The Contracts of Minors in the Modern Roman-Dutch Law

In his judgement in *Simon Naido v. Askin Noud* 1 Socerts, A.C.J., said: 'An examination of our law reports reveals the thoroughly unsatisfactory and illogical position in which many matters relating to the so-called contracts of minors stand... The uncertainty of the law is mainly due to the fact that it has been stretched or contracted to suit the merits or demerits of particular cases... What appeared to be hard cases have served to make bad or, at any rate, uncertain law and this tendency has derived support from the conflicting views of the Dutch Jurists themselves.' If the S. African decisions and textbooks have shown little agreement on many points in the law of Minors' Contracts, judges and textwriters in Ceylon have unfortunately been agreed upon much less. No apology is, therefore, necessary for attempting to restate, not indeed the whole of the law relating to what Voet calls 'the thorny subject of minority'; but the principles which it is submitted govern the Contracts of Minors in the modern Roman-Dutch Law.

It is, perhaps, necessary to explain the reason for the length of some of the notes in the present article. When one is attempting to formulate propositions which might serve as a guide through a branch of the law on which there has been much difference of judicial and juristic opinion, it becomes necessary to deal expressly with views which are not in accordance with the submissions made. In view of the space that had to be devoted to a discussion of some of the views which were submitted to be untenable, the notes to propositions formulated in the main body of the article had to be placed in the text immediately after those propositions rather than as footnotes. Further, even the footnotes *stricto sensu* in the introductory portion of the article had to be longer than they need otherwise have been, for the reason that it was often considered necessary to quote the *ipsissima verba* of judgements or textbooks in view of the fact that most law libraries available in Ceylon are unfortunately very far from being complete or up-to-date.

Before we can formulate the principles which govern the Contracts of Minors, it is necessary to define the scope of this article by explaining the meaning that certain terms (such as 'minor', 'guardian', 'void' and 'voidable') bear in this article. As we shall see, much confusion has been caused in Ceylon

1. 46 N.L.R. at p. 339.

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and in S. Africa by the failure to use some of these terms with precision and uniformity. We shall begin by examining the scope of the term 'minor'.

The term 'minor' is the Civil Law equivalent of the English term 'infant'; but since in Roman and Roman-Dutch Law the legal capacity of an *infans* (or minor who has not acquired the capacity of understanding the nature of a transaction) is peculiar in certain respects, the use of 'infant' as a synonym for 'minor' in the countries of the modern Roman-Dutch Law is to be deprecated. A 'minor' may be described as a young person who has not acquired majority, and with it the capacity to have and exercise rights, in one of the ways which the law recognises.

In Roman Law full majority was not attained until a young person had completed his twenty-fifth year. In the Netherlands the age of majority varied in the different provinces and at different times but came finally to be fixed at twenty-five years for both sexes. In S. Africa and Ceylon the age of majority has been fixed by statute at twenty-one years. A person under twenty-one years may, however, be treated as having acquired majority, wholly or partially, in certain ways: by marriage and by emancipation, express or tacit.

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3. The term "infants" as used in English law, includes without distinction all persons, whether male or female, who have not yet completed the twenty-first year of their lives (Simpson, *Law of Infants*, 4th edn., 1921, p. 1). In a note after the words 'without distinction' Simpson adds: "In the Probate, Divorce and Admiralty Division a distinct amongst infants, acquired originally from Roman Law, is for certain purposes still retained. Persons under seven are called infants and those between seven and twenty-one minors".

4. See, e.g., Wessels, *The Law of Contract in S. Africa* (2nd edn., 1931), ch. 6, part "Contracts of Infants or Minors" passim; e.g., sections 754, 730, 782, 804-818, 822, 841-84, 846-849, 858.

5. The capacity to have rights (called *Rechtsfähigkeit* in German Law; Schustor, *Principles of German Civil Law*, 1907, p. 10) is usually distinguished from disposing capacity or capacity for performing juristic acts (*Geschäftsftähigkeit*). Generally 'the first kind of capacity begins at a man's birth. The second kind of capacity... begins on the attainment of majority' (Armschelam, *Digest of the Civil Law of Ceylon*, 1910, vol. 1, p. 1).


8. Grotius 3.7.3; Voet 4.4.1; Van der Keesel, *Theses*, 110. This is also laid down by the Statutes of Batavia; see Van der Chijs, *Nederlandsch-Indisch Plakatoes*, 1802-1811, vol. 9, p. 216. Exceptions to the rule that majority was attained at 25 might be made for particular purposes (Vd. Keesel, ibid.; Vd. Chijs, ibid.).

9. Cape Ord. 52 of 1819, sec. 1; Natal Ord. No. 4 of 1846, sec. 2; Transvaal Volksraad Resolution of December 1833, art. 223; Orange Free State Law Bk. of 1901, ch. 89, sec. 14; S. Rhodesia Revised Statutes, ch. 26; Ceylon Age of Majority Ord. No. 7 of 1865 (Leg. En., cap. 33), sec. 2.

10. Cp. sec. 3 of Ceylon Age of Majority Ordinance No. 7 of 1865 (Leg. En., cap. 531).
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Marriage ends minority for all purposes in the case of a male, but a female on marriage is in S. Africa, but no longer in Ceylon, deemed to be under the guardianship of her husband if the marital power has not been excluded by antenuptial contract. If the marriage is dissolved before the minor attains the normal age of majority, the minority does not revive. Express emancipation by a declaration made by the father in Court has been superseded in the modern law by "venia autatis," which is granted by the Soverign authority in the State after due inquiry. The grant ends minority for all purposes, except that a power to alienate immovables is not conferred unless expressly included in the grant.

Tacit emancipation in the modern sense will be held to have taken place where a parent or guardian has knowingly allowed a minor to carry on some business, trade or occupation, in which case the minor will be treated as emancipated in relation to contracts incidental to that particular business, trade or

11. Voet 4.4.6; Schorer, note 29 ad Gr. 1.6.4; Van der Linden 1.4.3.
12. In Ceylon by sec. 5 of the Married Women's Property Ordinance No. 18 of 1973 (Leg. En., cap. 46), which replaced the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 (Leg. En., cap. 47) and is modelled on the English Married Women's Property Acts of 1882 and 1893, a married woman is capable of contracting, of acquiring, holding and disposing of property, and of suing or being sued in all respects as if she were a feme sole.
15. Voet 4.4.9; Vd. Keesseli Th. 879 and Dict. ad Gr. 3.48.9; Deenwarke v. Gouastehre 1 A.C.R. at pp. 116-7.
16. Voet 1.7.11.
17. Vd. Linden 1.4.3, n. 4; Decker ad V. Leeuwen 1.23.5; Vd. Keesseli Th. 107 and 110. In Ceylon the Governor as representing the Soverign exercises the power of granting letters of "venia autatis"; cp. section 4 of the Wills Ordinance No. 21 of 1844 (Leg. En., cap. 49). In the Orange Free State "venia autatis" is granted by the Governor-General to persons who have reached the age of 18; OFS Law Book of 1901, ch. 89 and Interpretation Act 1910, sec. 21.
18. Voet 4.4.5 and Somindra v. Pudiya 3 Leader at p. 57 (part 5 at p. 3). The grant will not usually be recommended unless some pressing necessity can be shown for accelerating the normal age of majority (Ex. p. Akiki 1925 O.P.D. at p. 311).
19. 'It is perfectly plain that what the S. African courts call "tacit emancipation" is not emancipation at all, but merely an anticipatory assent of parent or guardian to contracts relating to a particular trade or business. This shows how a legal institution may become denaturalised in the course of its history' (R. W. Lee, Ceylon Law Students' Magazine, 1939, at p. 16; cp. Lee, Intro. to Roman-Dutch Law, 3rd edn., 1931, pp. 475-6 and 5th edn., 1933, p. 39, and H. R. Hahlo in 1943 S. African Law Journal at pp. 298-9).
whether such tacit emancipation has or has not taken place in any particular case is a question of fact depending on the circumstances of the case: residence apart from parent or guardian is not essential, this being merely one of the factors to be taken into account in deciding whether or not tacit emancipation has taken place.

From what has been said in the last two paragraphs it is clear that a person who is below twenty-one, the normal age of majority, may be treated as having ceased to be a minor either altogether or in certain respects only. Consequently it seems to be an over-simplification to say (as some Ceylon judgements have said) that 'by our law persons are all majors or minors, ever or under twenty-one years of age, and we know nothing of the elaborate distinctions of Roman Law, which recognised three stages of non-age, "infancy", "puberty" and "minority".' For although the Roman-Dutch Law knew nothing of the Roman distinction between tutele ending at puberty and curatorship ending at twenty-five, the

20. Ochberg v. Ochberg's Est., 1914 C.P.D. at pp. 30-7, Ambakker v. African Meat Co., 1927 C.P.D. at p. 327. Ahmad v. Cassanida 1944 T.S.P.D. at p. 366. For Ceylon see e.g., WelApple Chetty v. Peris 3 Balasingham at p. 5 where it is pointed out that "part of the debt due to the plaintiff was incurred . . . in connection with the business".


But where the minor is living with his parent, stronger evidence will be required to show that the minor has a separate business and is independent of parental control in matters relating to the business (Venter v. Burgersdorp Stores 1915 C.P.D. at p. 235). Thus, Sinnechawanby v. Ibrahim 4 C.W.R. 311 (where the trading minor who was held not to be emancipated lived with his father and was being supported by him) may be contrasted with Weliappu Chetty v. Peris 3 Balasingham 4 (where the trading minor who was held to be emancipated lived with his mother but supported her).

23. In Roman law young persons who were not subject to the paternal power of an ascendant were subject either to tutele infantrum or to cura minorum (Inst. 2.23. pr.). The former ended with puberty which came to be fixed at 14 for males and 12 for females. The capacity of an infantrum, a child below the age of puberty, varied according as the child was an infans (which originally meant a child too young to speak) but was later defined as a child below 7) or was a pauperi or proximus, i.e. a child who, though below the age of puberty, had acquired intellectus, the capacity of understanding the nature of a transaction (Inst. 3.199 and 10). Cura minorum applied to young persons between the ages of 14 (or 12) and 25. (Inst. 1.23. pr.).

24. WelApple v. Meelathaami 6 N.L.R. at p. 235 (cited without comment in Nagaligaam v. Tanabulasingham 54 N.L.R. at p. 175 (P.C.), whether with approval or not it is difficult to say); cp. Francisco v. Costa 8 S.C.C. at p. 190.

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legal condition of all persons below twenty-one cannot be said to be uniform in the modern law.

Thus, the distinction between a minor who possesses and one who lacks intellectus (the capacity of understanding the nature of a transaction) is relevant where what is in question is the capacity to accept a donation without the assistance of a parent or guardian26 or the capacity to form the mental element required for liability in delict27; the distinction between a minor above the age of puberty and one below that age is recognised where capacity to marry28 or to make a will29 is in question; and there is an irrebuttable presumption that a child under eight in Ceylon or seven in S. Africa is incapable of committing a crime30 or that a boy under twelve in Ceylon31 or under fourteen in S. Africa32 is incapable of committing rape. It must be recognised, therefore, that the legal condition of all persons below the age of twenty-one is by no means uniform, and in particular, as we have seen, young persons below that age may in certain circumstances be treated as having either wholly or partially ceased to be 'minors'.

Having examined the scope of the term 'minor' we must now explain in what sense the word 'guardian' is used in this article. Guardianship is 'the lawful authority which one person has over the person and property of another,'


The distinction between a minor who possesses intellectus and an infans or minor who lacks intellectus is relevant not merely in regard to donations but in contracts generally: for the contract of an infans who has not been assisted by a guardian does not impose on him even a natural obligation, unlike the contract of other unassisted minors (see n. 3 at p. 81 below).


28. A minor below the age of puberty (14 for males, 12 for females) could not marry (Voet 32.3, 16), but by statute these ages have been altered in S. Africa to 18 and 16 (Marriage Law Amendment Act 8 of 1935, sec. 1) and in Ceylon to 16 and 12 (sec. 14 of Marriages (General) Ordinance No. 29 of 1907, Leg. En., cap. 95).

29. Gr. 2.153, Vd. Linden 1.9.3; but by statute in Ceylon (sec. 3 of Wills Ordinance No. 21 of 1844, Leg. En., cap. 49) no male minor under twenty-one and no female minor under eighteen can make a will, and in Natal (sec. 6 of Law 2 of 1868) no minor can make a will.

