Entertainment Law

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Lawyers For The Talent

by Richard Dooling

Doing Deals

Dealmaking in the publishing industry has always been a civilized sport with just a few usually friendly players: author, agent and publisher. Even deals worth millions are relatively simple and sound, never mind that it was made over the phone weeks ago. The same is true in Hollywood, despite the occasional high-profile lawsuits, some of which we read.

People in the entertainment industry do deals worth millions with phone calls, handshakes, napkin and iPad agreements. They haggle via texts and tweets and emails, until somebody says the magic words "we are closed" and everybody makes friendly noises, which means you have a deal, and 99% of the time you DO have a deal. The written parts of that deal might not come for months. But eventually people in business affairs cut, cull and paste those original messages into deal memos and letter agreements and proposed contract drafts that often say: "These contract terms are void and unenforceable unless this agreement is signed by both parties," but those agreements sometimes never get signed; they just stand as some evidence of what the parties intended during negotiations.

The entertainment industries are too fast moving and involve too many players and contingent deals to dawdle while lawyers fuss over contract language and wait for signatures. Usually the bargains struck work out fine. Blockbusters and tentpoles get made and the players compromise on any terms that weren't included in the conversations surrounding the original deal.

When deals fall through, a judge or jury comes along and asks almost metaphysical questions about what happened: Did the parties agree? Or did they

just agree to make an agreement later? After some uncertain event? Like, "Yes, we agree, but only if Spielberg directs and Daniel Craig plays the hero." A deal or a deal to make a deal if–?

The book passages help give us a glimpse into deals in the various industries, but another way to appreciate the boundaries of the often hurry-scurry world of dealmaking is to read the cases memorializing some famous Hollywood and publishing feuds.

Required Readings

The Movie Option

Where Publishing Meets Hollywood

What does it mean to "option" movie rights? Movie options are common in Hollywood, but they are also common in many industries, anytime a buyer wants an option to buy something valuable for an agreed period of time. It may be an option to buy fine art, rights to music, a building, a Stradivarius, stocks, whole corporations. It doesn't matter. The basics of the option are the same.

In the movie biz, it works this way. A producer or a studio thinks that your novel (magazine article, graphic novel, treatment, screenplay) might make for a nice feature film. They call your novel "source material" or "story material," and total story costs (including the screenplay) usually account for about 2-5% of a movie's budget.

Budgets for feature films average $70 million these days. Therefore if the producer were to buy the movie rights to your novel outright, she should pay roughly $1.5 to $2 million (1-3% of $70 million)(which leaves another 2% to pay the screenwriter). Nobody wants to spend that kind of money only to find out that a movie can't be made (because they've paid three different screenwriters and still can't get a script they like, or they can't make deals with enough A-list talent, or dozens of other reasons from insurance to tax credits).

Instead, of buying the rights outright, the producer *rents* them. She buys the OPTION to purchase the movie rights to your novel, for a fixed time period, probably with an option to renew. How does that work?

Three Essential Terms of any Option Agreement

1. The option period (for how long?);
2. The option payment (how much for the right to buy the rights?);
3. The purchase price (how much to actually buy the rights?)

1. The Option Period. The producer or the studio buys a period of time during which they will try to strike a movie deal. How many months or years are they asking the seller not to sell to someone else?

With budgets at $70 million or more and with complicated deals for talent, a producer wants time to "set up" the project at a major studio. At a minimum, 6, 12, or 18 months, or even two years. Longer periods of time are common, only because most options include another option to renew, or to buy another period of time, but for steadily escalating dollar amounts. For independent movies, the producer may need even more time to "pre-sell" foreign rights to exhibit movies which have not even been made yet, usually because a major name is associated with the project.

Usually measured in months, this is called the "Option Period." During this period of time if the producer or studio wish to "execute their option," they have the right to buy the movie rights for a pre-arranged purchase price.

2. The Option Payment How much is the producer or studio willing to pay for the right to buy those rights? This is the option payment (the "small money," or "the rent"). It goes something like this: I will pay you $20,000 for the right to buy the movie rights to your novel for 18 months. If I decide to make the movie during those 18 months, the full purchase price will be $700,000 (minus the $20,000 I already paid). If I don't buy the rights; after 18 months go by, the option EXPIRES. You keep the option payment, and you are free to sell the movie rights to your novel to any willing buyer, or option them again.

