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The Contracts of Minors in the Modern Roman-Dutch Law

IN his judgement in *Siman Naide* v. *Aslin Nona*[1] Soertsz, 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',[2] 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.
2. Voet, *Commentaries*, 4.4.12.

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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'[3]; 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'[4] in the countries of the modern Roman-Dutch Law is to be deplored. A 'minor' may be described as a young person who has not acquired majority, and with it the full capacity to have and exercise rights,[5] 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.[6] In the Netherlands the age of majority varied in the different provinces and at different times[7] but came finally to be fixed at twenty-five years for both sexes.[8] In S. Africa and Ceylon the age of majority has been fixed by statute at twenty-one years.[9] A person under twenty-one years may, however, be treated as having acquired majority, wholly or partially, in certain ways[10]: 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 distinction 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., 1951), ch. 6, part 5: 'Contracts of Infants or Minors' *passim*; e.g., sections 764, 780, 782, 804-818, 822, 841-843, 846-849, 858.

5. The capacity to have rights (called *Rechtsfahigeit* in German Law; Schuster, *Principles of German Civil Law*, 1907, p. 19) is usually distinguished from disposing capacity or capacity for performing juristic acts (*Geschaftsfahigkeit*). Generally 'the first kind of capacity (begins) at a man's birth. The second kind of capacity . . . begins on the attainment of majority' (Arunachalam, *Digest of the Civil Law of Ceylon*, 1910, vol. 1, p. 1).

6. *Dig.* 4.4.1.

7. Wessels, *History of Roman-Dutch Law*, 1908, pp. 419-20.

8. Grotius 1.7.3; Voet 4.4.1; Van der Keessel, *Theses*, 110. This is also laid down by the Statutes of Batavia: see Van der Chijs, *Nederlandsch-Indisch Plakaatboek*, 1602-1811, vol. 9, p. 216. Exceptions to the rule that majority was attained at 25 might be made for particular purposes (Vd Keessel, ibid.; Vd Chijs, ibid.).

9. Cape Ord. 62 of 1819, sec. 1; Natal Ord. No. 4 of 1846, sec. 2; Transvaal Volksraad Resolution of December 1853, art. 123; 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. 53), sec. 2.

10. Cp. sec. 3 of Ceylon Age of Majority Ordinance No. 7 of 1865 (Leg. En., cap. 53).

Marriage ends minority for all purposes in the case of a male,[11] but a female on marriage is in S. Africa, but no longer in Ceylon,[12] deemed to be under the guardianship of her husband[13] if the marital power has not been excluded by antenuptial contract.[14] If the marriage is dissolved before the minor attains the normal age of majority, the minority does not revive.[15] Express emancipation by a declaration made by the father in Court has been superseded in the modern law by *venia aetatis*,[16] which is granted by the Sovereign authority in the State after due inquiry.[17] The grant ends minority for all purposes, except that a power to alienate immovables is not conferred unless expressly included in the grant.[18]

Tacit emancipation in the modern sense[19] 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

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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 1923 (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.

13. Gr. 1.5.19; V. Leeuwen *Comm.* 1.6.7; cp. *Pathberiya* v. *Kachohamy* 24 N.L.R. at p. 492.

14. *Kent* v. *Salmond* 1910 T.S. at pp. 642-3. For some of the exceptional circumstances in which in S. Africa a married woman can bind herself by contract without her husband's authority, see *Pretorius* v. *Hack* 1925 T.P.D. at pp. 646-7.

15. Voet 4.4.9; Vd Keessel *Th.* 879 and *Dict.* ad Gr. 3.48.9; *Deerasekere* v. *Goonesekere* 1 A.C.R. at pp. 136-7.

16. Voet 1.7.11.

17. Vd Linden 1.4.3, n. 4; Decker ad V. Leeuwen 1.13.5; Vd Keessel *Th.* 107 and 110. In Ceylon the Governor as representing the Sovereign exercises the power of granting letters of *venia aetatis*; cp. section 4 of the Wills Ordinance No. 21 of 1844 (Leg. En., cap. 49). In the Orange Free State *venia aetatis* 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. *Padiya* 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. 211).

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, *Introd. to Roman-Dutch Law*, 3rd edn., 1931, pp. 415-6 and 5th edn., 1953, p. 39, and H. R. Hahlo in 1943 *S. African Law Journal* at pp. 298-9).

occupation.[20] 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[21] : 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.[22]

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, over or under twenty-one years of age, and we know nothing of the elaborate distinctions of Roman Law,[23] which recognised three stages of non-age, "infancy", "puberty" and "minority" '.[24] For although the Roman-Dutch Law knew nothing of the Roman distinction between *tutela* ending at puberty and curatorship ending at twenty-five,[25] the

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20. *Ochberg* v. *Ochberg's Est.* 1941 C.P.D. at pp. 36-7, *Ambaker* v. *African Meat Co.* 1927 C.P.D. at p. 327, *Ahmed* v. *Coovadia* 1944 T.P.D. at p. 366. For Ceylon see, e.g., *Welliappa 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 '.

21. *Dama* v. *Bera* 1910 T.S. at p. 929.

22. *Dama* v. *Bera* 1910 T.S. at p. 929, *Venter* v. *Burghersdorp Stores* 1915 C.P.D. at p. 255, *Pleat* v. *Van Staden* 1921 O.P.D. at pp. 96-7, cp. Vd Keessel *Dict.* ad Gr. 1.6.4, (dicta to the contrary in *Muttiah Chetty* v. *de Silva* 1 N.L.R. at p. 361 and *Welliappa Chetty* v. *Peris* 3 Balasingham at pp. 6 and 7 being, it is submitted, incorrect).

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. *Burghersdorp Stores* 1915 C.P.D. at p. 255). Thus, *Sinnethamby* 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 *Welliappa 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 *tutela impuberum* or to *cura minorum* (*Inst.* 1.13. pr.). The former ended with puberty which came to be fixed at 14 for males and 12 for females. The capacity of an *impubes*, 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 *pubertati 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.* 3.19.9 and 10). *Cura minorum* applied to young persons between the ages of 14 (or 12) and 25. (*Inst.* 1.23. pr.).