30. Sec. 75 Ceylon Penal Code and sec. 4 Ord. No. 50 of 1939; A. G., Transvaal v. Additional Magistrate, Johannesberg 1924 A.D. at p. 434. If the child is between the ages of 8 and 12 in Ceylon or 7 and 14 in S. Africa, the presumption exists but is rebuttable (sec. 76 Ceylon Penal Code and sec. 4 Ord. No. 50 of 1939; and the S. African case cited).

31. Sec. 113 of the Ceylon Evidence Ordinance, Leg. En., cap. 11.

32. See, e.g., The State v. Jeremy 12 Cape L. J. 234.
introduced for the latter's particular advantage.\textsuperscript{33} Many Continental systems of law regard the guardian as a "statutory agent"\textsuperscript{34} exercising "representation as of law"\textsuperscript{35} for the purpose of acting on the minor's behalf or of authorising his acts.\textsuperscript{36} Guardians may be of various kinds and may have wide or limited powers.

Thus, in S. Africa, apart from parents or 'natural guardians', there may be guardians appointed either by will or by deed\textsuperscript{37} or by the Master of the Supreme Court,\textsuperscript{38} or 'curators nominatim appointed by any person who gives or bequeaths property to a minor',\textsuperscript{39} or curators or guardians 'assumed' (i.e. persons appointed by curators nominatim or by guardians appointed by will or by deed by virtue of powers conferred on them by the instrument which appointed them curator or guardian),\textsuperscript{40} or 'curators ad litem appointed for the purpose of litigation where a minor has no other guardian or the action is between minor and guardian'.\textsuperscript{41} In Ceylon also, apart from natural guardians, there may be guardians appointed by will or by deed, or guardians of the person or curators of the property of the minor appointed by a Court,\textsuperscript{42} or a 'next friend' or 'guardian for the action' appointed to represent a minor specially in litigation.\textsuperscript{43}

33. Gr. 1.4.5; cp. Veet 26.1.t.
34. German Civil Code of 1896, sec. 8; Schuster, Principles of German Civil Law, p. 84.
35. Swiss Civil Code of 1907, sec. 279. 'For although a ward does not always give a mandate to his guardian, and often through tenderness of years or want of understanding cannot give one, nevertheless the guardian is bound to the ward and the ward to the guardian just as if a mandate had existed between them'. (Gr. 3.26.5 and cp. ibid. 3.26.2 and 4)
36. 'Under English law the management of the affairs of a person under disability... is frequently very difficult owing to the absence of an authorised agent whose acts are binding on such persons' (Schuster, Principles of German Civil Law, p. 84). 'In English law the... guardian acts as trustee for the ward. He neither contracts in (the ward's) name nor authorises his contract' (Lee, Elements of Roman Law, 3rd edn., 1933, p. 104). 'Guardians cannot in English law bind the minors of whom they have charge by their contracts, nor is the contract of a minor made more binding by the... approval of the guardian' (Morice, English and Roman-Dutch Law, 2nd edn., 1905, p. 27; cp. Buckland and McNair, Roman Law and Common Law, 2nd edn., 1931, pp. 32-3).
38. Administration of Estates Act of 1913, secs. 76, 107. The Master also confirms guardians appointed by will or by deed; ibid., sec. 73.
39. Ibid., sec. 71, the appointment being subject to confirmation by the Master, ibid., secs. 73, 74.
40. Ibid., sec. 77 (1), the appointment being subject to confirmation by the Master, ibid.
41. van den Linden, Justiciae Practicae, t.8.3; Gr. 1.8.4. Further, in those cases (see p. 67 at n. 13 above) in which in S. Africa a married woman is deemed to be in the guardianship of her husband, the husband may be the appropriate 'guardian'.
42. Civil Procedure Code, chapter 40.
43. Ibid., chapter 35.

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Throughout this article the single word 'guardian' is used in a wide sense to cover all the above types of 'representation as of law'. Exactly which of these 'guardians' has authority to act for or with the minor in any particular circumstances must depend on those circumstances. But where the appropriate authority in the circumstances has not acted for or with the minor, the act will be ineffective: for, as Voet says, it makes no difference whether the guardian's authority is not given at all or is wrongly given. Thus, a guardian ad litem appointed to represent a minor in administration proceedings relating to the estate of her late father has no authority to bind the minor by a contract in respect of her share of the estate.

We must now consider the meanings of the words 'void' and 'voidable', the indiscriminate use of which by judges and textwriters has been the cause of much confusion. Although 'there are many traces in the (Dutch Law) of the distinction between void and voidable acts', the now familiar distinction between void and voidable was not distinctly or fully present to the minds of the older jurists. It was perhaps natural, therefore, that textwriters and judges in the countries of the modern Roman-Dutch Law should have followed the English usage of these terms. But unfortunately even in English Law the terms 'void' and 'voidable' have not always been used with precision or uniformity.

The word 'void' is usually used in modern textbooks to mean that the contract or transaction to which the word is applied is 'devoid of any legal effect' so that it 'confers no legal rights on either party'. The word 'voidable' is usually used to describe a contract or transaction which is prima facie valid and binding on the parties until one of them takes steps to have the contract set aside. But sometimes the same word is used, less commonly and correctly, to mean that a contract or transaction is invalid until ratified or

44. Voet 26.8.1 ad fin.
45. Persens v. Tissiria 35 N.L.R. at pp. 274 and 262.
48. There is 'a constant confusion in the books, and sometimes even in recent books, between void and voidable'. So that the language of textwriters, of Judges and even of the Legislature, is no safe guide apart from actual decision'. Pollock, on Contracts, quoted in Fernando v. Fernando 19 N.L.R. at p. 193.
confirmed; while the word is sometimes also used in a wide sense, covering both the above meanings, to describe a contract or transaction which one of the parties (to it) may affirm or reject at his option.

In considering the question whether a minor's contract is void or voidable, a distinction must be drawn on the one hand between the contract of a minor who has not been assisted by a guardian and on the other hand the contract of a minor who has been assisted by a guardian or the contract of a guardian acting for a minor; for the legal results in the first case are different from those in the other two cases. The chief difficulty arises in connection with the contract of an unassisted minor.

The contract of a minor who has been assisted by a guardian or the contract of a guardian who has acted for a minor can be described as 'voidable' in what may be said to be the usual and proper sense of a contract prima facie valid and binding on both parties to it until avoided by one of them. But the contract of an unassisted minor cannot be said to be 'void' in the usual sense of a contract devoid of any legal effect which 'confers no legal rights on either party', because (as we shall see), it is binding on and may be enforced against the other contracting party, and the minor will be liable to the other contracting party where he has ratified the contract or to the extent to which he has been enriched by the other party's performance of the contract. Nor can the contract of an unassisted minor be said to be voidable in the usual sense of a contract prima facie valid and binding on both parties until set aside at the instance of one, because it is not normally binding on the minor.

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52. See n. 8 at p. 32 below. But 'the natural meaning of the word 'voidable' imports a valid act which may be avoided, rather than an invalid act which may be confirmed, and the weight of authority as well as reason points in the same direction'. (Williston on Contracts, revised edn. 1936, vol. 1, p. 997; cp. Duncan v. Dixon (1890) 44 Ch. Div. at pp. 213-4 and Judges v. Tye and Harding, 1867 L.R. 2 H.L. at p. 375.)

53. Ansom, Contract, p. 17; Jenius, Digest, section 84; Law, The South African Law of Obligations, section 120 and An Introduction to Roman-Dutch Law, 5th edn., p. 208. Wessels, Contract, section 638 ad fin., seems to use the word 'voidable' in this sense, although earlier in the same section he uses the word in the first sense mentioned above.

54. See p. 21 above at n. 51.

55. See p. 21 above at n. 50.

56. See p. 80 below.

57. The liability in the last case is quasi-contractual. See n. 12 at p. 83 below. The contract is also capable of supporting suretyships and pledges. See n. 3 at p. 81 below.

58. For the circumstances in which the minor will be liable see above at n. 57 and p. 80 below.

59. Of course, if the word 'voidable' is used in the wide third sense of the word mentioned above, in the sense of a contract which one of the parties may affirm or reject at his option, the unassisted minor's contract may be said to be 'voidable'; but see n. 52 above for the proper meaning of 'voidable'. Wessels, Contract, section 638, curiously enough; gives an unassisted minor's contract as an example of a voidable contract in the sense (defined at the beginning of section 638) of a contract valid and binding on both parties until avoided by one of them; but perhaps Wessels, when he gives this example, is using the word 'voidable' in the widest sense of that word into which he lapses at the end of section 638.
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The difficulty of fitting the contract of an unassisted minor in Roman-Dutch Law into one or other of the categories of 'void' or 'voidable' contract as usually defined in English Law, or in textbooks and judgements in S. Africa and Ceylon which follow English usage, is not really surprising. For these two categories of agreements binding on both parties until avoided by one and agreements binding on neither do not exhaust all the possible types of situation that may arise in practice where an agreement has been entered into which has not resulted in the creation of a fully valid contract. In particular, the usual description of 'voidness' is unsatisfactory in that it overlooks the possibility of voidness not being absolute.

Many cases of voidness (for example, those caused by illegality) are covered by the usual definition of voidness; but voidness may also be relative. Thus, in interpreting statutes the word 'void' has been construed to mean that 'a juristic act may be "null and void" as against one individual and yet be fully valid as against another.' Similarly, the contract of a minor who has not been assisted by a guardian is in Roman-Dutch Law an example of a contract which is only relatively void: since in such a contract one party is bound while the other is not, Voet describes it as a 'halling' or 'limping' contract.

Such a contract does not fit neatly into either of the categories of void and voidable contract as usually defined by English usage. In such circumstances there is a real danger that in the modern Roman-Dutch Law countries legal results might be attached to transactions in which a minor is concerned so as to fit in with preconceived notions of the meaning of the terms 'void'...

60. 'Goudsmit (Prandshion System, sec. 67), in investigating the kinds of invalidity in the Roman law, states that there were two kinds of invalidity, namely nullity and voidability (or annulability) and nullity was either absolute or relative. (Ed. Phillips v. Commissioner for Inland Revenue 1442 A.D. at p. 52. Cp. also Potier v. Rand Townships Registrar 1445 A.D. at pp. 285-6 where the relevant passages from Goudsmit’s work are quoted).

61. Messenger of the Magistrate’s Court, Durban v. Pillay 1452 (3) S.A.L.R. at p. 683, citing English cases. Cp. also the effect of section 1 of the English Infants’ Relief Act of 1874, by which certain contracts of a minor are rendered 'absolutely void', a phrase however which, it has been suggested (Benjamin on Sale, 8th edn., 1950, pp. 34-3, Simpson on Infants, 4th edn. p. 7, Chalmers, Sale of Goods, 10th edn. 1945, p. 17) does not mean that the party contracting with the minor is not bound.

62. Voet 26:8:3.

63. 'We have no English legal expression which adequately covers this conception of relative nullity): ...'the word" voidable "... is perhaps sufficiently satisfactory if it is carefully borne in mind that we are dealing with something which resembles a suspensive rather than a resolutive condition' (i.e. 'voidable' used in the sense, see p. 72 above at n. 52, of 'invalid until ratified')... 'I think I should perhaps prefer the word "imperfect" in the sense that it is capable of being perfected, but in truth no word is entirely satisfactory.' (Potier v. Rand Townships Registrar 1445 A.D. at pp. 286-7, a case of donation between spouses).

and 'voidable'. 'When we say a juristic act is void or voidable, we pass judgment upon it from various points of view, basing our judgment upon the degree or direction of its effectiveness. We unconsciously assume as standard of comparison the perfect specimen of juristic act from which all the contemplated legal results flow in all directions: e.g., a valid transfer of ownership in property, which binds the parties to it and all third parties as well. When we find a difference between the actual legal results (of some juristic act) and our expectations according to that standard, we stigmatize the juristic act as null and void or voidable, according to the degree or direction of its inoperativeness. To invert the process, however, and deduce the legal results of a juristic act from a notion used as a label roughly to express its degree or direction of effectiveness, is a logical perversion'.