The option payment varies greatly (depending if you are J.K. Rowling or a minor Midwestern novelist). The rule of thumb is that the option payment should be in the neighborhood of 10% of purchase price.

3. The Purchase Price If the movie gets made, the producer or studio will pay the total amount of money due to the writer, usually on the first day of principal photography. This is the execution price or purchase price (the "big money"), the full price for the movie rights (usually 1-3% of the film's budget with a cap).

The option agreement MUST CONTAIN A PURCHASE PRICE to be an enforceable promise (PL 101-105). Otherwise the producer has promised only to BUY the movie rights, not how much she will pay.

The price may vary greatly, but it must be negotiated up front at the time the option agreement is made. If the movie gets made, the author is paid in full. If the deal falls through for any reason and the movie does NOT get made in the option period, then the novelist keeps the option payment and the movie rights remain with the novelist, too.

Headline Cases

Oral Agreements

- *Mainline v. Basinger,* 1994 WL 814244 (Cal.Ct.App.2d 1994)(9 pages).
- *Los Angeles Times* on *Basinger* case.

> Because timing is critical, film industry contracts are frequently oral agreements based on unsigned "deal memos." Often, artists authorize their agents or lawyers to bind them. Sometimes, however, the parties also desire to memorialize the agreement in an executed written contract, commonly referred to as a "long form agreement." This written contract is usually negotiated by attorneys and contains many standard terms. Although the parties may intend their oral agreement to be binding, many subsidiary or ancillary terms may subsequently be agreed upon and incorporated into the written contract. The written agreement also enables parties to formalize their understanding in legal language. The absence of an executed written agreement does not mean there is no legally binding agreement. Basinger, for example, had entered into executed written agreements for only two of her prior films.

Did We Make A Deal?

Did your client make a deal? Did she just discuss terms? Did he agree on some terms but not on others? Did your client agree to pay a writer to do a screenplay for me, but never settled on WHEN the writer would do it? Did your client promise to act in a music video next Wednesday, but never settled on for how much? And now she has a chance to be in the next *Hunger Games* and wants out?

At common law, contracts require three elements:

- offer and acceptance, "a meeting of the minds"
- an intention to be legally bound
- consideration (something of value given in exchange for something of value)

Deals get made and deals go bad, and rarely do parties pursue the nuclear option and sue each other. But if they do sue each other for breach of contract, the courts will try to guess what agreement the parties made. The terms of the contract must be definite and enforceable, and the court wants to be assured that the parties reached that point of negotiations, where the parties made a deal.

At a minimum, oral and written contracts must usually answer the following questions:

- Who?
- What?
- When?
- Where?
- How much?

Statute of Frauds

Contracts may be oral or written, implied or explicit. For centuries, the common law had required that some contracts MUST BE in writing, or courts will not enforce them.

- Contracts for the sale of land;
- Contracts for the sale of goods above a certain dollar amount (often $500.00);
- Contracts that cannot be completed in less than one year;
- Contract promising to marry someone;
- Contracts where somebody promises to pay the debt of somebody else.

In the entertainment business, the most common statute of frauds issue is when an an artist promises to perform services for MORE THAN A YEAR. Usually such contracts must be in writing, or courts will not enforce them. But this doesn't mean that any contract that COULD last more than a year must be in writing. Contracts of indefinite duration don't require a writing no matter how long they may take.

Promissory Estoppel

> "The law is simply expediency wearing a long white dress." –Quentin Crisp

The legal magic words "promissory estoppel" and "detrimental reliance" mean that sometimes the law will enforce promises, even if they aren't contained in binding contracts. That's what happened when singer Aretha Franklin promised to perform in a Broadway musical and then backed out at the last minute.

***Elvin Associates v. Aretha Franklin,* (SDNY 1990)**

- *Elvin Associates v. Aretha Franklin,* 735 F.Supp. 1177 (SDNY 1990)(9 pages).

In early 1984, broadway producer Ashton Springer wanted to make a Broadway musical about gospel singer Mahalia Jackson, her life and her music.

Springer wrote to singer Aretha Franklin and asked her to appear in the title role.

Aretha personally called Springer and expressed strong interest in the role. She told Springer to contact her agents at the William Morris Agency.

Springer had several conversations with Aretha's agents and traded proposals and counter-proposals with them. Springer also began making arrangements to begin production.

Near the end of February 1984, Aretha's agents called Springer and accepted his final proposal.