24. *Wellappu* v. *Mudalihami* 6 N.L.R. at p. 235 (cited without comment in *Nagalingam* v. *Thanabalasingham* 54 N.L.R. at p. 125 (P.C.), whether with approval or not it is difficult to say) ; cp. *Francisco* v. *Costa* 8 S.C.C. at p. 190.

25. Gr. 1.7.3; Schorer ad Gr. ibid.; Voet 27.10.1; Vd Keessel *Th.* 111. Scots Law still retains the distinction; see Gloag and Henderson, *Introd. to the Law of Scotland*, 5th edn., 1952, p. 606.

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 guardian[26] or the capacity to form the mental element required for liability in delict[27] ; the distinction between a minor above the age of puberty and one below that age is recognised where capacity to marry[28] or to make a will[29] 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 crime[30] or that a boy under twelve in Ceylon[31] or under fourteen in S. Africa[32] 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,

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26. *Babaihamy* v. *Marcinahamy* 11 N.L.R. at p. 234, *Nagalingam* v. *Thanabalasingham* 50 N.L.R. at pp. 98-9. Vd Keessel *Theses* 485 and de Villiers, C.J. in *Slabber's Trustee* v. *Neezer's Executor* 12 S.C. at p. 168 say that a minor can accept a donation if he is above *puberty;* but see the Ceylon cases cited in this note, and *Buttar* v. *Ault N.O.* 1950 (4) S.A.L.R. at p. 239.

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).

27. Gr. 3.32.19 and Vd Keessel *Dict.* ad Gr. ibid. ; cp. *Collinet* v. *Leslie* 17 C.T.R. 110.

28. A minor below the age of puberty (14 for males, 12 for females) could not marry (Voet 22.3.16), 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. 19 of 1907, Leg. En., cap. 95).

29. Gr. 2.15.3, 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, Johannesburg* 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. 231.

introduced for the latter's particular advantage '.[33] Many Continental systems of law regard the guardian as a 'statutory agent '[34] exercising 'representation as of law '[35] for the purpose of acting on the minor's behalf or of authorising his acts.[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[37] or by the Master of the Supreme Court,[38] or 'curators nominate' appointed by any person who gives or bequeaths property to a minor,[39] or curators or guardians 'assumed' (i.e persons appointed by curators nominate 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),[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.[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,[42] or a 'next friend' or 'guardian for the action' appointed to represent a minor specially in litigation.[43]

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33. Gr. 1.4.5 ; cp. Voet 26.1.1.

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., 1952, 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., 1952, pp. 52-3).

37. Administration of Estates Act of 1913, sec. 71.

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. 72, 74.

40. Ibid. sec. 77 (1), the appointment being subject to confirmation by the Master, ibid.

41. Van der Linden, *Judicieele Practijcq*, 1.8.3 ; 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.

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,[44] 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.[45]

We must now consider the meanings of the words ' void ' and ' voidable ', the undiscriminating 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 ',[46] ' the now familiar distinction between void and voidable was not distinctly or fully present to the minds of the older jurists '.[47] 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.[48]

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 '[49] so that it ' confers no legal rights on either party '.[50] 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.[51] But sometimes the same word is used, less commonly and correctly, to mean that a contract or transaction is invalid until ratified or

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44. Voet 26.8.1 *ad fin.*

45. *Perera* v. *Tissera* 35 N.L.R. at pp. 274 and 262.

46. *Breytenbach* v. *Frankel* 1913 A.D. at p. 397.

47. *Du Toit* v. *Lotriet* 1918 O.P.D. at p. 114 ; cp. *Fernando* v. *Fernando* 19 N.L.R. at p. 194.

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. 195.

49. Wessels, *Law of Contract in S. Africa*, section 639.

50. Wille, *Principles of S. African Law*, 3rd edition, 1949, p. 284. Cp. Anson, *Principles of the English Law of Contract*, 20th edition, 1952, p. 17 ; Jenks, *Digest of English Civil Law*, 4th edn. 1947, section 83 ; Lee, *The South African Law of Obligations*, 1950, section 119, and *An Introduction to Roman-Dutch Law*, 5th edn. 1946, p. 208.

51. Wessels, *Contract*, section 638; Wille, *Principles*, p. 285.

confirmed[52] ; 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 '.[53]

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[54] 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[55] of a contract ' devoid of any legal effect ' which ' confers no legal rights on either party ', because (as we shall see[56]), 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.[57] Nor can the contract of an unassisted minor be said to be voidable in the usual sense[54] of a contract prima facie valid and binding on both parties until set aside at the instance of one, because it is not normally[58] binding on the minor.[59]

52. See n. 8 at p. 82 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. 687; cp. *Duncan* v. *Dixon* (1890) 44 Ch. Div. at pp. 213-4 and *Oakes* v. *Turquand and Harding*, 1867 L.R. 2 H.L. at p. 375).

53. Anson, *Contract*, p. 17 ; Jenks, *Digest*, section 84 ; Lee, *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. 71 above at n. 51.

55. See p. 71 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.

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 definition 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.[60] 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 '[61]. 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[62] as a ' halting ' or ' limping ' contract.[63]

Such a contract does not fit neatly into either of the categories of void and voidable contract as usually defined by English usage.[64] 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 '

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60. ' Goudsmit (*Pandekten Systeem*, 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 '. (*Est. Phillips* v. *Commissioner for Inland Revenue* 1942 A.D. at p. 52. Cp. also *Potter* v. *Rand Townships Registrar* 1945 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* 1952 (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. 52-3, Simpson on *Infants*, 4th edn. p. 7, Chalmer's, *Sale of Goods*, 12th 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 be 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 '. (*Potter* v. *Rand Townships Registrar* 1945 A.D. at pp. 286-7, a case of donation between spouses).