Thus, it has sometimes been said that since an unassisted minor's contract is described by the authorities as 'null and void', it cannot be ratified; and on the other hand it has been said that if a contract is capable of ratification, it cannot be void. Such statements seem to be due to a failure to realize that voidness is not of a single nature, as the usual definitions of it imply. For, while it is true that some kinds of void contract (such as illegal contract) cannot be ratified, others which are only relatively void (such as the contract of an unassisted minor or a donation between spouses) are capable of ratification or confirmation; and on the other hand an agreement which is not fully valid nor void in the usual sense of being a contract 'void of any legal effect'

65. *Van der Westhuizen v. Engelbrecht* 1942 O.P.D. at pp. 199-200. 'It is unsafe to classify transactions into those which are voidable and those which are void and then to draw conclusions from the classification. Such a proceeding begs the question'. (Edelstein v. Edelstein N.O. 1952 (3) S.A.R.L. at p. 10).


68. See p. 71 above.

69. See *Van der Westhuizen v. Engelbrecht* 1942 O.P.D. at pp. 199-200, quoted above in the last paragraph of the text. The paragraph quoted from the judgment continues: 'The label is used roughly to convey the effectiveness of the act, for its legal results will not be uniform, but will vary with each of the considerations underlying the law's refusal to take it at face value: protection of persons without legal capacity; protection of parties against their own precipitation by the prescription of formalities; facilities of proof; the avoidance of fraud; the maintenance of law, order and public decency and a host of other considerations. In the interest of these considerations juristic acts may be impugned from varying directions and to different degrees'.

70. See, e.g., *Cape Dairy and General Livestock Auctioneers v. Sim* 1924 A.D. 167.

71. See p. 80 below.

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which 'confers no legal rights on either party' may admit of ratification without being voidable in the usual sense of being a contract valid and binding on both parties until disaffirmed by one.

It would seem, therefore, that the terms 'void' and 'voidable' as usually defined by English usage are inadequate to describe all the possible types of situation that may arise in practice where an agreement has been entered into which has not resulted in the creation of a fully valid contract. Consequently, it would perhaps have been best if those terms had been avoided in the modern Roman-Dutch Law countries, at any rate with reference to the contracts of minors. But usage dies hard, and the terms 'void' and 'voidable' have been hallowed by the use of generations of judges and textwriters in S. Africa and Ceylon: they are undoubtedly convenient shorthand expressions the use of which obviates a large amount of circumlocution and repetition. The use of these terms may, therefore, be retained, provided we are careful to explain in what sense they are employed.

Throughout this article the contract of an unassisted minor is described as 'prima facie void as against the minor', in order to convey the idea that the contract is not void in the usual sense of a contract 'devoid of any legal effect' which 'confers no legal rights on either party': the words 'prima facie' and 'as against the minor' are used to suggest that the party contracting with the minor is bound by the contract, and that even the minor may in certain circumstances become liable himself. By contrast, the contract of a minor who has been assisted by a guardian or the contract of a guardian acting for a minor is in this article described as 'prima facie valid' or merely as 'voidable', since such a contract (as we have seen) is voidable in the usual sense of a contract valid and binding on both parties to it until set aside at the instance of one party.

In defining the scope of this article it is also necessary to state that the principles set out below are not intended to apply to the contract of marriage which 'is not a mere ordinary private contract between the parties' but 'a contract creating a status' with 'its own peculiar rules'. For example, the proposition that a contract entered into by a minor without the consent of a parent or guardian is prima facie void as against the minor is not true of the contract of marriage. It will suffice to say here that in S. Africa the view has prevailed that, although a marriage which lacks parental consent can be set aside at the instance of the parent whose consent was required, it cannot

73. See page 86 below.
76. and *restitutio in integrum* cannot be obtained by a minor against marriage on the basis of minority alone, in the absence of other factors like fraud. See n. 28 at p. 90 above.
be set aside at the instance of the minor. In Ceylon it has been suggested that once a marriage has been registered under the Marriages (General) Ordinance No. 19 of 1907, it cannot be impeached even where the consent of the parent or guardian (which section 21 of the Ordinance requires) is lacking; and it has been held that, in the case of a customary Hindu marriage which has been contracted with the proper ceremonies but has not been registered, the absence of the parental consent would not invalidate the marriage where it has been consummated.

Having defined the scope of this article we can now attempt a formulation of the principles which, it is submitted, govern the Contracts of Minors in the modern Roman-Dutch Law. We shall begin with contracts which have not been executed by alienation of a minor's property, distinguishing between contracts entered into by a minor without the assistance of a guardian and contracts in the making of which a guardian has taken part. We shall then go on to consider contracts which have been executed by alienation of a minor's property, distinguishing between immovable property (for the alienation of which the sanction of a Court is necessary) and movable property. Finally, we shall consider the rules relating to the burden of proof which apply where a minor seeks to be relieved from the consequences of a contract or alienation. All the principles will first be set out in a summary form, and they will later be considered separately in more detail.


78. The opposite view (that the marriage is null and void as against the minor also, so that he may himself sue to have the marriage set aside) see Van der Westhuizen v. Engelbrecht 1942 O.P.D. 101 per Van den Heever, J. But in Pretorius v. Pretorius 1948 (4) S.A.L.R. 144, Van den Heever, J.P., while reaffirming the view he laid down in the earlier case, held that in the Roman-Dutch Law, unlike in the English Law, estoppel could be set up as a defence to an action for nullity of marriage, and that a minor who had voluntarily continued to live with the other spouse after attaining majority was estopped from claiming that the marriage was void. The admission of the doctrine of estoppel in Pretorius v. Pretorius (supra) will in many cases make academic the difference between the view expressed in Willemburg v. Willemburg (supra) and that expressed in Van der Westhuizen v. Engelbrecht (supra); see Romans v. Romans 1909 (4) S.A.L.R. at p. 738.

79. Sekaratnam v. Anandavelu 42 N.L.R. at pp. 493-4, per de Kretser, J.

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A contract (other than a *donatio mortis causa*) entered into by a minor without the assistance of a guardian is not binding upon him and may be said to be prima facie void as against the minor in so far as he is exempt from liability under the contract without the need for any relief from a Court by way of *restitutio in integrum* or otherwise. But the contract is not entirely devoid of legal effect for all purposes, inasmuch as the contract (unless repudiated by the guardian during minority or by the minor during or after minority) is binding on the other party to it, and as the contract can be made binding on the minor by being ratified either expressly or impliedly by the guardian during minority or by the minor after he has attained majority.

Further, although the minor is not liable on the contract unless it has been ratified, he will be liable to the other contracting party in quasi-contract to the extent to which the minor has been enriched by the other party’s performance of the contract; and the minor may also be liable to the other contracting party where the latter has been misled by the minor expressly or impliedly representing himself to be of full age.

A contract (other than a *donatio inter vivos*) entered into by a minor with the assistance of a guardian or by a guardian on behalf of a minor is prima facie valid and binding on the minor and on the other party to the contract. But since the minor may repudiate the contract during or after minority by claiming *restitutio in integrum* from a Court on the ground that the contract is prejudicial to him, the contract may be described as voidable.

*Restitutio in integrum* is an extraordinary remedy granted to a minor, within three years of his attaining majority, on strict proof of appreciable prejudice suffered by reason of youth, where the minor has no other ordinary and equally effective remedy open to him. By restitution, (which is not restricted to contracts but applies inter alia also to alienations in pursuance of contracts, which is available to the minor’s heirs, and which lies against all persons who are the cause of the damage and in some cases against third parties in possession of property lost to the minor), the Court as far as possible restores the status quo ante on both sides. Restitution will not be granted to a minor where on coming of age he has ratified the contract either expressly or impliedly, or where the other contracting party has been misled by the minor expressly or impliedly representing himself to be of full age.
The alienation of immovable property of a minor, either by him with or without his guardian's assistance or by his guardian on his behalf, is prohibited except by leave of a Court.

Where a contract entered into by a minor with or without the assistance of a guardian or by a guardian on behalf of a minor has been executed by the alienation of immovable property of the minor without the sanction of a Court, the alienation is prima facie void as against the minor; and the guardian before majority or the minor during or after minority is entitled to vindicate the property. But the alienation is not entirely devoid of legal effect inasmuch as it is not open to the alienee to assert that the alienation was invalid, as the alienation is capable of being made binding on the minor by being ratified either expressly or impliedly by him on his attaining majority, and as the alienation will be held to be valid even as against the minor where the alienee has been misled by the minor expressly or impliedly representing himself to be of full age.

Although where an alienation is prima facie void as against a minor there is strictly no need to apply to a Court for a declaration that the alienation is void, yet since the minor may be held to have impliedly ratified the prima facie void alienation by allowing a certain period of time to elapse after majority without asserting his rights, it is safer in all cases, whether the alienation is prima facie void or prima facie valid, to make an application to a Court for relief from the consequences of the alienation.

Where immovable property of a minor has been alienated with the sanction of a Court, the alienation is prima facie valid and is binding on the minor and on the alienee. The minor may, however, obtain restitution in integram from a Court within three years of attaining majority, if he can show that he has been prejudiced by the alienation and that the prejudice is considerable.

Where a contract (other than a contract of donation) entered into by a guardian for a minor or by a minor with the assistance of a guardian has been executed by the alienation of movable property of the minor, the alienation is prima facie valid without the sanction of a Court and is binding on the minor and on the alienee. The minor may, however,
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obtain *restitutio in integrum* from a Court within three years of attaining majority, if he can show that he has been prejudiced by the alienation.

Where a contract entered into by a minor without the assistance of a guardian, or a contract of donation entered into by a guardian for a minor or by a minor with or without the assistance of a guardian, has been executed by the alienation of movable property of the minor, the alienation is prima facie void as against the minor; and the guardian before majority or the minor during or after minority is entitled to vindicate the property. But the alienation is not entirely devoid of legal effect inasmuch as it is not open to the alienee to assert that the alienation was invalid, as the alienation is capable of being made binding on the minor by being ratified either expressly or impliedly by him on his attaining majority, and as the alienation will be held to be valid even as against the minor where the alienee has been misled by the minor expressly or impliedly representing himself to be of full age.

Where a contract has been entered into by a minor without the assistance of a guardian, it is sufficient for the minor who claims that the contract (which is prima facie void as against him) is not binding on him to prove minority, and he need not also prove prejudice. The burden of proving that the minor has attained majority, or that he has been benefited by the contract, or that he expressly or impliedly misrepresented his age, or that he expressly or impliedly ratified the contract, is on the party contracting with the minor.

Where a contract has been entered into by a minor with the assistance of a guardian or by a guardian on behalf of a minor, the minor, if he claims relief from the prima facie valid contract, must prove minority as well as prejudice—except where the contract is by its nature prejudicial to the minor (e.g., a donation of his property), in which case prejudice is presumed in his favour, the presumption being rebuttable by the other party to the contract showing that the minor has been benefited. The burden of proving that the minor has attained majority, or that he expressly or impliedly misrepresented his age, or that he expressly or impliedly ratified the contract, is on the other party to the contract.

Where a contract entered into by a minor or by a guardian on behalf of a minor has been executed by alienation of the minor's property, movable or immovable, similar principles as to the burden of proof
apply according as the alienation is prima facie void as against the minor or is prima facie valid and binding on him.

* * * *

A contract (other than a donatio mortis causa) entered into by a minor without the assistance of a guardian is not binding upon him and may be said to be prima facie void as against the minor\(^1\) in so far as he is exempt from liability under the contract without the need for any relief from a Court by way of restitutio in integrum or otherwise\(^2\). But the contract is not entirely devoid of legal effect for all purposes\(^3\), inasmuch as the contract (unless repudiated\(^4\) by the guardian during minority\(^5\) or by the minor during or after minority\(^6\)) is binding on the other party to it\(^7\), and as the contract can be made binding on the minor by being ratified\(^8\) either expressly or impliedly\(^9\) by the guardian during minority\(^10\) or by the minor after he has attained majority\(^11\).

Further, although the minor is not liable on the contract unless it has been ratified, he will be liable to the other contracting party in quasi-contract\(^12\) to the extent to which the minor has been enriched by the other party's performance of the contract\(^12\); and the minor may also be liable to the other contracting party where the latter has been misled by the minor expressly\(^14\) or impliedly\(^15\) representing himself to be of full age.

1. But a promissory donatio mortis causa made by an unassisted minor is prima facie valid and binding on him if he is above the age of puberty, except in Natal and Ceylon (see n. 18 at p. 87 below). It must be noted, however, that an unassisted minor cannot before majority implement the promise by alienating property inter vivos, because an unassisted minor has not the capacity to alienate property (Schorer ad Gr. 3.2.23; Sande, De Prohib. Rer. Alien. 1.1.7.111).