Meanwhile Springer spoke often with Aretha about artistic and production issues, as he continued working out the terms of the deal with her agents.

In a conversation about rehearsal and performance dates, Aretha told Springer that she had no conflicts on her schedule. "This is what I am doing," she told Springer.

In New York, Springer struck deals with various investors to finance the *Mahali* production and spoke with promoters and theaters in other cities to reserve dates. In discussions with several promoters, Springer learned for the first time that Aretha Franklin had cancelled several recent performances because of a fear of flying.

Springer called Aretha's agents and asked about the cancelled performances. The agents told Springer not to worry, that the cancelled engagements had been made by other agents without Aretha's approval, and that there were no such problems with this deal.

Springer also checked with Aretha, who told him that she wanted to do the show and would fly as necessary.

Springer met with his lawyer and Aretha's agents on March 23rd 1984 and agreed to the same basic terms that had been proposed before. Springer asked the agents to call Franklin and confirm. The agents stepped out, called Franklin, returned to the meeting and told Springer that Aretha had agreed.

After that meeting, Springer's lawyer wrote the contract in the form of a letter to Franklin's company. The contract draft began:

> This letter . . . **when countersigned by you**, shall constitute our understanding until a more formal agreement is prepared.

More drafts circulate, all of them had the same "when countersigned by you" language, all of them quibbling over details. Meanwhile, Springer hired set,

lighting and constume desginers, stage and crew, reserved dance studios, and did everything necessary to begin rehearsals.

A final draft of the contract was ready for signatures on June 7th, the date that Aretha was scheduled to come to New York to begin rehearsals.

Aretha Franklin never showed on June 7th and never came to New York for rehearsals. When Springer's lawyer called Aretha's agents they reported that Franklin would not fly to New York.

Springer paid off the cast, cancelled production and sued Aretha Franklin.

Springer's problem? The letter his lawyer wrote plainly said that it would be our understanding "when signed by you." The judge said this meant that Springer did not have a contract, either express or implied, until Aretha Frankline signed the letter, and she never did.

Now what? Aretha Franklin did not make a contract, but she did make repeated promises, and her promises caused Springer to spend a lot of money getting the show ready. In the magic words of contract law, Springer "detrimentally relied" on Aretha's promises.

Unjust? Yes. Meaning we need some magic words to make Aretha Franklin pay Springer for breaking her promise to perform, even though she never made a final, formal contract. As stated by the court:

> The elements of a claim for promissory estoppel are: "[A] clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance." The " 'circumstances [must be] such as to render it unconscionable to deny' the promise upon which plaintiff has relied."

Voila. Promissory estoppel. It requires:

- A makes a clear and unambiguous promise to B;
- B relies on that promise.
- B is "injured" (loses money, suffers other damages) when A fails to keep the promise.

In the Aretha Franklin case, the judge said that it was "difficult to imagine a more fitting case for applying" promissory estoppel and awarded Springer $209,364.07 to compensate his losses in preparing for the production of *Mahalia*.

Contract Formation

The eternal ambiguity. The parties shake hands (or trade emails) and say:

"Hooray! We have a deal."

Do they mean: We have a deal NOW? Or do they mean we WILL have a deal, once we sign contracts?

***Gold Seal v. RKO,* (Cal.Ct.App.2d 1955)**

- *Gold Seal v. RKO,* 286 P.2d 954 (Cal.Ct.App.2d 1955)(17 pages);

An oldie but a goodie.

Movie producer Jack Skirball owned the motion picture rights to *Appointment In Samara,* a novel by John O'Hara.

In March 1950, Skirball spoke with Sidney Rogell, an executive producer with RKO, about making a movie based on *Appointment In Samara*. The Skirball and Rogell bargained over terms: RKO would pay Skirball a sum of money and a percentage of profits to produce the movie on the RKO lot for distribution by the studio.

At the same time, RKO was negotiating for the services of Gregory Peck to play the leading role and with Skirball for the rights.

On May 16, RKO faced a deadline for making a deal with Gregory Peck, so they presented Skirball with a final offer for the film. They reached an *oral understanding* that would pay Skirball $125,000 plus 20% of the movie's profits, to produce the film.

Skirball confirmed that the other terms of his deal would be the same as another movie he had made for RKO and then he confirmed that his agreement with Rogell and RKO was a deal **"with or without Peck."**

Skirball and Rogell shook hands and said, "We have a deal."