64. Cp. *Fernando* v. *Fernando* 19 N.L.R. at p. 200.

and 'voidable'. 'When we say a juristic act is void or voidable, we pass judgement upon it from various points of view, basing our judgement 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 stigmatise 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'.[65]

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[66]; and on the other hand it has been said that if a contract is capable of ratification, it cannot be void.[67] Such statements seem to be due to a failure to realise that voidness is not of a single nature, as the usual definitions[68] of it imply.[69] For, while it is true that some kinds of void contract (such as illegal contracts[70]) cannot be ratified, others which are only relatively void (such as the contract of an unassisted minor[71] or a donation between spouses[72]) 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 'devoid 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.L.R. at p. 10).

66. *Gunasekera Hamini* v. *Don Baron* 5 N.L.R. at pp. 279-80, *Willenburg* v. *Willenburg* 25 S.C. at p. 913.

67. *Willenburg* v. *Willenburg* 3 Buch. A.C. at p. 424, *Fernando* v. *Fernando* 19 N.L.R. at pp. 195 and 196, argument of counsel in *Edelstein* v. *Edelstein N.O.* 1952 (3) S.A.L.R. 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 judgement 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.

72. *Est. Phillips* v. *Commissioner for Inland Revenue* 1942 A.D. at pp. 51-3.

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 '[73] with ' its own peculiar rules '.[74] 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[75] is not true of the contract of marriage.[76] 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. *Weatherley* v. *Weatherley* 1878 Kotze at p. 71.

74. *Selvaratnam* v. *Anandavelu* 42 N.L.R. at p. 492.

75. See page 80 below.

76. and *restitutio in integrum* cannot be obtained by a minor against marriage on the ground of minority alone, in the absence of other factors like fraud. See n. 28 at p. 90 below.

be set aside at the instance of the minor.[77] In Ceylon it has been suggested[78] that once a marriage has been registered under the Marriages (General) Ordinance No. 19 of 1907,[79] 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[80] 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.

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77. See *Willenburg* v. *Willenburg* 3 Buch. A.C. 409, *Manton* v. *Manton* 30 Nat.L.R. 387, *Romans* v. *Romans* 1950 (4) S.A.L.R. 727.

For 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. 191 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 *Willenburg* v. *Willenburg* (supra) and that expressed in *Van der Westhuizen* v. *Engelbrecht* (supra) ; see *Romans* v. *Romans* 1950 (4) S.A.L.R. at p. 738.

78. *Selvaratnam* v. *Anandavelu* 42 N.L.R. at pp. 493-4, per de Kretser, J.

79. Leg. Enact., cap. 95.

80. *Ratnammah* v. *Rasiah* 48 N.L.R. at p. 477, following the view expressed *obiter* by Wijeyewardene, J. in *Selvaratnam* v. *Anandavelu* 42 N.L.R. at p. 494.

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 *restitutio 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.

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,

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[13]; 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, *Cens. For.* 1.4.43.2; Grotius 3.48.10; *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 (*tutus*)' (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'.

(Voet 4.1.13 ; cp. also Voet 4.1.20 ; Van Leeuwen, *Comm.* 4.42.3 note and Groenewegen, *De Leg. Abrog. 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 (26.8.9) 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.* 41.2.13 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 *condictio 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 abundanti cautela* even by an application to Court. See n. 2 above and n. 6 below.

5. *Baddeley* v. *Clarke* 1923 N.P.D. 306, *Rhode* v. *Minister of Defence* 1943 C.P.D. at pp. 44-5.

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. 88 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 nn. 8-11 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. 98-9 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. *Willenburg* v. *Willenburg* 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 immovables and p. 103 for movables), 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. 99 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.* 1952 (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. Cp. Goudsmit, *Pandekten Systeem* (Gould's transl. p. 186), cited in *Potter* v. *Rand Townships Registrar* 1945 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. 195-6) 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

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. (*Fouche* v. *Battenhausen and Co.* 1939 C.P.D. at p. 233).

11. Voet 4.4.44 and 26.8.4.

12. Gr. 3.30.3, *Edelstein* v. *Edelstein N.O.* 1952 (3) S.A.L.R. at p. 12. The liability arises out of the contract but is not itself contractual.

13. See *Tanne* v. *Fogitt* 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* v. *Divine Hall and Co.* 8 S.C. 16, *Queen* v. *Koning* 17 S.C. 541, *Silberman* v. *Hodgkinson* 1927 T.P.D. 502 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 (*Tanne* v. *Fogitt* (supra) at pp. 48-9, *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 other is the minor's father with whom the minor is living (*Vellasamy Pulle* v. *Peries* 3 Balasingham at p. 4, *Ramen 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 'necessaries' (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-contract, it would seem that he is not bound to pay the contractual price of 'necessaries' supplied to him but only what they are reasonably worth.* For the

*In English Law also a minor's liability for 'necessaries' supplied to him is quasi-contractual, and does not extend beyond their reasonable value. *Nash* v. *Inman* (1908) 2K.B. at pp. 8-9 ; and cp. section 3 of the Ceylon Sale of Goods Ordinance No. 11 of 1896, Leg. En., cap. 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 (Gr. 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).

14. *Pleat* v. *Van Staden* 1921 O.P.D. 91 ; cp. *Vogel and Co.* v. *Greentley* (1903) 24 Natal L.R. 252.

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 as 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. 50 at p. 100 below) ; and Voet 4.4.43 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 cautela* (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.