2. Van Leeuwen, Cons. For. 1.4.43.2; Grotius 3.43.10; De Beer v. Est. De Beer 1916 C.P.D. at p. 127.

But although an action to repudiate a contract is not absolutely necessary 'whenever a person is ipso iure protected (latus) ' (Voet, 4.1.13, see also ibid. 4.4.52), yet in practice 'since extra caution can do no harm and skilled practitioners are apt to take the safer course... a general practice has been introduced for the sake of safety rather than from necessity, to ask for restitution from the Courts against contracts labouring under manifest nullity'.

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(Voet 4.1.13; cp. also Voet 4.1.20; Van Leeuwen, Comm. 4.42.3 note and Groenewegen, De Leg. Abridg. ad Code 2.41.15 and ad Gr. 3.48.10).

3. The contract of an unassisted minor creates a natural obligation (Voet 26.8.4), provided the minor is not an *infans* but has *intellectus*, the capacity of understanding the nature of a transaction (see nn. 23, 26 at pp. 68, 69 above) and is thus capable of manifesting consent 'which is necessary in all contracts' (Voet 26.8.4; cp. Van Leeuwen, Comm. 4.2.2). Voet indeed says (26.8.6) that where the minor is an *infans* altogether incapable of manifesting consent it is rather a case for the guardian to act on his behalf than a case in which he acts with the assistance of the guardian: in the modern law, however, the contract of an *infans* who has been assisted by a guardian will probably be treated as having the same legal effect as the contract of a guardian acting on behalf of an *infans* (cp. Dig. 41.2.73 and 41.2.32.2). It must be noted that, although the contract of an unassisted *infans* does not create even a natural obligation, he will be liable to the other party in quasi-contract to the extent of his enrichment; see n. 13 at p. 84.

The natural obligation created by the contract of an unassisted minor who has *intellectus* is sufficient to permit of a valid suretyship (Voet 26.8.4 and 44.7.3; Van Leeuwen, Cens. For. 1.4.43.10) or novation (Voet 26.8.4) being entered into in respect of it, and valid pledges being given in respect of it (Voet 44.7.3); but, contrary to the usual rule applicable to natural obligations, the minor may by the *conditio indebiti* recover anything he has paid in execution of the contract (Voet 26.8.4).

4. Although repudiation is not strictly necessary where a contract is prima facie void as against the minor, it is often made *ex abscendenti cautela* even by an application to Court. See n. 2 above and n. 6 below.


6. Presumably the minor may repudiate the prima facie void contract even during minority. Cp. Sande, Dec. Fris. 2.9.22, dealing with an *alienation* which was prima facie void, and cp. n. 20 at p. 85 for prima facie valid contracts.

Does the four (now three) year period of prescription applicable (see p. 85 and n. 25 at p. 89 below) to claims for restitution where they are strictly necessary (i.e. in the case of contracts prima facie valid and binding on the minor) limit the time within which relief is obtainable by a minor who wishes to repudiate a contract which is prima facie void as against him?

Where a contract is prima facie void as against the minor, an action for a declaration that the contract is void as against him or a claim for restitution is not (as we have seen) strictly necessary, though 'a general practice has been introduced from the sake of safety rather than from necessity to ask for restitution from the Courts against contracts labouring from manifest nullity'
(Voet, cited in n. 2 at p. 80 above). Although in principle no limit of time can bar repudiation of a prima facie void contract, yet as we shall see (see p. 80 at n. 811 and nn. 8-11 at pp. 82-83 below), a minor will be held liable on a contract prima facie void as against him where he has ratified the contract after attaining majority, and implied ratification may be held to have taken place where the minor has not, within a reasonable time of attaining majority, taken steps (either as plaintiff or as defendant) to repudiate the contract (see below n. 34 at pp. 91-93 for prima facie valid contracts, and cp. p. 95 at nn. 48-49 and 52-54, n. 48 at pp. 98-99 and n. 54 at pp. 100-1 for contracts which have been executed by alienation of the minor’s property).

It is submitted that in the modern law the period of prescription applicable to claims for restitution in respect of prima facie valid contracts should be applied to determine the period of time after majority, inactivity during which might be construed as tacit ratification by a minor of a contract prima facie void as against him and as barring him from asserting that the contract is void (cp. Willenberg v. Willenberg 25 S.C. at p. 913). But it must be noticed that where a contract has been executed by alienation of a minor’s property and the alienation is prima facie void as against him (see p. 95 for inmoveables and p. 103 for moveables), the period of inactivity on the minor’s part from which a tacit ratification may be presumed is different; see below n. 48 at p. 98 and n. 66 at p. 104.

7. Gr. 3.6.9. Because the minor is not bound whereas the other party is, Voet (26.8.3) calls the contract a ‘halting’ or ‘limping’ one.

The contract may be enforced by the minor acting with his guardian’s assistance or by the minor alone after majority, provided that the minor performs his part of the contract (Voet 26.8.3). Such enforcement would be construed as ratification of the contract (Edelstein v. Edelstein N.O. 1932 (3) S.A.L.R. at p. 13).

8. Voet 4.4.44 and 26.8.4 ad fin. Ratification of the contract validates it completely even as against the minor (cp. Voet 26.8.4 ad fin.) not as from the time of ratification but as from the time when the contract was made.

Goudsmit, Pandekten System (Gould’s transl. p. 186), cited in Potter v. Townships Registrar 1944 A.D. at p. 286, for the effect of ratification of a contract which is void relatively and not absolutely (see p. 73); and cp. n. 49 at p. 99 below for ratification of a prima facie void alienation.

Because ratification of a prima facie void contract validates it as against the minor, an unassisted minor’s contract is sometimes (see, e.g., Fernando v. Fernando 19 N.L.R. at pp. 105-6) described as ‘voidable’. But, as we have seen (n. 52 at p. 72 above), this is an improper use of the word ‘voidable’. That word is best omitted altogether in describing the contract of a minor who has not been assisted by a guardian, although the word ‘voidable’ may quite
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properly be used (see p. 85 below) to describe the contract of a minor in the
making of which a guardian has taken part.

9. See n. 34 at p. 91 below and n. 6 at p. 82 above.

10. Such ratification by a guardian during the minority in effect makes
the contract one with his assistance, the ratification operating retrospectively.
(Foncha v. Eattenhausen and Co. 1939 C.P.D. at p. 233).


The liability arises out of the contract but is not itself contractual.

13. See Tanza v. Fogill 1938 T.P.D. 43, where most of the authorities
are reviewed and it is stated (see especially pp. 47-50) that the test is not whether
the contract is for the benefit of the minor (as some of the earlier cases like Nel
Hodgkinson 1927 T.P.D. 562 had laid down) but whether the minor has in fact
been benefited. See also Edelstein v. Edelstein N.O. 1952 (3) S.A.L.R.
at pp. 12-14.

It follows that executory contracts entered into by an unassisted minor,
however advantageous they may seem, cannot be enforced against him (Tanza
v. Fogill (supra) at pp. 48-49, Edelstein v. Edelstein N.O. (supra) at p. 12), for an
unassisted minor who has entered into a contract which has not enriched him
is not liable to the other contracting party (Voet 4.1.13). For the same reason,
money lent to an unassisted minor cannot be recovered by the lender where
it has been lost or squandered (Gr. 3.30.3; cp. Voet 4.4.52), or it has benefited
not the minor but some other person, even if that person is the minor’s father
with whom the minor is living (Vellasamy Pulle v. Peries 3 Balasingham at p. 4,
Rama Chetty v. Silva 15 N.L.R. at p. 287). On the other hand, money lent
to a minor can be recovered where it can be shown to have been spent on ‘neces-
saries’ (Gr. 3.30.3; and cp. Voet, Compendium, 14.6.5 and Groenewegen ad
Code 4.28). The father will be liable on a loan given to the minor son to the
extent to which the money was applied to the father’s use (Voet 15.3.1.5) or
where the money has been spent on necessaries of the son which the father has
not supplied and for the supply of which the father is by law responsible (Voet
15.3.4). For the strict construction of what constitutes ‘enrichment’ in the
case of minors, see n. 71 at p. 105 below.

Since an unassisted minor is not liable in contract but only in quasi-con-
tract, it would seem that he is not bound to pay the contractual price of ‘neces-
saries’ supplied to him but only what they are reasonably worth.* For the

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*In English Law also a minor’s liability for ‘necessaries’ supplied to him is quasi-con-
tractual, and does not extend beyond their reasonable value. Nash v. Tanan (1908) 2 K.B.
at pp. 8-9; and cp. section 3 of the Ceylon Sale of Goods Ordinance No. 11 of 1896, Leg. En.,
chap. 70.
same reason, even an 

*infans* or minor so young that he is incapable of understanding the nature of a transaction will be liable to the extent to which he has been enriched by the transaction (Cr. 3, 30.3 and cp. n. 3 at p. 81 above).

It must be added that statutory exceptions have been created to the rule that a minor is not bound by a contract entered into by him without the consent of a guardian. Thus, in S. Africa a minor above the age of eighteen can effect a policy of insurance upon his life, though he may not cede, pledge or surrender it (sec. 20 (a) of Act 27 of 1943); and a minor is bound by a bail-bond executed by himself on his own behalf (sec. 105 of Act 31 of 1917. See also sec. 55 of Act 10 of 1911 and sec. 21 of Act 62 of 1934).


Voet 27.9.13 *ad fin.* says that the sale of a minor's immovable property made without judicial decree and without the guardian's authority (i.e., an alienation which is prima facie void against the minor, see p. 95 below) will be considered valid where the minor has represented himself as a major and so misled the purchaser (cp. n. 30 at p. 100 below); and Voet 4.1.4.43 says that restitution will be denied a minor where he has fraudulently misrepresented himself to be a major. The former passage deals with contracts executed by alienation of the minor's property, and the latter passage is strictly relevant to cases where restitution is necessary (i.e., where the guardian has acted for or with the minor so that the contract is prima facie valid and binding on the minor, cp. n. 35 at p. 93 for such cases). But even where a contract which has not been executed by alienation of the minor's property is prima facie void as against the minor (as where the minor has not been assisted by a guardian), the minor may be liable to the other contracting party where he has misrepresented his age, as was held in the two S. African cases cited above.

For, although restitution is not strictly necessary where a contract is prima facie void as against the minor, it is usually sought *ex abundanti causa* (cf. nn. 4 and 6 at p. 81 above), especially because the contract may be held to have been impliedly ratified if not repudiated within a reasonable time of majority. Where a minor does repudiate the prima facie void contract either as plaintiff or as defendant, the principle that restitution will be refused a minor who has misrepresented his age will be applied to him; and where the minor does not repudiate the contract within a reasonable time of majority (see n. 6 at pp. 81-2 above), the minor may be liable as having impliedly ratified the prima facie void contract. Even where the minor does not seek restitution and has not impliedly ratified the prima facie void contract, the minor may be liable in delict (cp. Wessels, *Contract*, sec. 843) for damage caused to the other contracting party by the minor's fraud, although it must be noted that in such a case the minor will not be liable to perform his obligations under the contract itself.
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15. E.g., by his dealings, contracts or the offices he holds. See n. 36 at p. 93 below.

A contract (other than a donatio inter vivos\(^\text{26}\)) entered into by a minor with the assistance\(^\text{27}\) of a guardian or by a guardian on behalf of a minor is prima facie valid and binding on the minor\(^\text{28}\) and on the other party to the contract. But since the minor may repudiate the contract\(^\text{29}\) during or after minority\(^\text{30}\) by claiming\(^\text{31}\) restitution in integram from a Court on the ground that the contract is prejudicial to him, the contract may be described as voidable.\(^\text{32}\)

Restitution in integram is an extraordinary remedy\(^\text{33}\) granted to a minor, within three years of his attaining majority\(^\text{34}\), on strict proof of appreciable prejudice suffered by reason of youth\(^\text{35}\), where the minor has no other ordinary and equally effective remedy open to him\(^\text{36}\). By restitution, (which is not restricted to contracts but applies inter alia\(^\text{37}\) also to alienations in pursuance of contracts\(^\text{38}\), which is available to the minor’s heirs\(^\text{39}\), and which lies against all persons who are the cause of the damage and in some cases\(^\text{40}\) against third parties in possession of property lost to the minor), the Court as far as possible restores the status quo ante on both sides\(^\text{41}\). Restitution will not be granted to a minor where on coming of age he has ratified the contract\(^\text{42}\) either expressly or impliedly\(^\text{43}\), or where the other contracting party has been misled by the minor expressly\(^\text{44}\) or impliedly\(^\text{45}\) representing himself to be of full age.