After budgeting the film and securing Gregory Peck's participation, RKO publicized the deal in trade journals and news sources.

RKO's legal department sent a deal memo to Skirball outlining the terms of the agreement. A draft of the contract was then submitted to Skirball's attorney with a letter that stated **any enforceable agreement would be subject to the execution of a written contract.**

On May 24th, Skirball met with an RKO attorney and told him that the deal was satisfactory. Skirball also reiterated his understanding the the parties had a deal with or without Peck.

The next day, Gregory Peck backed out of the deal, and RKO told Skirball that it would not sign a contract without first approving a replacement for Peck.

After discussions about other leading actors, a change in management occurred at RKO. In February, 1951, RKO told Skirball the deal was off. Skirball tried to sell rights elsewhere but was unable to because RKO's advertisements,

followed by their cancelling the deal, made other studios and directors leery of getting involved with an iffy deal.

Skirball sued RKO for breach of their ORAL CONTRACT. The trial court entered judgment for Skirball to the tune of $397,486.

On appeal, RKO argued that the alleged agreement of May 16th left many important terms open and also that the parties had explicity said that they did not intend to be bound until they each signed a **written contract.** Unsettled terms included: The starting date, the budget, the director, and principal cast, and minor script revisions.

RKO argued that the words "we have a deal" were ambiguous:

> it could not be determined therefrom whether the parties were not to be bound until the formal agreement was signed, or whether they were to be bound immediately and that the formal agreement to be prepared would be a memorial of their present agreement.
>
> [the words] meant that the parties had agreed upon the basic points (story, star and money) and that other points were details as to which, it was anticipated, the parties could agree without difficulty; but that a formal agreement would be prepared.

From the opinion of the court:

> In Mancuso v. Krackov, 110 Cal.App.2d 113, 115, it was said: '[I]t is not necessary that each term [of an oral contract] be spelled out in minute detail.' In Thompson v. Schurman, 65 Cal.App.2d 432, at page 440, it was said: 'The rule is well established and uniformly followed that when the respective parties orally agree upon all the terms and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract. * * * The question as to whether an oral agreement, including all the essential terms and conditions thereof, which according to the mutual understanding of the parties is to be subsequently reduced to writing, shall take effect forthwith as a completed contract depends on the intention of the parties, to be determined by the surrounding facts and circumstances of a particular case.'
>
> The significance of shaking hands, under such circumstances and following the conversation hereinbefore mentioned, and at the same

> time saying 'We have a deal,' was material. The intention of the persons who shook hands and used those words, under such circumstances, was material. The testimony of both persons, with respect to intention, was to the same effect—that they intended to close the deal.

The court ultimately decided that on May 16th the parties entered into an oral contract and that they intended it to be legally binding.

Two drafts incorporated those terms and the parties orally agreed to them. Skirball conceded that there were other points to be decided, but the parties had stated they would be handled according to the terms of the deal he for the other movie he had going at RKO.

Oral Deals With Unsigned Writings

The Second Circuit has a famous four-prong test it uses to "help determine whether the parties intended to be bound in the absence of a document executed by both sides."

The court is to consider:

1. whether there has been an express reservation of the right not to be bound in the absence of a writing;
2. whether there has been partial performance of the contract;
3. whether all of the terms of the alleged contract have been agreed upon; and
4. whether the agreement at issue is the type of contract that is usually committed to writing.

No single factor is decisive, but each provides significant guidance. Winston v. Mediafare Entertainment, 777 F.2d 78 (2nd Cir. 1985).

Restatement 2nd of Contracts 27

Existence of Contract Where Written Memorial is Contemplated

> Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

These circumstances may be shown by "oral testimony or by correspondence or other preliminary or partially complete writings."
Restatement (2nd) Contracts 27

Definiteness

***Pinnacle Books v. Harlequin,* (SDNY 1981).**

- *Pinnacle Books v. Harlequin,* 519 F.Supp 118 (SDNY 1981)(5 pages).

In 1976, Pinnacle Books entered into a contract with Pendleton for the rights to publish books 29 through 38 in *The Executioner* series. Since 1969, Pendleton had written and Pinnacle had published 38 different action/adventure books in *The Executioner* series. Author Pendleton owned copyright in the series, which had sold approximately 20 million copies.
The agreement provided that:

> Pendleton would not offer rights in the series to any other publisher until, **after extending their best efforts**, the parties were unable to agree on terms for a new contract."

