and acquaintance. No case in point arising within this jurisdiction is cited, but a modern English case is cited, showing that this principle has been applied by the courts there. (*Evans v. Ware*, L. R. (1892) 2 Ch. Div. 502; see, also, *Fellows v. Wood*, 59 L. T. Rep. 513.)"

The case, although dealing with an intangible is, of course, distinguishable from the Massachusetts decision on the ground that the conduct of Prigge constituted a continuing injury of an affirmative nature, which demanded drastic action. Obviously, in the Adamowski case, injunction (even assuming it would lie) provided no remedy to the flying school, for it could demonstrate no injury even if Adamowski continued to fly. But the very absence of a remedy emphasizes the drastic need of reform.

In the *Mutual Milk and Cream* case the infant, grown adult, in effect was estopped from violating the contractual obligations which he had assumed while under legal disability, and his estoppel was reinforced by the mandatory weapon of injunction. In principle, therefore, should not a student who has completed full courses of flying instruction, given in good faith, be similarly estopped from demanding the return of his entire tuition? Otherwise, does not the law border perilously upon condonation of inequity? Solicitude for the infant's inexperience and protection against his improvidence are greatly to be desired but surely not at the expense of innocent adults, who, as in the case of flying schools, are by the very nature of the particular activity compelled to draw their students from the ranks of seventeen to twenty years. What should be protection becomes aggression and the ends of justice are poorly served. Until curative legislation arrive or judicial thought change, the flying school, when dealing with the infant, must seek financial safety in an original undertaking from the parent or guardian.