16. See n. 18 at p. 87 below and see the footnote on p. 87 for the exceptions to the rule that a donatio inter vivos of a minor’s property is prima facie void as against him.

17. Assistance may take the form either of consent given before or at the time of the contract, or of ratification given after the contract has been made (Veet 26.8.3; cp. n. 10 at p. 83 above). But the guardian’s mind must deliberately be brought to bear on the subject and an asser without consideration, especially if it be subsequent, is of no value (Du Toit v. Lotriet 1918 O.P.D. at pp. 105, 107); and knowledge by the guardian of the fact that a contract had been made will not be construed as assistance by him in the absence of information as to the terms of the contract (Baddley v. Clarke 1923 N.P.D. 306, De Beer v. Est. De Beer 1926 C.P.D. at p. 127).

18. Van der Keessel, Dict. ad Gr. 1.8.5 and Th. 133; Gr. 3.48.10 and 1.8.8; Skjaa v. Colonial Banking and Trust Co., Ltd. 1924 T.P.D. at p. 500.

Are contracts of donation, suretyship and loan (as suggested by Ennis, J. in Silica v. Mohamade 19 N.L.R. at p. 428) exceptions to the general rule that a contract entered into by a minor assisted by a guardian is prima facie valid
and binding on the minor (subject only to avoidance by *restitutio in integrum*). It is submitted that where a minor has with the assistance of a guardian entered into a contract to borrow or lend money or into a contract to stand as surety for another's debt, the contract is prima facie valid, subject to *restitutio in integrum* on the ground of prejudice: as regards a loan to a minor, see Voet 4.4.24 and cp. Van der Keessel *Dict.* ad Gr. 3.1.30 and *Moohan v. Erasmus* 1910 C.P.D. at p. 85; as regards a loan by a minor see Voet 4.4.23, referring to Voet 4.4.21; and as regards suretyship by a minor see Voet 46.1.5. The only difference between these contracts and others is that in the case of loan and suretyship the minor who claims restitution is absolved from the necessity of proving prejudice which is presumed in his favour (Voet 4.4.13, and see below p. 104 at nn. 75 and 76, and n. 75 at p. 205).

Gifts and promises to give to a minor are prima facie valid if accepted by a guardian on his behalf (*Barrett v. O'Neill's Executors* 1879 Kotze at p. 103, *Mynhardt v. Perries* 14 Cape L.J. 295, *Government Agent, Southern Province v. Karolis* 2 N.L.R. 72, *Idroos v. Sithie Leyandus* 51 N.L.R. 509).* Where the guardian is himself the donor, the guardian may accept the donation on behalf of the minor by doing some act (such as delivery to a third person or transfer in the Deeds Office, or, in the case of a cession of a right, by giving notice to the debtor), which proves unequivocally his intention to divest himself of the property and puts it out of his power to revoke the gift (*Slabber's Trustee v. Nezer's Executor* 12 S.C. at pp. 168-9, *Buttar v. Ault* N.O. 1950 (4) S.A.L.R. at p. 279, *Mohaideen v. Maricair* 54 N.L.R. at p. 176); and it has been suggested that where the guardian is the donor, he may in his capacity as guardian authorise some other person to accept the gift on behalf of the minor (*Mohaideen v. Maricair*, ibid.**), citing *Francisco v. Costa* 5 S.S.C. at p. 192 and *Lewishamy v. de Silva* 3 Bal. at p. 46; cp. *Bindua v. Uthly* 7 N.L.R. at p. 269, where it is pointed out that the donor permitted the elder brother of the minor donees to accept for them).

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*Where a donation is accepted by a minor without the assistance of his guardian (which the minor can do if he has intellectus, the capacity of understanding the nature of the transaction, see p. 69 at n. 26 above) the contract will be prima facie valid as against the minor (see p. 80 above); so that, although the donation would be binding on the donor and admits of ratification by the minor after majority, it can be repudiated by the minor if he finds it in any way burdensome.*

**The argument would seem to be that, if an adult donee can accept a gift either by himself or through a mandatorily or can ratify an acceptance made on his behalf but without his prior authority (Voet 39.5.12 and *ad fin.*), the acceptance by a guardian of a gift to a minor donee can also be effected either by the guardian himself or by a mandatory of the guardian or by ratification by the guardian of an acceptance made on his behalf but without his authority. If the circumstance that the guardian is himself the donee does not disqualify him from accepting the gift on behalf of the minor (*Slabber's Trustee v. Nezer's Executor* 12 S.C. at pp. 168-9), that same circumstance ought not to disqualify the guardian from accepting in one of the ways which the law recognises.
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As regards donations by a minor, it seems clear that no alienation of a minor’s property, movable or immovable, can be made in execution of a contract of donation (whether donatio mortis causa or donatio inter vivos*) either by a minor with or without the assistance of a guardian or by a guardian on behalf of a minor (Voet 39.5.9 and 26.7.6, Sande, De Proh. Rer. Aliqu. 1.1.3.21, Gr. 3.41.8 and Vd Linden 1.15.1), although the minor after attaining majority can ratify the prima facie void alienation (Voet 39.5.9). It is also clear that a minor over the age of puberty can make a promissory donatio mortis causa even without the assistance of a guardian since capacity to make such a promise is governed by the rules of testamentary capacity (Voet 39.6.5, Van der Keessell and Schorer ad Gr. 3.2.23; secus in Natal and Ceylon where by statute (see p. 69 at n. 29 above) minors are debarred from making wills). But it would seem that a guardian cannot make a promissory donatio mortis causa on behalf of a minor because the making of a will must be a personal act. As regards a gift inter vivos, though many of the old texts do not clearly distinguish between the promise to make a gift and the execution of the promise by the alienation of property, it would seem that a promise to make a gift inter vivos made by a guardian on behalf of a minor or by a minor even with the guardian’s assistance is (with the exceptions— noted earlier, n.* below — of a donatio remuneratoria and ordinary presents to close relatives) prima facie void as against the minor (Gr. 3.1.30 and 3.2.7), unlike other promises entered into by a guardian on behalf of a minor or by a minor with the assistance of a guardian.

But whether a minor’s promise to make a gift inter vivos which has not been executed by alienation of his property is prima facie valid or prima facie void as against the minor makes little difference. For the period of time within which relief is obtainable by the minor, whether as plaintiff or defendant, against a prima facie void contract which has not been executed by the alienation of property is the same as the period of prescription applicable to a claim for restitutio in integrum brought in respect of a prima facie valid contract (see n. 6 at pp. 81-2 above); and the burden of proof required of a minor who seeks relief in respect of a promise to make a gift is the same where he has had the assistance of a guardian as where he has had no such assistance, for even where he has had the assistance of a guardian he need not prove prejudice which in the case of donations is presumed in his favour (see below p. 104 at n. 75).

Are there any other exceptions to the general rule that where a guardian has acted for or has assisted a minor the contract is prima facie valid and binding on the minor (subject only to avoidance by restitutio in integrum at the instance of the minor)? Voet 26.8.1 ad fin. says that it makes no difference whether

*with the possible exception of a donatio remuneratoria which partakes of the nature of an exchange (Gr. 3.3.3 and Schorer ad Gr. ibid.) and with the exception of ordinary presents to close relatives and gifts for their necessary maintenance (Dig. 26.7.12.3, cited by Voet 4.4.18 and by Van der Keessell ad Gr. 3.1.30, and Dig. 26.7.13.2 and Dig. 27.3.1.2, cited by Voet ibid.).
the guardian's authority is wanting or is wrongly given, and the guardian's authority will be considered to be wrongly given where a contract is entered into between a minor and his guardian, either directly or through the interposition of an intermediary (Voet 26.8.6). Such a contract is, therefore, prima facie void as against the minor (cp. Karuwannayake v. Perera 1 A.C.R. 156, which uses the word 'voidable', probably in the third loose sense of that word mentioned at p. 72 above), although the contract is capable of ratification by the minor after he attains majority (Voet 18.1.4).

The reason for the rule that 'the guardian cannot give authority in a matter which affects his own interest' (Inst. 22.3) is the necessity for avoiding a conflict between the guardian's duty to his ward and his own self-interest. But the position will be different, and a contract between a minor and his guardian would be prima facie valid and binding on both parties (subject to restitution at the suit of the minor) 'where the reason for the rule does not apply; that is to say, where (the guardian) is in the position of a stranger ... thus, where the sale to him takes place by or with the (authority) of another entitled to exercise this authority ... for instance ... his co-guardian, having knowledge of the circumstances or under a judicial decree' (Ostay v. Hirsh Loubsor and Co. Ltd. 1922 C.P.D. at p. 552). See Voet 26.8.6, and 18.1.9 which says 'a guardian may purchase the property of his ward openly at public auction,' as also from a co-guardian if he does so in good faith'.

Another case in which the guardian's authority will be treated as wanting because it has been wrongly given is where the guardian has entered into, or authorised the minor's entering into, a contract which is to become binding on the minor only after he attains majority. Such a contract, which the guardian has no authority to make or authorise (Du Toit v. Lotried 1918 O.P.D. at pp. 106-8, 111-12, 113 ad iud., and p. 116), would also be prima facie void as against the minor, though it admits of ratification by him after majority.

19. provided he has not expressly or impliedly ratified it after majority. See p. 85 above at nn. 33 and 34.

20. The minor can claim restitution even before attaining majority (cp. De Wet v. Bousier 1919 C.P.D. 43 and n. 6 at p. 81 above).

The contract is also voidable at the instance of the guardian during the ward's minority by the guardian withdrawing his consent (cp. Schoeman v. Rafferty 1918 C.P.D. 485), at any rate where the contract is executory. If the guardian's con-

*The phrase 'public auction' has been held to mean 'a sale by means of bidding held by authority of the state... under which is included the decree... of a judge, acting in his official... capacity' (Ostay v. Hirsh Loubsor and Co., Ltd. 1922 C.P.D. at p. 557), e.g., a sale in execution (ibid. at p. 555 and 557; cp. Staples v. de Saram 1820-33 Ramanathan at p. 277); 'whereas an ordinary auction sale, to which those members of the public who care to attend have free access is held to be a private auction' (1922 C.P.D. at p. 560).
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sent is unreasonably withdrawn or withheld, the minor may by applying to Court compel the giving of such consent (Magau v. Mathope 1936 A.D. at p. 507).

21. It is not only as a plaintiff that the former minor can claim restitution—he can, if sued, plead as a defence facts which would justify restitution. (Voet 4.4.12, Gr. 1.8.8, Foncke v. Battenhausen and Co. 1939 C.P.D. at p. 233, cp. De Wet v. Kruger 1919 C.P.D. 43).

22. As to the proper use of the word 'voidable' see p. 71 and n. 52 at p. 72 above.

23. For the history of this remedy see Ahoyaschera v. Harmanis Appu 14 N.L.R. 353, which also explains the practice and procedure of the Ceylon Courts with regard to it.

24. The remedy of restitutio in integrum was not restricted to cases where relief was claimed on the ground of minority, although we are here concerned only with this ground of relief. Voet (4.1.26) mentions among the other 'just grounds for restitution' fear, fraud, absence from the country and justifiable error.

25. Sec. 10 of the Ceylon Prescription Ordinance No. 22 of 1871 (Leg. En. cap. 55), Silinda v. Akara 19 N.L.R. 193, Silva v. Mohamadu 19 N.L.R. at p. 432, sec. 3 (2) (e) (viii) of the South African Prescription Act of 1943. In Roman-Dutch Law the period was four years from majority (Voet 4.1.19, Gr. 3.48.13, Vd Kessel Thees. 900) or from the time after majority when the late minor knew or ought to have known of the facts which entitled him to relief (Van Leouwen, Cons. For. 1.4.43.9 ad fin., Voet 4.1.20, cp. Silinda v. Akara 10 N.L.R. at p. 105).

26. Strict proof of appreciable and not merely trifling prejudice (levis laesio) must be given (Gr. 3.48.11, Voet 4.1.11, and Wood v. Davies 1934 C.P.D. at p. 358). Restitution will be granted not only on account of the low price for which the minor's property has been sold or the high price he has paid for property, but also where articles inherited by him and of sentimental value to him have been sold when other property was available which might have been sold with less prejudice to him (Voet 4.4.15). No relief will be given in respect of damage occurring accidentally after the date of a contract which at the time of its making was not prejudicial to the minor (Shead v. Colonial Banking and Trust Co., Ltd. 1924 T.P.D. at p. 501, citing Digest 4.4.14 ; cp. Veet 4.4.49).