In 1978-79, Pendleton and Pinnacle began negotiating for an extension of their agreement, when a dispute broke out over foreign royalties. It was settled eventually, and according to Pinnacle negotiations became more intense, but their differences could have been resolved if the parties had continued using **their best efforts.**
But in January 1980, Harlequin Books began negotiating with Pendleton for rights to *The Executioner* series.
On May 15, 1980, Pendleton signed with Harlequin.
Pinnacle sued Harlequin and sought an injunction and damages against Harlequin for unlawful interference with the contractual relationship between Pinnacle and Don Pendleton (its most successful author).
Now, for Pinnacle to succeed for unlawful interference with a contract, Pinnacle had to prove up a VALID contract. Pinnacle argued that it had an agreement with Pendleton that he would use **best efforts** to agree on new contract terms.
Indeed if Pendleton had not negotiated at all, perhaps Pinnacle would have a good argument, but how is the court supposed to enforce a contract provision that says the parties must use their **best efforts?**
The court said:

> where the parties agreed only to negotiate and failed to state the standards by which their negotiation efforts were to be measured,

> it is impossible to determine whether Pinnacle used their "best efforts" to negotiate a new agreement.
>
> There simply is no objective standard by which the court can determine whether Pinnacle's offer constituted its best efforts; nor can it decide whether Pendleton's participation in negotiations with Pinnacle for over a year were his best efforts. In short, the option clause is unenforceable due to the indefiniteness of its terms . . .
>
> "Best efforts" or similar clauses, like any other contractual agreement, must set forth in definite and certain terms every material element of the contemplated bargain. It is hornbook law that courts cannot and will not supply the material terms of a contract. Essential to the enforcement of a "best efforts" clause is a clear set of guidelines against which the parties' "best efforts" may be measured.

What Pinnacle really needed (and apparently was unable to bargain for) was an "option clause."

Authors Guild on Option Clauses To the Authors Guild, Option clauses are "Unacceptable Provisions."

A typical option clause looks like this:

> The Author grants Publisher the exclusive option to acquire the rights to the next full-length work of [fiction or non-fiction] to be written by the Author. Publisher shall be entitled to a period of sixty (60) days after submission of the next work in which to make an offer for that work, during which time the Author agrees not to solicit any third party offers, directly or indirectly.

See Dooling Book Contract at paragraph 19.

As the Authors Guild puts it: These clauses favor PUBLISHERS ONLY, not authors. An option clause gives your publisher the PRIVILEGE to publish your next book (but only if they want to).

An book contract option clause binds the author to the publisher, even if the relationship has been unsatisfactory. The clause usually contains some or all of the terms you MUST accept for the optioned work. Even "first refusal" clauses and "agreements to agree" impede the author's freedom. Some publishers will simply delete option clauses. Consider asking for an editor's clause instead?

What if your editor leaves? What if you get a better deal elsewhere? You may not want a provision hanging over your head that you MUST show your next book to your current publisher first.

If you cannot get rid of the clause, limit it: Avoid options on "the same terms" and "last refusal rights" (allowing publisher to match terms the author has received). Go for a "limited time right of first refusal" on terms "to be mutually agreed upon."

Also limit the clause to a summary or proposal for the next book (not entire manuscript). Otherwise you may be unable to shop a query, proposal, or summary to another publisher until you finish the second book and show it to your original publisher.

Limit the time. And don't let the publisher require publication of the first work. Limit option only to similar books (fiction, non-fiction, poetry).

See Dooling Book Contract at 19.

How Book Advances Work

Your client signs a book contract and agrees to a standard 15% royalty with a $120,000 advance payable as follows:

- 1/3 ($40k) on signing.
- 1/3 ($40k) on delivery of manuscript.
- 1/3 ($40k) on publication.

But remember, all of these payments are going to your client's literary agent.

So when your client gets the first third of his advance ($40k on signing), the literary agent removes her 15% ($6k) and you the entertainment or publishing lawyer get 5% ($2k).

On the entire $120,000, the literary agent would take 15% ($18,000) and the publishing lawyer would take 5% ($6,000).

The book gets published and the cover price is $20, so every book sold gets your client $3.00 (15% of $20).

Let's say the book sells 50,000 copies:

- $3.00 x $50,000 = $150,000 gross royalties
- $150,000 - $120,000 (advance) = $30,000.