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*[16]) entered into by a minor with the assistance[17] of a guardian or by a guardian on behalf of a minor is prima facie valid and binding on the minor[18] and on the other party to the contract. But since the minor may repudiate the contract[19] during or after minority[20] by claiming[21] *restitutio in integrum* from a Court on the ground that the contract is prejudicial to him, the contract may be described as voidable.[22]

***Restitutio in integrum* is an extraordinary remedy[23] granted to a minor[24], within three years of his attaining majority[25], on strict proof of appreciable prejudice suffered by reason of youth[26], where the minor has no other ordinary and equally effective remedy open to him[27]. By restitution, (which is not restricted to contracts but applies inter alia[28] also to alienations in pursuance of contracts[29], which is available to the minor's heirs[30], and which lies against all persons who are the cause of the damage and in some cases[31] 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[32]. Restitution will not be granted to a minor where on coming of age he has ratified the contract[33] either expressly or impliedly[34], or where the other contracting party has been misled by the minor expressly[35] or impliedly[36] 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 (Voet 26.8.1 ; cp. n. 10 at p. 83 above). But the guardian's mind must deliberately be brought to bear on the subject and an assent 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 (*Baddeley* v. *Clarke* 1923 N.P.D. 306, *De Beer* v. *Est. De Beer* 1916 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; *Skead* 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 *Silva* v. *Mohamadu* 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 4.1.24 and cp. Van der Keessel *Dict.* ad Gr. 3.1.30 and *Moolman* 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. 105).

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. *Perrins* 14 Cape L.J. 295, *Government Agent, Southern Province* v. *Karolis* 2 N.L.R. 72, *Idroos Sathuk* v. *Sitthie Leyaudeen* 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. *Neezer's Executor* 12 S.C. at pp. 168-9, *Buttar* v. *Ault N.O.* 1950 (4) S.A.L.R. at p. 239, *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* 8 S.C.C. at p. 192 and *Lewishamy* v. *de Silva* 3 Bal. at p. 46 ; cp. *Bindua* v. *Untty* 13 N.L.R. at p. 260, 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 void 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 mandatary or can ratify an acceptance made on his behalf but without his prior authority (Voet 39.5.12 and 13 *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 mandatary 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 donor does not disqualify him from accepting the gift on behalf of the minor (*Slabber's Trustee* v. *Neezer'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.

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. Alien.* 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 Keessel 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. 3.2.3 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 Keessel 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. *Karuwanayake* 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 18.1.9).

The reason for the rule that ' the guardian cannot give authority in a matter which affects his own interest ' (*Inst.* 1.21.3) 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 ' (*Osry* v. *Hirsh Loubser 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. *Lotriet* 1918 O.P.D. at pp. 106-8, 111-12, 113 *ad init.*, 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. *Bouwer* 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 ' (*Osry* v. *Hirsh Loubser 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).

sent is unreasonably withdrawn or withheld, the minor may by applying to Court compel the giving of such consent (*Magano* 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, *Fouche* v. *Battenhausen and Co.* 1939 C.P.D. at p. 233, cp. *De Wet* v. *Bouwer* 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 *Abeyasekera* 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), *Silindu* v. *Akura* 10 N.L.R. 193, *Silva* v. *Mohamadu* 19 N.L.R. at p. 432, sec. 3 (2) (c) (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 Keessel *Thes.* 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 Leeuwen, *Cens. For.* 1.4.43.9 *ad fin.*, Voet 4.1.20, cp. *Silindu* v. *Akura* 10 N.L.R. at p. 195).

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. 258). 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 (*Skead* v. *Colonial Banking and Trust Co., Ltd.* 1924 T.P.D. at p. 501, citing *Digest* 4.4.11.4 ; cp. Voet 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, *Breytenbach* v. *Frankel* 1913 A.D. 390 and p. 95 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 4.4.31-2 ; cp. *Majeeda* 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 4.4.45) 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 ' (now three) ' 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 damnified while still a minor and who reaching majority died within the four ' (now three) ' 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 ' (now three) ' 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 ' (now three) ' 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 fin.*), 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

property for restoration of it and he cannot show any special reason (e.g., sentimental value, Voet 4.4.15 *ad fin.*) 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. 3.48.12).

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

33. Voet 4.4.44, Van Leeuwen, *Cens. For.* 1.4.43.8, *Stuttaford and Co.* v. *Oberholzer* 1921 C.P.D. 855 ; with knowledge of the facts and circumstances of the contract entitling him to relief (Van Leeuwen *op. cit.* 1.4.43.9, *De Beer* v. *Est. De Beer* 1916 C.P.D. at p. 128, *Bastian* v. *Andris* 2 S.C.R. at p. 119). After majority he will be presumed to know his legal rights (*de Villiers* v. *Liebenberg* 17 C.T.R. at p. 869).

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 *restitutio in integrum.*

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, *Stuttaford 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 (*Skead* 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 *restitutio 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 27.9.14, 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 80 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 '.

during which repudiation was permitted (*Wolff* v. *Solomon's Trustee* 12 S.C. at p. 49 and *Skead* v. *Colonial Banking and Trust Co., Ltd.* 1924 T.P.D. at p. 500). 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.* 1.4.43.8, 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.*, 1.1.6.88 and n. 48 at p. 99 below).

35. Voet 4.4.43, *Shorter 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. *Van 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. 91 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 4.4.50, 51 ; V. Leeuwen, *Cens. 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. *Muttiah Chetty* v. *de Silva* 1 N.L.R. at p. 362 and *Ratwatte* v. *Hevawitharna* 3 Balasingham at pp. 27-8 and 30). Where tacit emancipation 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 Proh. Rer. Alien.*, 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, *Manuel Naide* v. *Adrian Hamy* 12 N.L.R. at p. 262, *Gunesekera Hamini* v. *Don Baron* 5 N.L.R. at p. 280), a sale (Sande *op. cit.* 1.1.3.17, *Anidris Appu* v. *Abanchi Appu* 3 Browne at p. 13, *Ratwatte* v. *Hevawitharna* 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* 1913 A.D. at p. 402, *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 divesting of the thing pawned takes place' (Sande *op. cit.* 1.1.3.49).