The burden of proving minority is on the minor, whether as plaintiff or defendant (Voet 4.4.12) and the burden of proving prejudice is on the person relying upon it, i.e. usually the minor (Voet 4.4.13 and Wood v. Davies 1934 C.P.D. at p. 258; see p. 104 below).

27. Voet 4.1.12 and 4.4.53. A minor usually has, apart from the claim for restitution, a claim against his guardian for compensation for damages for
maladministration, the actio tutelae directa (Voet 4.4.53). Where immovables have been alienated without the sanction of a Court, a vindicatio, as we shall see, lies against the possessor (cp. Voet 4.4.52, Birkenbach v. Frankel 1913 A.D. 390 and p. 92 and n. 46 at pp. 96-7 below.

28. Thus, restitution can be obtained in respect of compromises (Voet 4.4.20), and in respect of judicial proceedings (Voet 4.4.14 and 4.4.13-2; cp. Majeeta v. Paramanayagam 36 N.L.R. at p. 197).

But restitution cannot be obtained by a minor against marriage on the ground of minority alone (Voet 4.4.15) in the absence of other factors like fraud (Haupt v. Haupt 14 S.C. at p. 40). Cp. pp. 75-6 above for the question whether a marriage contracted by a minor without parental consent is void as against the minor.

29. See p. 102 below.
30. Voet 4.4.38, Gr. 3.48.12.

'If a major shall have succeeded the deceased minor, he would have four years from the date of adiating the inheritance, or at least from the date of the admitted possession of the property of the estate; but if he succeeds to a major who was damned while still a minor and who reaching majority died within the four years thereafter, he could only have the time which was still left to the deceased whom he succeeded. If a minor succeeds to the rights of a minor, the four years allowed for petitioning for restitution on behalf of the deceased would be calculated from the time that the heir himself, and not the deceased minor, arrived at the age of majority. But if he were heir to a major against whom the full four years allowed for petitioning for restitution had not yet run, the portion of time still open to the deceased major would only commence to run against the heir when he had completed the years constituting majority' (Voet ibid.)

31. e.g., where the possessor is a party to a fraud on the minor (Voet 4.4.35) or where it is of importance to the minor that he should get the property itself back and not merely get its value (Voet ibid.; cp. n. 26 at p. 89 above).

32. Thus, where a prima facie valid contract has been executed by the alienation of the minor's property, the minor will have restored to him what he has been deprived of with fruits, interest and profits (Voet 4.1.22 and 4.4.36). He on his side must compensate for necessary and useful improvements to the property returned (Voet 4.1.22) and restore with fruits, interest and profits what he acquired by the contract (Voet 4.1.22 and 4.4.36, Wood v. Davies 1934 C.P.D. at pp. 260-1), at any rate to the extent to which he has benefited by the contract (Voet 4.4.36 ad fn.), subject to set-off wherever the circumstances demand it (Voet 4.1.22 and 4.4.37). But if the minor sues a purchaser of his
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property for restoration of it and he cannot show any special reason (e.g., sentimental value, Voet 4.4.15 ad fn.) for getting the thing itself back, the purchaser may offer to make up any deficiency in the price which prejudiced the minor together with interest on the amount for the interim period (Voet 4.4.54).

It must be noticed that generally 'restitution does not profit the surety of a minor. For if knowing a person to be a minor and not caring to contract with him I should accept a surety for him, it is not just that the surety should be aided to my entire loss' (Voet 4.4.39, Gr. 3.4.8.12).

For the minor's rights and duties on rescission of an alienation which is prima facie void, see n. 46 at p. 96 below.


Strictly, 'ratify' means 'to confirm or make valid by approving'; so that 'ratification' would be the appropriate word to describe the confirmation by a minor after majority of a contract which was originally prima facie void as against him, the confirmation having the effect of validating the contract as against the minor retrospectively as from the time when the contract was made (see n. 8 at p. 82 above). But where a contract is prima facie valid, recognition by the minor after attaining majority of the validity of the contract (which is all that 'ratification' can mean here) does not validate something previously invalid but has the effect merely of taking away the right to disaffirm the prima facie valid contract by proceedings for restituto in integram.

34. Ratification may be either express or implied from words and conduct.

Voet (4.4.44) says that in the case of prima facie valid contracts (such as those made by a guardian for a minor or by a minor with the assistance of his guardian), anything done by the former minor in furtherance of a transaction concluded during minority (such as paying for a thing bought or delivery of a thing sold or a claim for payment of a thing sold) will not amount to a tacit ratification of the contract having the effect of barring a claim for restitution. For, says Voet, anything so done by way of performance is to be considered as done only to avoid action on what is a prima facie valid contract, and even a claim by the former minor of performance from the other contracting party is to be considered as done merely out of caution to prevent loss in case he should later elect not to seek restitution. On the other hand, says Voet, acts done de novo in recognition of a prima facie valid contract concluded during minority (such as rebuying or borrowing a thing sold) are to be treated as a tacit ratification.
of it; and in the case of contracts prima facie void (such as those of an unassisted minor), even any payment demand or acceptance of the price after the attainment of majority, and not only acts done de novo, will be regarded as tacit ratification and as validating the contract.

But in the modern law this distinction has not been accepted, and in the case both of prima facie valid contracts and of prima facie void contracts, acts after majority will be construed as amounting to tacit ratification of contracts concluded during minority (see, e.g., Fenner Solomon v. Martin 1917 C.P.D. 22, Stuttford and Co. v. Oberholzer 1921 C.P.D. 855, Raman Chetty v. Silva 15 N.L.R. 286), provided only that the act in question unequivocally indicates an intention to ratify the contract (Shead v. Colonial Banking and Trust Co., Ltd. 1924 T.P.D. at p. 500, and Rossiter v. Barclay's Bank 1933 T.P.D. at p. 387).

Will tacit ratification be held to have taken place if the minor remains inactive after majority without taking steps to repudiate the prima facie valid contract within a reasonable time? Van Leeuwen (Censura Forensis 1.4.43.8) says that "if within a period of four consecutive years the period of prescription applicable to claims for restitution in integrum" after the minor's coming of age he has neglected to seek the benefit of restitution ... he is considered to have, as it were, ratified what was done when he was a minor." Compare Voet 97,914, Sande, De Prohibita Rerum Alienatione 1.1.6.88 and note 48 at p. 98 below as regards prima facie void transactions. In Ceylon the view has been taken that if a minor does not repudiate a contract or alienation within a reasonable time of attaining majority, that amounts to tacit ratification. See page 95 and n. 54 at p. 100 below.

For South African Law, Wessels, Contract, sec. 823 suggests that there can be no tacit ratification by mere lapse of time in the case of an unassisted minor's prima facie void contract,* although in secs. 862 and 863 (where he refers to Anglo-American text-books and cases only), he seems to suggest the contrary, perhaps in the case of prima facie valid contracts of minors assisted by their guardians.

But Wessels cites no Roman-Dutch authorities either in sec. 823 or in secs. 862 and 863, and the three South African cases which he cites in sec. 823 do not bear out his proposition. For in all of them the contract was not that of an unassisted minor but of a guardian acting for a minor or of a minor acting with the assistance of a guardian; and in the first two cases which he cites the judgements make it clear that on the facts there was a repudiation within the period.

*Wessels (sec. 823 and sec. 787) uses the phrase 'voidable contract' to describe contracts made by an unassisted minor, which throughout the present article have been described as contracts 'prima facie void as against the minor' (see pp. 75 and 98 above); and Wessels, sec. 787 uses the phrase 'valid contract' to describe contracts made by a minor with the assistance of a guardian or made by a guardian for a minor, whereas in this article such contracts have been described as 'prima facie valid contracts'.

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during which repudiation was permitted (*Wolff v. Solomon’s Trustee* 12 S.C. at p. 49 and *Stead v. Colonial Banking and Trust Co., Ltd.* 1924 T.P.D at p. 506). It is submitted, therefore, that the mere statement in the third case which Wessels cites (*Rossiter v. Barclay’s Bank* 1933 T.P.D. at p. 388) to the effect that ‘it cannot be said that mere delay amounts to ratification’ is not sufficient authority for Wessels’ proposition that delay in asserting the minor’s rights does not amount to ratification.

It is submitted that in the modern law the minor may be held to have tacitly ratified the prima facie valid contract if, with knowledge of the facts and circumstances entitling him to relief, he has remained inactive after majority without repudiating the contract for three years, the period of prescription applicable in the modern law (see n. 25 at p. 89 above) to claims for *restitutio in integrum* (cp. V. Leeuwen, *Cens. For.* 1.4.43.6, quoted at p. 92 above, and cp. p. 99, note* below). But it must be noted that this inference of tacit ratification will not necessarily be drawn from the mere lapse of time after majority, but must depend on all the circumstances: e.g., it will not be drawn if the inactivity of the late minor was due to ignorance of the facts and circumstances entitling him to relief (V. Leeuwen, *op. cit.* 1.4.43.9, cp. Sande, *op. cit.* 1.1.6.85 and n. 48 at p. 99 below).

35. *Voet* 4.4.43, *Shortt and Co. v. Mohamed* 39 N.L.R. 113 (where earlier decisions are cited), *Fouche v. Battenhausen and Co.* 1939 C.P.D. 228. In the latter case it was held that fraudulent misrepresentation of his age by a minor operated to bar a claim by him for *restitutio in integrum* even where the claim was raised by him not as a plaintiff but as a defendant and by way of a claim in reconvention. In the former case, where the minor merely pleaded the defence of minority without making any claim in reconvention for restitution, his fraud was held to be a bar to relief; cp. *Pleat v. V an Staden* 1921 O.P.D. at p. 102.

Restitution will be denied the minor only where the other contracting party has been misled by the minor’s representation: so that where the other party to the contract ‘is not ignorant of his being a minor, the minor, however fraudulent, is still to be listened to’ (*Voet ibid.*). The burden of proving knowledge on the part of the other contracting party that the fraudulent minor was in reality a minor is on the minor (*Voet ibid., Pleat v. Van Staden* 1921 O.P.D. at pp. 99-100 and 105), unless the other contracting party is a blood-relation of the minor for then the presumption is that he was aware of the minor’s age (*Voet ibid.*).

36. Even where the minor has not expressly represented that he was of full age, restitution will be denied him if by his dealings, contracts or the offices he holds he has impliedly represented himself to be of full age and is generally taken to be a major (*Voet 4.4.43*). *Wessels, Contract*, section 841, wrongly says
that a tacit representation is insufficient, basing his statement on English cases
and with no reference to Roman-Dutch authorities.

It is also relevant to mention here that a minor who has suffered loss owing
to his own lack of skill in the practice of a profession, trade or business in which
he publicly engages cannot obtain restitution in respect of contracts incidental
to such practice (Voet 4.4.30, 51; V. Lecuwen, Cons. For., 1.4.43-5 and 6).

It must be noticed that the liability of a minor for implied representation
of full age or for lack of skill in the practice of a profession, trade or business is
independent of tacit emancipation of the minor by his guardian: so that it would
apply even where the circumstances are insufficient to show tacit emancipation
in the proper sense (cp. Mutiah Chetty v. de Silva 1 N.L.R. at p. 362 and Rat-
watte v. Hewavitharana 3 Balasingham at pp. 27-8 and 30). Where tacit eman-
cipation can be shown to have taken place, the minority will, of course, be deemed
to have ended in relation to contracts incidental to the particular trade,
occupation or business (see p. 67 above).

The alienation 37 of immovable property 38 of a minor, either by him
with or without his guardian’s assistance or by his guardian on his behalf, is prohibited except by leave of a Court. 39

37. ‘Alienation is any course of dealing by which dominium is transferred’
(Sande, De Prob. Rev. Aliens., 1.1.3.16) and includes any act by which the real
rights of a minor are transferred, diminished, or abandoned (Voet 27.9.3). Thus,
it includes transfer in pursuance of a contract of donation (Sande, D.P.R.A.
1.1.3.21, Mannel Naidu v. Adrian Hamy 12 N.L.R. at p. 232, Ginnnakara Hamini
v. Don Baron 5 N.L.R. at p. 280), a sale (Sande op. cit. 1.1.3.17, Andris Appu
v. Abanchi Appu 3 Browne at p. 13, Ratwotte v. Hewawitharana 3 Balasingham
at p. 29, Mustapha Lebbe v. Martinus 6 N.L.R. at p. 367), a lease in longum
tempus (Sande op. cit. 1.1.3.45, 47, Breytenbach v. Frankel 1973 A.D. at p. 102,
Perera v. Perera 3 Browne at pp. 151-2, Fernando v. Fernando 19 N.L.R. at p. 194),
and even includes the making of a pledge or a mortgage (Girigorishamy v. Lebbe
Marikar 30 N.L.R. 209), for ‘although a pledge is not strictly an alienation
since the property remains in the dominium of the debtor, yet the passing from
a pledge to an alienation is easy for when the debtor ceases to pay the divest-
ing of the thing pawned takes place’ (Sande op. cit. 1.1.3.49).