On next royalty statement, your client will earn $30,000, the literary agent will take $4,500 and the lawyer will take $1,500.

Consideration and Mutuality

As we know, "consideration" is anything of value promised to another when making a contract. It can take the form of money, physical objects, services, promised actions, abstinence from a future action, and much more.

Consideration fulfills at least two functions in entertainment law contracts:

1. an evidentiary function (proof that you are making a contract;
2. a cautionary function (you stand to lose x or you must do y, if this contract is enforceable).

Must both sides assume some detriment or obligation?

***Wood v. Lucy, Lady Duff-Gordon* (NY.App. 1917)** We all recall from first-year contracts, the famous case.

- Fashion designer Lady Duff-Gordon gives Wood the exclusive rights to market her designs.
- Wood agrees to pay Lady DG half the profits from selling Lady DG products.
- Lady DG breaches the K by endorsing the products of someone else.
- Wood sues for breach of K.
- Lady Duff-Gordon says she hasn't breached because her

Judge Cardozo famously found that the agreement contained an implied promise:

> The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed. If that is so, there is a contract.

Bonner v. Westbound Records (Ill.Ct.App. 1979) 394 NE.2d 1303 (9 pages).

- Ohio Players enter into a recording agreement with Westbound Records in 1972.
- Contract requires OP to make records ONLY for Westbound for a 5-year period.
- In 1974 (two years later) OP signs a new deal to record exclusively for Phonogram.

What is the consideration offered by Westbound? THERE ISN'T ANY. The contract is silent as to consideration.

OP seeks a declaratory judgment.

Lower Court entered summary judgment for the Ohio Players, recording agreement is invalid and unenforceable.

On appeal, the court holds that the existence of consideration may be established through parol evidence) Contracts valid because of the money passing from Westbound to OP.

> By making the $4,000 advance, Westbound suffered a legal detriment and The Ohio Players received a legal advantage. . . It is not the function of either the circuit court or this court to review the amount of the consideration which passed to decide whether either party made a bad bargain. . . unless the amount is so grossly inadequate as to shock the conscience of the court. The advance The Ohio Players received, taken together with their expectation of what Westbound would accomplish in their behalf, does not shock our conscience. On the contrary, to a performing group which had never been successful in making records, Westbound offered an attractive proposal. The adequacy of consideration must be determined as of the time a contract is agreed upon, not from the hindsight of how the parties fare under it.

Court looks beyond the four corners of the contract for an implied promise, promissory estoppel, detrimental reliance, parol evidence

Minority

- *Scott Eden Management v. Kavovit,* 563 NYS2d 1001 (NY 1990).

Facts: Defendant was 12-year-old actor who entered into deal with Eden to act as his manager. Eden was to receive 15% commission of Kavovit's earnings. After two years, Eden had Kavovit sign with Andreadis Agency, who would receive an additional 10% commission. Soon after, Kavovit signed a contract to be on "As the World Turns." Kavovit's attorney contacted Eden, informing him that Kavovit was disaffirming the contract on the grounds of infancy.

From the opinion of the court:

> An infant's contract is voidable and the infant has an absolute right to disaffirm. . . After disaffirmance, the infant is not entitled to be put in a position superior to such a one as he would have occupied if he had never entered into his voidable agreement. He is not entitled to retain an advantage from a transaction which he repudiates. 'The privilege of infancy is to be used as a shield and not as a sword.'. . .
>
> The restoration of consideration principle, as interpreted by the courts, has resulted in the infant being responsible for wear and tear on the goods returned by him (*Myers v. Hurley Motor Co.*, 273 U.S. 18 [automobile]; *Rice v. Butler*, 160 N.Y. 578 [bicycle]; *Scalone v. Talley Motors*, 3 A.D.2d 674 [automobile]). In the event that the minor cannot return the benefits obtained, he is effectively precluded from disaffirming the contract in order to get back the consideration he has

> given. In *Vichnes v. Transcontinental & Western Air*, 173 Misc. 631) the infant paid the air fare from New York to Los Angeles. On returning to New York she demanded the return of her money. Appellate Term granted summary judgment to defendant because "there is no basis for rescission here in view of the concession that the reasonable value of the transportation was the sum paid by plaintiff" (at 631).

While Kavovit was allowed to disaffirm the contract, he was required to pay Eden all commissions Eden would have been due over the course of the contract.

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