38. 'and other things which are reckoned as immovables' (Van der Keessel, *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

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 Keessel, *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[40] has been executed by the alienation of immovable property of the minor without the sanction of a Court[41], the alienation is prima facie void[42] as against the minor[43]; and the guardian before majority[44] or the minor during[45] or after minority is entitled to vindicate the property[46]. 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[47], as the alienation is capable of being made binding on the minor by being ratified either expressly or impliedly[48] by him on his attaining majority[49], 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[50], [51].

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[52], yet since the minor may be held to have impliedly ratified the prima facie void alienation by allowing a certain period of time[53] to elapse after majority without asserting his rights[54], it is safer in all cases, whether the alienation is prima facie void or prima facie valid[55], to make an application to a Court for relief from the consequences of the alienation[56].

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. 1 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. 85 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. *Bouwer* 1919 C.P.D. at pp. 46-7 and *Bergtheil* 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 alienee 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 iure 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 *op. 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 *op. 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.

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 Lebbe* v. *Martinus* 6 N.L.R. 364 and *Girigorishamy* v. *Lebbe Marikar* 30 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, *Gunesekera Hamini* v. *Don 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 proper remedy would be a *vindicatio** where a minor's immovable property has been alienated without the sanction of a Court (Sande *op. cit.* 1.1.6.80 and Groenewegen, *De Leg. Abrog.* ad *Code* 2.41.13) or where a minor's movable property has been alienated without a guardian's assistance (Voet 4.4.21 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 *condictio 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 bag).

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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. 95 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 *Utrechtsche Consultatien* cons. no. 122, n. 8, vol. 1 of the 1676 edition at p. 447, says) 'impertinent' (i.e. irrelevant) to the case of a prima facie void alienation, 'because *restitutio 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).

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 limine* 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, *Introd. to Roman-Dutch Law*, 5th edn., 1953, pp. 143-4).

In Ceylon, in the case of land the period is ten years (*Haturusinghe* 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. *Mohamadu* 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 cp. n. 8 at p. 82 above).

*Thus, in *Silva* v. *Mohamadu* 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.

But it must be noticed that even after ratification the transaction may be rescinded on the ground of *laesio enormis* (Voet 27.9.14, Sande, *D.P.R.A.* 1.1.6.91), where, as in Ceylon, *laesio enormis* has not been abolished by statute.

50. Voet 27.9.13 *ad fin.* (referring to Voet 4.4.43), Sande, *Dec. Fris.* 2.9.16, *Ahamadu Lebbe* v. *Amina Umma* 29 N.L.R. 449, *Wijesooria* v. *Ibrahimsa* 13 N.L.R. 195. Cp. p. 80 at nn. 14-15 and p. 93 at nn. 35-6 above.

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 movables), 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.

52. *Breytenbach* v. *Frankel* 1913 A.D. at p. 400, *Haturusinghe* v. *Ukku Amma* 45 N.L.R. at pp. 502, 504.

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. *Mohamadu* 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*

Hamy 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, *Breytenbach* 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. 452, *James* v. *Solomon* 3 Times at pp. 125-6, *Velupillai* v. *Elanis* 7 C.L. Rec. at p. 165, *Siriwardena* v. *Loku Banda* 1 S.C.R. at p. 220, *Kanapathipillai Thangaretnam* v. *Aliarlevve Amarulevve* 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 alienee.

In *Andris Appu* v. *Abanchi Appu* 3 Browne 12 and *Saibo* v. *Perera* 4 Balasingham 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. 99 above); and in *Haturusinghe* v. *Ukku 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 transferor 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 alienee, 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 (*Breytenbach* v. *Frankel* 1913 A.D. at pp. 401-2).

See n. 46 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[57] and on the alienee. The minor may, however, obtain *restitutio in integrum* from a Court within three years of attaining majority[58], if he can show that he has been prejudiced by the alienation and that the prejudice is considerable.[59]

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 graviore laesione constet*' (Voet 4.4.15); *si graviter laesus sit* (Sande, *D.P.R.A.* 1.1.6.77 and cp. *In re Nooitgedacht* 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. 62*a* 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[60]) entered into by a guardian for a minor or by a minor with[61] 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[62] and is binding on the minor and on the alienee. The minor may, however, obtain *restitutio in integrum* from a Court within three years of attaining majority[58], if he can show that he has been prejudiced by the alienation.[62a]

60. As we have seen 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

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 remuneratoriae* 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. 1.8.5 and 2.48.4; 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[63], has been executed by the alienation of movable property of the minor, the alienation is prima facie void as against the minor[64]; and the guardian before majority or the minor during or after minority is entitled to vindicate the property[65]. 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[66], 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[67].

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 *condictio 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[68], and he need not also prove prejudice[69]. The burden of proving that the minor has attained majority[70], or that he has been benefited by the contract[71], or that he expressly or impliedly misrepresented his age[72], or that he expressly or impliedly ratified the contract[73], 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[68] as well as prejudice[74]—except where the contract is by its nature prejudicial to the minor (e.g., a donation of his property[75]), 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[76]. The burden of proving that the minor has attained majority[70], or that he expressly or impliedly misrepresented his age[77], or that he expressly or impliedly ratified the contract[78], 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.[79]

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

into which he has entered without the assistance of a guardian (Gloag, *Law of Contract*, 2nd edn., 1929, p. 82).

70. As by reaching the age of 21 (see p. 66 above) or by having obtained letters of *venia aetatis* (see p. 67 above) or by marriage (see p. 67 above) or by tacit emancipation (*Venter* v. *de Burghersdorp Stores* 1915 C.P.D. at p. 255, *Pleat* v. *Van Staden* 1921 O.P.D. at p. 97, *Ochberg* v. *Ochberg's Estate* 1941 C.P.D. at p. 36).

71. *Du Toit* v. *Lotriet* 1918 O.P.D. at p. 115, *Nel* v. *Divine Hall and Co.* 8 S.C. at p. 18 (which speak of the burden of proving that the contract was for the minor's benefit ; but since *Tanne* v. *Fogitt* 1938 T.P.D. 43 and *Edelstein* v. *Edelstein N.O.* 1952 (3) S.A.L.R. 1 what has to be proved is that the minor has benefited by the contract and the extent of such benefit, and not that the contract is for the minor's benefit; cp. n. 13 at p. 83 above).