38. ‘and other things which are reckoned as immovables’ (Van der Keese-
bel, Th. 130, cp. de Villiers, N.O. v. Lay 3 South African Republic (Transvaal)
Reports at p. 51). Van der Keessel (Theses 129) says that the more valuable
movables also should be retained without being alienated, and Voet (27.9.1)
includes in the list of things for the alienation of which the sanction of a Court
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is required movables which are capable of preservation and are not perishable, such as gold, silver, gems and other valuable movables (cp. De Villiers, N.O. v. Lay supra).

39. Gr. 1.8.6, Voet 27.9.1, Vd Kessael, Th. 130 and the authorities in n. 37 above.

Where a contract entered into by a minor with or without the assistance of a guardian or by a guardian on behalf of a minor has been executed by the alienation of immovable property of the minor without the sanction of a Court, the alienation is prima facie void as against the minor; and the guardian before majority or the minor during or after minority is entitled to vindicate the property. But the alienation is not entirely devoid of legal effect inasmuch as it is not open to the alienee to assert that the alienation was invalid, as the alienation is capable of being made binding on the minor by being ratified either expressly or impliedly by him on his attaining majority, and as the alienation will be held to be valid even as against the minor where the alienee has been misled by the minor expressly or impliedly representing himself to be of full age.

Although where an alienation is prima facie void as against a minor there is strictly no need to apply to a Court for a declaration that the alienation is void, yet since the minor may be held to have impliedly ratified the prima facie void alienation by allowing a certain period of time to elapse after majority without asserting his rights, it is safer in all cases, whether the alienation is prima facie void or prima facie valid, to make an application to a Court for relief from the consequences of the alienation.

40. Where the contract is made by a minor without the guardian’s assistance, it is prima facie void as against him except where the contract is a donatio mortis causa (see p. 80 and n. 2 at p. 80 above). Where the contract is made by a minor with the guardian’s assistance or by a guardian for a minor, it is prima facie valid (see p. 55 above) except where the contract is a donatio inter vivos (see n. 16 at p. 85 above).

But it is arguable that where a contract relating to immovables is made without the sanction of a Court by a minor with the assistance of a guardian or by a guardian for a minor, the contract itself and not merely alienation in execution of the contract should be treated as prima facie void as against the minor. For otherwise we have the curious position (see, e.g., Hogg v. Van Rensburg 1946 C.P.D. 193) that a guardian acting for a minor or a minor with the assistance of a guardian could enter into a contract which is prima facie valid and binding
on the minor (subject only to avoidance by restitution at the suit of the minor); but that if the guardian or the minor with the guardian's assistance proceeded to implement the contract by alienating the property in execution of his obligations under the contract, the alienation would be prima facie void as against the minor. Sande (D.P.R.A. 1.1.5.68-9, 72 and 74) suggests that the contract (which usually precedes the alienation) also requires the sanction of a Court; and compare ibid. 1.1.7.114 which seems to treat both the alienation and the contract as being governed by the same principles.

41. or where the sanction of a Court has been fraudulently obtained (Voet 27.9.9, Sande, D.P.R.A. 1.1.4.64 and 1.1.5.78; cp. De Wet v. Bimwer 1919 C.P.D. at pp. 46-7 and Borgileil v. Crowley (1896) 17 Natal L.R. at pp. 221 and 232).

As regards the burden of proof of absence of a valid decree of a Court, in case of doubt it is presumed in favour of the minor that the alienation was not validly made, and therefore the alienor must show that the Court's sanction had been obtained (Voet 27.9.11). But where it has been shown that the order of a Court has been given, the burden of showing that the order was obtained by fraud is on the minor (Voet ibid., Sande, D.P.R.A. 1.1.4.64).

42. Voet 27.9.9, Sande, D.P.R.A. 1.1.6.79 and 1.1.7.114, Gr. 1.8.6, Breytenbach v. Frankel 1913 A.D. at pp. 396-7 and 399-400, and the Ceylon cases in n. 37 at p. 94 above.

43. Sande (Dec. Fris. 2.9.15) says that 'a sale of the immovable property of a ward without a decree of Court is ipso jure void, namely in respect of the ward himself, so that he cannot be sued on the contract'; but Sande points out that the other party cannot impeach the transaction. Cp. Sande, D.P.R.A. 1.1.7.114.

44. Voet 6.1.19.

45. Sande Dec. Fris. 2.9.22 (where a minor during minority had refused to be bound by a long lease entered into by a guardian on his behalf but without an order of Court, it was held that the lease amounted to an alienation which required the sanction of a Court and that the minor was justified in repudiating the lease).

46. Voet 27.9.10, Sande, D.P.R.A. 1.1.6.80.

The minor is entitled to all fruits if the possessor knew that the property belonged to a minor, but if the possessor was a bona fide possessor the minor is entitled only to fruits in existence at the time of the action (Sande 63. cit. 1.1.6.81-2, Voet 27.9.10). The purchase-money (or so much of it as the minor has received and applied to his use) must be restored by the minor with interest (Voet ibid., Sande 63. cit. 1.1.6.83, Fernando v. Fernando 19 N.L.R. at pp. 198-9). Cp. n. 32 at p. 90 above for a minor's rights and duties where a prima facie valid alienation is rescinded.
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The proper remedy to reclaim the property is the vindicatio (Sande op. cit. 1.1.6.79, 80) because ownership is still with the minor; and this is true whether the alienation of the immovables was by a guardian on behalf of a minor (as in Mustapha Leboe v. Martinus 6 N.L.R. 364 and Girgerishamy v. Lobbe Marikar 10 N.L.R. 209, cp. Breytenbach v. Frankel 1913 A.D. at pp. 399-400) or it was by a minor with or without the assistance of a guardian (as in Manuel Naide v. Adrian Hamy 12 N.L.R. 259, Gunesebera Hamini v. Dom Baron 5 N.L.R. 273, and Fernando v. Fernando 19 N.L.R. 193), because in all cases where a Court's sanction has not been obtained for the alienation of immovables belonging to a minor no ownership passes to the alienee.

It is only where ownership in the minor's property has passed by the transfer (e.g., in the case of an alienation of immovables with the sanction of a Court (see p. 102 below) or an alienation of movables otherwise than by way of gift by a minor with the assistance of a guardian or by a guardian acting for a minor (see p. 102 below)), that the alienation is prima facie valid, that the vindicatio is not available, and that proceedings for restitutio in integrum are the appropriate remedy. But the improper remedy would be a vindicatio* where a minor's immovable property has been alienated without the sanction of a Court (Sande op. cit. 1.1.6.89 and Groenewegen, De Leg. Abrog. ad Code 2.141.13) or where a minor's movable property has been alienated without a guardian's assistance (Voet 4.4.2r and 23) or where movables have been alienated by way of gift even with the guardian's assistance (see n. 18 at p. 87 above).

Many of the old authorities and many of the modern decisions do not clearly distinguish between a contract that is prima facie void as against the minor and one that is prima facie valid and binding on him until disaffirmed by him, or between the contract itself and alienation made in execution of the contract. Thus, Sande op. cit. 1.1.6.88 speaks of an alienation being ratified and in 1.1.6.91 sets out the factors which would operate to nullify ratification of a contract; cp. also Sande op. cit. 1.1.5.68-72 and 1.1.7.114. Consequently, many decisions do not recognise the logical distinction between the circumstances in which the vindicatio is the appropriate remedy where alienation has followed in execution of a contract and the circumstances in which proceedings for restitutio in integrum should be brought in respect of an alienation. In fact in Ceylon the distinction between the two remedies is blurred by the common practice by which a minor who seeks relief from an alienation in execution of a contract asks the Court that the transfer be declared void and that he be declared entitled to the property and to recover possession (cp. Siman Naide v. Aslin Nona 46 N.L.R. at p. 340, and Silva v. Mohamadu 19 N.L.R. at p. 428).

* The condiicio indebiti would be available if the property was irrecoverable in specie from the defendant, as in the case of money (except where the money was, e.g., in a sealed *sachet).
But it is submitted that this practice should not be allowed to obscure the fundamental difference between an alienation which is prima facie void as against the minor and one which is prima facie valid. Thus, the burden of proof that must be discharged by the minor is different in the two cases: see p. 104 below for the rules relating to the burden of proof. If the relief sought is in respect of a prima facie valid alienation (see p. 102 for immovables and ibid. for movables), the minor must generally prove minority as well as damage, but if the relief sought is in respect of a prima facie void alienation (see p. 93 for immovables and p. 103 for movables), the minor generally need prove only minority (see n. 41 at p. 96 above for the burden of proof of the absence of the sanction of a Court which is required for alienation of immovables, and for the burden of proof of fraud in obtaining the sanction of a Court). *

It must also be remembered that the period of prescription applicable to claims for restitution in respect of prima facie valid alienations was four, and is now three, years (see p. 102 below), while the period of time within which a vindicatory action is available where an alienation is prima facie void as against a minor is different; cp. n. 48 at p. 99 below. The period of four (now three) years after majority in which restitution must be applied for in respect of a prima facie valid alienation is (as Uitrechtse Consultatie cons. no. 122, n. 8, vol. 1 of the 1676 edition at p. 447, says) "impertinent" (i.e. irrelevante) to the case of a prima facie void alienation, 'because restitution in integrum is not necessary to vindicate property sold without a decree of Court' (ibid.); and see Voet 27.9.14 for a justification of the difference between the periods of prescription applicable in the two cases.

47. Sande, D.P.R.A. 1.1.7.114.

48. An example of tacit ratification occurs where the minor on reaching full age claims from the guardian in the actio tutelae the purchase price of property sold (Voet 27.9.14), or where the minor does not assert his rights within a reasonable time of attaining majority. 'A void alienation may be tacitly confirmed if the minor, having come of age, has raised no protest within five years after coming of age' (Sande, D.P.R.A. 1.1.6.88), except where the alienation was not for value but by way of gift, 'for this is prescribed not in five but in ten years where both parties reside in the same district and in twenty where the parties do not reside in the same district' (Sande, D.P.R.A. 1.1.6.90). If no protest is raised within the periods mentioned, 'an alienation void per se will be confirmed by an implied ratification as it were' (Sande, D.P.R.A. 1.1.6.88; cp. Voet 27.9.14).

*In Breytenbach v. Frankel 1913 A.D. at p. 400 Solomon, J.A., suggests that where a minor's immovable property has been alienated by a guardian on behalf of a minor without the sanction of a Court, the minor must prove that the property was alienated by the guardian without the Court's sanction; but see Voet 27.9.11 and n. 41 at p. 96 above."

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In the modern law the period of time during which a vindicatory action is available to a minor can be taken to be the period of time after majority during which inactivity by a minor aware of the circumstances entitling to relief may be considered to amount to tacit ratification of the prima facie void alienation. *Cp. n. 34 at pp. 92-3 above for ratification of prima facie valid transactions.* Thus in S. Africa 'if an owner seeks to recover his property, the possessor may contest his claim in ius sine by pleading that he has not brought his action in time. The time is the same as that required for acquisitive prescription (now thirty years); so that in relation to property the same period bars the remedy, and when the conditions of acquisitive prescription are present, transfers the right' (Lee, *Intro. to Roman-Dutch Law*, 5th edn., 1953, pp. 143-4).

In Ceylon, in the case of land the period is ten years (*Haturasinghe v. Ukku Amma* 45 N.L.R. at p. 504). For if the minor does not bring his vindicatory action within ten years of attaining majority, he will in many cases find that he has lost his ownership because some one else has acquired it by acquisitive prescription in terms of section 3 of the Ceylon Prescription Ordinance No. 22 of 1871 (Leg. En., cap. 55); and where the conditions of acquisitive prescription have not been satisfied by anybody else, it is submitted that, since the Ceylon Prescription Ordinance does not seem to provide for extinctive prescription to land, but some limit of time must be laid down to determine the period of time after majority during which inactivity might be construed as tacit ratification by a minor of a prima facie void alienation, the period of ten years can be accepted for that purpose. But the inference of tacit ratification will not, of course, necessarily be drawn from the mere lapse of ten years after majority, but must depend on all the circumstances; *cp. Sande, D.P.R.A. 1:1.6.88 and n. 34 ad fin.* at p. 93 above.