It must be noted that ' in regard to minors enrichment is construed more strictly than in other cases ', i.e., persons of full capacity (Gr. 3.30.3) : ' because the condition of minors is such that it is not to be presumed that they would manage their own affairs carefully, and hence the presumption is that they had not spent . . . on what was serviceable to them ' (Voet 4.4.36 *ad fin.*). Thus, ' enrichment is not held to have taken place if the minor has lost what he received or spent it in some unusual way, but the case is different if the minor has spent it through necessity or if it would in any event have had to come out of his estate' (Gr. ibid. ; cp. n. 13 at p. 83 above). ' In the case of persons of full understanding and capacity, whatever is enjoyed by them is held to be enrichment ' (Gr. ibid.). This strict construction of what constitutes enrichment in the case of minors also prevails in French Law (see F. P. Walton, *The Egyptian Law of Obligations*, vol. 1, 2nd edn., 1923, pp. 96-7) and in Scots Law (Gloag, *Law of Contract*, 2nd edn., 1929, pp. 85 and 80).

72. See page 80 at nn. 14 and 15 above, and cp. Voet 4.4.51 as regards tacit representations.

73. See page 80 at nn. 8 and 9 above.

74. Voet 4.4.13, *Wood* v. *Davies* 1934 C.P.D. at p. 258.

75. or where the minor binds himself as surety or gives or even receives a loan of money (Voet 4.4.13).

76. Voet 4.4.13. It is submitted that *Christie* v. *Mohamed Bhai* 53 N.L.R. 526 (in which it was held that ' in the case of a loan ' to a minor ' the onus of proof is on the minor to show that he has received no benefit ') was wrongly decided ; see 1952 *University of Ceylon Review*, pp. 317 et seq.

77. See p. 85 at nn. 35 and 36 above.

78. See p. 85 at nn. 33 and 34 above.

79. 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. 95 for immovables and p. 103 for movables) the minor generally need prove only minority. See n. 46 at p. 98 above; and 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 the alienation of immovables, and for the burden of proof of fraud in obtaining a Court's sanction.

In *Siman Naide* v. *Aslin Nona* 46 N.L.R. at p. 341 it was suggested that in the case of contracts executed by alienation of a minor's immovable property special principles regarding the burden of proof apply; and it was said that where the alienation of a minor's immovable property is void for want of a Court's sanction the burden is on the alienee to prove that the minor was benefited by the alienation. In *Kanapathipillai Thangaretnam* v. *Aliarlebbe Amarulevve* 41 C.L.W. at p. 52 (where the alienation was in fact void for want of a Court's sanction —cp. n. 56 first paragraph at p. 101 above—but the alienation was treated as being voidable), the view was expressed that where the alienation of a minor's immovable property is voidable the burden was on the alienee to prove benefit. It is respectfully submitted that there is no warrant for any such hybrid rules as those suggested in the first-mentioned case and applied in these two cases. Where the contract has been executed by alienation of a minor's property, *movable or immovable*, the analogy of principles similar to those which apply to a minor's contract which has not been executed by alienation of his property should apply.

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T. NADARAJA

The Brodie Papers on Sinhalese Folk-Religion

Introduction

IN his celebrated study of Sinhalese folk-religion, Otaker Pertold emphasised the importance of utilizing extant folk-traditions ' which may disappear wholly or partly during the next few years as the Sinhalese become more and more Europeanized '.[1] Indeed, the only instance of *yakkun-natīma* he records is a ceremony he witnessed in 1910 in a village near Kurunāgala. It was performed to cure a well-to-do Sinhalese after all other attempts, ' including the treatment of a English doctor ', had failed. The dress of the *kapurāla* on that occasion—breeches of coarse blue serge, and a well-patched coat of the same material, with large navy buttons—is indicative of the process of Westernization which Pertold feared would lead to the atrophy of age-old traditions. Pertold realized that accounts of Sinhalese folk-religion in by-gone days were important for the sociologist, and he listed the various accounts known to him. The Brodie Papers were, however, unpublished, and are reproduced here for the first time. Besides providing an account of the folk-religion as practised by the villagers of the North-Western Province over a hundred years ago, they represent an early essay in the sociology of religion.

Brodie's notes were written at a time when missionary zeal on the part of Christians as well as Buddhists, hampered the objective study of folk-religion. Many nineteenth century Christian missionaries were obsessed with the Mediaeval dichotomy of mankind into Christian and Heathen. With Knox, they dismissed the popular religion of the Sinhalese as idolatry. ' The heathen, in his blindness, bows down to wood and stone '. It is true that missionaries like Bishop Copleston and the Reverends Hardy and Gogerly did make painstaking studies of Buddhism, but the Sinhalese folk-religion was almost universally condemned, by Christian and Buddhist churchmen alike, as the most contemptible aspect of paganism. Thus John Callaway refers to a composition by a Buddhist of Matara describing the practices of *Kapuvas*, which 'affords a gratifying display of zeal on the part of a heathen against demon-worship and in a striking manner exposes the impositions of a class of men of boundless influence '.[2]

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1. Pertold: The Ceremonial Dances of the Sinhalese. An Inquiry into the Sinhalese Folk-religion (*Archiv Orientalni*, Prague, II, 1930).

2. A translation of *The Practices of a Capua* is appended to Callaway's edition of *Yakun-Nattanawa* (London, 185). For the Christian attitude cf. Rev. R. S. Hardy: The British Government and the Idolatry of Ceylon (London, 1841), and Rev. B. Boake: A Brief Account of the Origin and Nature of the Connection Between the British Government and the Idolatrous System of Religion Prevalent in the Island of Ceylon...(1854).

But besides the denunciations of the churchmen, another current of European thought—the rationalism of the eighteenth century—laid the foundations of the new science of anthropology. The new science had to face the charge of irreligion, and although anthropology has nothing to do with truth or falsity in religion, the early rationalist bias fostered the comparative study of religion.[3] The mental climate of the Age of Reason is typified in the spirit of critical detachment and curiosity which characterise the Brodie Papers on Sinhalese folk-religion.

Brodie suggests that the 'darker superstitions' originate in the natural and social environment of folk-communities. The importance of the natural environment is implicit in Knox's remark that the voice of the devil was heard only in the forests of Kande Uda, never in the lowlands:

'This for certain I can affirm, That oftentimes the Devil doth cry with an audible Voice in the Night; 'tis very shrill almost like the barking of a Dog. This I have heard myself; but never heard that he did anybody any harm. Only this Observation the Inhabitants of the Land have made of this Voice, and I have made it also, that either just before or very suddenly after this Voice, the King always cuts off People. To believe that this is the Voice of the Devil these reasons urge, because there is no Creature known to the Inhabitants, that cry like it, and because it will on a sudden depart from one place, and make a noise in another, quicker than any fowl could fly: and because the very Dogs will tremble and shake when they hear it; and 'tis so accounted by all the People.

'. . . When the Voice is near to a Chingulaye's house, he will curse the Devil, calling him Geremoi goulammah, [geriya ulamah, i.e., beef-eating Ghoul] Beef-eating Slave be gone, be damned, cut his Nose off, beat him a pieces. And such like words of Railery, and this they will speak aloud with noise, and passion, and threatening. This Language I have heard them bestow upon the Voice; and the Voice upon this always ceaseth for a while, and seems to depart, being heard at a greater distance'.[4]

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3. 'Thus the Christian religion has no advantage over the other superstitions with which the universe is infected' (D'Holbach: *Christianism Devoile*, 1761 in K. Urwin: *A Century For Freedom. A Survey of the French "Philosophers"*, London, 1946, p. 73). The French *Philosophers* shared Voltaire's view that belief in gods was born of limited experience and ignorance.

4. Knox, p. 124. Similarly J. Haafner: *Travels on Foot through the Island of Ceylon* (English Ed. 1821) describes a shrill and horrible yell, 'like the barking of dogs', piercing, sharp, and uncommon, which seemed to approach rapidly, continue for several minutes, and retreat with equal swiftness. The Sinhalese attributed it to evil spirits, the vulgar Europeans called them cries of wood-devils. 'The philosophical reader will, however, ascribe them to natural causes, at present untraced'. cp. also J. Campbell: *Excursions, Adventures, and Field Sports in Ceylon*, 1843, I, 40: 'I was certainly much surprised at the extraordinary dismal, or melancholy cry I heard, seemingly about three or four hundred yards off; and I confess I have not the most distant idea by what animal or bird it was uttered'.

The spirits which infest the mountains, woods and streams could thus be threatened and subjugated, or propitiated and cajoled into docility. At times words of abuse are supposed to be effective as a charm to ward off the evil influence of spirits,[5] but at other times more elaborate ceremonies are necessary, and the *kattadiya* is called in. As Knox observes, the spirits are local, and each district had its peculiar spirits ' under whose subjection the People do acknowledge themselves to be '.

The problem of the existence or otherwise of spirits, perennially debated by metaphysicians, is outside the scope of sociological inquiry. The sociologist is concerned, rather, with the belief in spirits, the frame of mind which prompts such belief, and its effect on human activity. As Sir James Frazer observed in his monumental codex of magic and religion, it requires a conscious effort of our imagination to realise the psychology of peoples whose lives are dominated by belief in the omnipresence of spirits. For we live in an age in which the magic wand of science has dispelled the army of spirits which haunted our ancestors.[6] We have depersonalised these spirits and regard them as abstract ' forces of nature ', or ' natural phenomena '. Whereas the Sinhalese villager, terrified and bewildered by certain inexplicable sounds, attributes them to the Devil, we remain unperturbed, and are convinced that they have a ' natural ' cause.

Yet every age has to contend with an uncharted area of human experience. Even in our scientific age the Churches pray for rain to end a prolonged drought, or for strength to triumph in battle. Among other peoples, certain activities which are now regarded as matters of science or technology, were largely questions of religion, as in the case of Agriculture in Ancient Greece and in Mediaeval Ceylon.[7] It is not that the Greeks or the Sinhalese were totally ignorant of agricultural techniques. The ground had to be cleared, ploughed and irrigated, and if wild beasts destroyed the fences, the remedy lay neither in prayer nor in magic, but in labour guided by rational techniques. But in spite of all forethought and calculation, there remained the uncharted regions of experience, the unexpected drought, flood, or epidemic which, as Brodie says, ' cannot be explained by the ordinary rules which guide the affairs of this world '.

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5. Such abusive epithets, sometimes bordering on the obscene, were commonly employed in Ancient Rome as a religious antidote against the Evil One. cf. for instance certain verses of Catullus. ' In such poems the technique of *Vituperatio*, carried on from the coarse flyting and burlesquing of peasant festivals, was to paint as ferocious a caricature on a single trait as possible, and was related to the fear of the Evil Eye. The enemy becomes the evil bogey whom the attack demolishes, and life is saved ' (Jack Lindsay's Ed. of Catullus's Poems. London, 1948, p. 66, commenting on poems of vituperation).

6. Frazer : *The Golden Bough. A Study in Magic and Religion* (London, 1913) *Part* 6.

7. cf. H. C. P. Bell's Accounts of Sinhalese Paddy Cultivation Ceremonies. (*J.R.A.S. C.B.*, VIII/26, 1883, XI/39, 1889).