49. *Voet 27.9.14, Sande, D.P.R.A. 1:1.6.84, Breytenbach v. Frankel 1913 A.D. at pp. 401 and 397, Silva v. Mohamedu 19 N.L.R. at p. 432* (where the alienation was prima facie void for lack of the Court’s consent, and not merely voidable).

The ratification validates the prima facie void alienation not as from the time of ratification but as from the time when the alienation was made. (*Breytenbach v. Frankel* 1913 A.D. at pp. 401 and 397 and ep. n. 8 at p. 82 above).

*Thus, in *Silva v. Mohamedu* 19 N.L.R. at p. 432, de Sampayo, J., questioned whether in the modern law the period of time after majority lapse of which would amount to tacit ratification differed from the period of prescription. It must be noticed, however, that de Sampayo, J., was wrong in treating the application before him as one for restitution (the period of prescription for which is three years). The alienation of the land not having been sanctioned by Court, it was prima facie void as against the minor and the appropriate action would have been, not restitution, but *vindicatio* which can be brought within ten years of majority.

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But it must be noticed that even after ratification the transaction may be rescinded on the ground of _laesio enormis_ (Voct 27.9.14, Sande, _D.P.R.A._ 1.1.6.91), where, as in Ceylon, _laesio enormis_ has not been abolished by statute.


51. Where a minor has not ratified an alienation of his property and has not been guilty of fraudulently misrepresenting his age, will the alienation (as _dicta_ in some Ceylon cases suggest) be treated as valid to the extent to which the minor can be shown to have been enriched by the transaction? It is submitted that the alienation cannot be so treated.

We have seen that where a minor has without the authority of his guardian entered into a contract which has not been executed by alienation of his property, the minor will not be liable to perform his obligations under the contract itself (that being _prima facie_ void as against him), although he will be liable to the other contracting party in _quasi-contract_ to the extent to which the minor has been benefited by the other's performance of the contract (see p. 80 and nn. 12 and 13 at pp. 83-84 above). We have also seen (see p. 85 above) that where a minor has with his guardian's authority entered into a contract which has not been executed by alienation of his property, the minor will be liable _in contract_ to perform his obligations under what is a _prima facie_ valid contract, unless and until it is avoided at the instance of the minor.

Where, however, a minor's property, movable or immovable, has been alienated in execution of a contract, the validity or invalidity of the alienation is in principle independent of the question whether or not the minor has been enriched by the transaction. Thus, where the alienation of the minor's property is _prima facie_ void as against him (see p. 95 for immovables and p. 103 for moveables), the alienation will be validated and become binding on the minor only where there has been ratification of it by the minor or there has been misrepresentation by him of his age. The fact that a minor who seeks and obtains relief against the consequences of a _prima facie_ void alienation will not be allowed to retain what he received from the alienee (see n. 46 first paragraph at p. 96 above) does not, of course, mean that the _alienation itself_ is validated to the extent of the minor's enrichment.


53. See n. 48 at pp. 98-9 above.

54. Sande, _D.P.R.A._ 1.1.6.88. At any rate in Ceylon this view has been followed: see _Silva v. Mohanadu_ 19 N.L.R. at p. 432 (alienation by way of sale _prima facie_ void for lack of a Court's sanction); cp. _Manuel Naide v. Adrian_
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Ilamy 12 N.L.R. at p. 262 (alienation by way of donation prima facie void for lack of a Court’s sanction) and Bastian v. Andris 2 S.C.R. at p. 118 (mortgage prima facie void for lack of a Court’s sanction).

For South Africa see n. 34 ad fin. at pp. 92-3 above.

55. See p. 102 for alienations which are prima facie valid and in respect of which therefore application to a Court for relief is strictly necessary.

56. Voet 4.1.13, Brydenbach v. Frankel 1913 A.D. at p. 398; cp. Silva v. Mohamadu 19 N.L.R. at pp. 431-2, Ahamadu Lebbe v. Amina Umma 29 N.L.R. at p. 459, James v. Solomon 3 Times at pp. 125-6, Veldhipillai v. Elanis 7 C.L. Rec. at p. 165, Sirigardenav. Loku Banda 1 S.C.R. at p. 220, Kuanopathipillai Thanigazharm v. Aliarleve Amaruleve 41 C.L.W. at p. 52. In all these cases the alienation was in fact prima facie void as against the minor because of the absence of the sanction of a Court, although some of the judgements, overlooking this point, use the word ‘voidable’ and proceed on the view that, being voidable, the alienation did pass rights to the alinee.

In Andris Appu v. Abanchi Appa 3 Browne 12 and Saibo v. Perera 4 Balsingh. Notes 57 the view seems to have been taken that where an alienation is prima facie void for lack of the sanction of a Court, the fact that the minor later made a second transfer to some one other than the first transferee was sufficient to repudiate the first alienation even without his coming to a Court for relief. But it must be noticed that in these two cases the second alienation was made before the lapse after majority of the time which might have led to an inference of tacit ratification of the first alienation (see n. 48 at p. 92 above); and in Haturusinghe v. Udkku Amma 45 N.L.R. 499 (where at p. 502 it was said obiter that if the alienation is void no application to Court is strictly necessary), it is significant that an action was in fact brought by the transferee and that the action was brought before the period (ten years, see n. 48 at p. 99 above), lapse of which might have led to an inference of tacit ratification. It is submitted that it is safer in all cases, whether an alienation is prima facie valid or prima facie void, for application to be made to a Court for relief.

In South Africa, even where there has been no ratification express or implied, and indeed even where soon after attaining majority the former minor has repudiated the prima facie void alienation by giving notice of repudiation to the alinee, it is necessary, where the invalid transfer has been erroneously registered against the title to the land, for the former minor to apply to a Court to have the registration cancelled before he can again pass the dominium in the property (Brydenbach v. Frankel 1913 A.D. at pp. 401-2).

See n. 40 at p. 98 above for the differences between an alienation in execution of a prima facie void contract and an alienation in execution of a prima facie valid contract.
Where immovable property of a minor has been alienated with the sanction of a Court, the alienation is prima facie valid and is binding on the minor and on the alienee. The minor may, however, obtain resitutio in integrum from a Court within three years of attaining majority, if he can show that he has been prejudiced by the alienation and that the prejudice is considerable.

57. Sande, D.P.R.A. 1.1.6.77. Where the sanction of a Court has been fraudulently obtained, the alienation is as we have seen, n. 41 at p. 96 above, prima facie void as against the minor.

58. See p. 85 above for restitution and for the three year period of prescription, and other limitations, applicable to restitution. Contrast the period of time within which a vindicatory action in respect of property alienated in execution of a prima facie void contract must be brought; see n. 46 ad fin. at p. 98 above.

59. ' dummodo de graviere laesione constet' (Voet 4.4.15); si graviter laesus sit (Sande, D.P.R.A. 1.1.6.77 and cp. in re Noojigedacht 23 Natal L.R. at pp. 86, 91). ' For a minor's own interest requires that restitution should be sparingly and circumspectly granted after such a judge's order, lest otherwise no one should care with this risk of restitution to purchase minors' property ' (Voet, ibid.)

Presumably the prejudice which will found a claim for relief in cases where the alienation has been sanctioned by a Court will have to be more considerable than in other cases, although it need not necessarily amount to laesio enormis; cp. n. 62a at p. 103 below.

See n. 32 at p. 90 above for the minor's rights and duties where the prima facie valid alienation is rescinded.

Where a contract (other than a contract of donation) entered into by a guardian for a minor or by a minor with the assistance of a guardian has been executed by alienation of movable property of the minor, the alienation is prima facie valid without the sanction of a Court and is binding on the minor and on the alienee. The minor may, however, obtain resitutio in integrum from a Court within three years of attaining majority, if he can show that he has been prejudiced by the alienation.

60. As we have seen that a promissory donatio mortis causa entered into by a guardian on behalf of a minor or an alienation of property in execution of such a promise will be prima facie void as against the minor; and although a minor over the age of puberty can (except in Ceylon and Natal) make a valid promissory donatio mortis causa, an alienation of property in execution of the promise...
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would be prima facie void as against the minor (see n. 18 at p. 87 above). We have also seen (ibid.) that a contract of donatio inter vivos is prima facie void as against the minor even where the guardian has assisted the minor or has entered into the contract on the minor's behalf, and that an alienation of movables in execution of a contract of donatio inter vivos is also prima facie void as against the minor. But the alienation is not entirely without legal effect inasmuch as it will not be open to the donee or third parties to challenge its validity, and as the alienation admits of ratification by the minor after majority. It must be noted, however, that donationes remuneratorias and ordinary presents to close relatives are exceptions to the general rule prohibiting donations of a minor's property (see p. 87 n. * above).

61. Where a minor has contracted without the assistance of his guardian and alienates movables in execution of the contract, the alienation is prima facie void as against the minor, because the contract of an unassisted minor is prima facie void as against him (see p. 80 above) and because a minor cannot alienate property (Gr. 1.3.5 and 2.4.8.4; Van Leeuwen Comm. 2.7.8). But the alienation is capable of ratification by the minor on attaining majority when the disabilities which made the contract and the alienation prima facie void no longer exist.

62. But it must be noted that the prohibition on the alienation of immovable property belonging to a minor without the sanction of a Court applies also to certain movables; see n. 38 at p. 94 above.

62A. Although the prejudice must be appreciable and not merely trifling (see n. 26 at p. 89 above), the prejudice need not be as considerable as in cases where a Court has sanctioned the alienation; cp. n. 59 at p. 102.

Where a contract entered into by a minor without the assistance of a guardian, or a contract of donation entered into by a guardian for a minor or by a minor with or without the assistance of a guardian, has been executed by the alienation of movable property of the minor, the alienation is prima facie void as against the minor; and the guardian before majority or the minor during or after minority is entitled to vindicate the property. But the alienation is not entirely devoid of legal effect inasmuch as it is not open to the alienee to assert that the alienation was invalid, as the alienation is capable of being made binding on the minor by being ratified either expressly or impliedly by him on his attaining majority, and as the alienation will be held to be valid even as against the minor where the alienee has been misled by the minor expressly or impliedly representing himself to be of full age.

63. See n. 18 at p. 87 above for donations.
64. See nn. 60 and 61 at pp. 102-3 above.

65. The remedy is the vindicatio, or the condicio indebiti in the case of money; see n. 46 at p. 97 above.

66. See p. 95 at nn. 48 and 49, and nn. 48-49 at pp. 98-100 above, which relate to immovable property but which would apply, mutatis mutandis, to movables also.

67. See p. 95 at n. 50 and n. 50 at p. 100 above, which relate to immovable property but which would apply, mutatis mutandis, to movables also.

Where a contract has been entered into by a minor without the assistance of a guardian, it is sufficient for the minor who claims that the contract (which is prima facie void as against him) is not binding on him to prove minority, and he need not also prove prejudice. The burden of proving that the minor has attained majority, or that he has been benefited by the contract, or that he expressly or impliedly misrepresented his age, or that he expressly or impliedly ratified the contract, is on the party contracting with the minor.

Where a contract has been entered into by a minor with the assistance of a guardian or by a guardian on behalf of a minor, the minor, if he claims relief from the prima facie valid contract, must prove minority as well as prejudice—except where the contract is by its nature prejudicial to the minor (e.g., a donation of his property), in which case prejudice is presumed in his favour, the presumption being rebuttable by the other party to the contract showing that the minor has been benefited. The burden of proving that the minor has attained majority, or that he expressly or impliedly misrepresented his age, or that he expressly or impliedly ratified the contract, is on the other party to the contract.

Where a contract entered into by a minor or by a guardian on behalf of a minor has been executed by alienation of the minor’s property, movable or immovable, similar principles as to the burden of proof apply according as the alienation is prima facie valid against the minor or is prima facie valid and binding on him.

68. The burden of proving minority is always on the minor (Voet 4.4.12), because ‘in case of doubt everyone contracting is presumed to have had the legal capacity for doing effectually what he proceeded to do, so that anyone asserting the contrary must prove it’ (ibid.).

69. Gantz v. Wagenaar v Menzies 92. In Scots Law also no proof of lesion (prejudice) is required where a minor seeks relief in respect of a contract
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