In a community haunted by the constant insecurity of life, and the fearful proximity of death, the will to live, which we suppose to be ' natural ' or biological (' instinctive '), is in point of fact largely ' artificial ' or sociological, being buttressed by a complex of life-giving cults which epitomise the collective desires of the community. And these desires centre around the fundamental concept of fertility, in the widest sense. The earth, as well as the tribe, must be fruitful and multiply. As such, the folk-religion is permeated with a vitality which has led to the observation that primitive religion is *danced*. As we would expect, ' a " lascivious " spirit pervades certain of these fertility dances '.[8] According to Knox, the religious game *An-keliya*, performed in honour of the goddess Pattini, culminated in rejoicing by the winning team ' exprest by Dancing and Singing, and uttering such sordid beastly Expressions, together with Postures of their Bodies, as I omit to write them, as being their shame in acting, and would be mine in rehearsing. For he is at that time most renowned that behaves himself most shamelessly and beast-like '.[9] Nevertheless, as Gilbert Murray says of the ' beastly devices ' of primitive Greek religion, although there may be some repulsiveness in these primeval life-giving cults, they also have an element of fascination.[10]

Brodie suggests that Buddhism lent form to Sinhalese folk-religion. For it is a peculiar feature of Buddhism that it did not wipe away the primary religions of the countries in which it is revered. Philosophically the message of the Enlightened One established a religious ideal and an ethic derived from His wisdom and personal experience. But from another point of view, Buddhism, as a result of its lofty tolerance, became ' an objective centre of crystallization for a variety of sociological developments '.[11] In its original form, Buddhism recognised only the *bhikkus* as true members of its religious society, and laymen were left with their ancestral folk-religions, being subject only to the Buddhist moral code.[12] The primeval pre-Buddhist cults did subsequently undergo change, but they were never completely obliterated. Relics of former practices outlived the original system and survived in the practices of ordinary life. Upham aptly compares these survivals to planks from a shipwreck—they retain some slight token or mark whereby the original fabric may be conjectured.[13]

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8. L. Spence : *Myth and Ritual in Dance, Game, and Rhyme.* (London 1947) p. 133.

9. Knox, p. 157. The game *An-keliya* is usually performed to avert an outbreak of disease, e.g. a small-pox epidemic. It consists of a tug-of-war of two crooked sticks which are interlocked. (cf. Le Mesurier : An-keliya, *J.R.A.S. C.B.*, VIII/29, 1884, and Raghavan: *The Pattini Cult as a Socio-Religious Institution* (Spolia Zeylanica 26/II. 1951).

10. Murray : *Five Stages of Greek Religion* (London, 1935).

11. J. Wach : *Sociology of Religion* (London, 1947).

12. cf. Pertold : The Pilli Charm. A Study in Sinhalese Magic (*J. Anthrop. Soc., Bombay*, XII/5, 1922).

13. Upham : *History and Doctrine of Buddhism* (London, 1829).

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It is sometimes difficult to conjecture the nature of the original fabric, since elements of diverse cults are inextricably fused. It may also happen that the uninitiated observer may fail to recognise a particular form of worship in its proper context. Brodie himself confuses the *dēvāle* worship with the so-called demon dancing.

The *dēvāles*, properly so called, ' connected with the Buddhism of the Island, are temples consecrated to certain gods of the Hindu pantheon, whose character and attributes, as adopted into the Ceylon Buddhist cult, entirely alter their nature and the worship paid to them. With the Hindus these gods are immortal, revengeful, licentious ; here they are but mortal, well-behaved, guardian deities, and even candidates for Buddhahood. Shrines are erected to them, and offerings made solely to obtain temporary benefits—not by religious supplication to merit reward in a future world. This essential difference between the Hindu and Buddhist notion of the gods, common in name to both forms of worship, is rarely understood '.[14] Buddhism, already founded on Hinduism, subsequently incorporated some of the Hindu gods which were worshipped in the *dēvāles*.[15] But the *dēvāle* deities like Pattini, acquire a new character, since the Buddhist ethic left a strong imprint on post-Buddhist and pre-Buddhist cults.[16]

Whereas the *dēvāles* came to be an accepted form of Buddhistic worship in Ceylon,[17] and like the *vihāres* enjoyed extensive lands for their support, the pre-Buddhist demon-worship was never an integral part of Buddhism, although it may have been tolerated by the clergy. There are numerous royal edicts which forbade the clergy indulging in the ' despised sciences ' of magic, such as exorcising devils, making sacrifices, divining by means of omens, and preparing charms for the detection of thieves, as well as the improper practice of astrology.[18] These injunctions indicate that the priests did at times have a hand in the ' despised sciences ' and from time to time the *Sangha* had to be purged of heresy.

Dēvāle worship must then be distinguished from demon-worship. The former institutions are consecrated to a limited number of Hindu gods, namely Vishnu (' a Buddhist guardian angel, a candidate for Buddhahood and tutelary deity of Lanka '), Nata (the future Maitri Buddha), Kataragama, Pattini (the

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14. H. C. P. Bell : *Report on the Kegalle District* (Archaeological Survey, 1892).

15. cf. A. K. Coomaraswamy : *Mediaeval Sinhalese Art* (Broad Campden, 1908) p. 45.

16. cf. L. Meerwarth-Levina : The Hindu Goddess Pattini in the Buddhist Popular Beliefs of Ceylon (*Ceylon Antiquary*, I, 1916).

17. ' There is a small *dēvala* in the courtyard of nearly every Buddhist *vihāra* in Ceylon, and, in some places, they are both found under the same roof, as, for example, at Lankatilaka '. (C. H. S. Ward : Buddhism, Vol. I : Hinayana, London, 1947, p. 126.

18. cf. කතිකාවත්සඟරා (1922 ed.).

goddess of chastity), and Saman who with Vishnu and Kataragama accepted the general trust of guarding Lanka for Buddha.[19] In a few cases there are *dēvāles* consecrated to other powerful deities. Thus the Galakäpu *dēvāle* at Alutnuvara, originally dedicated to Vishnu, was latterly consecrated to Vahala Bandara Deviyo.[20] The priest of the *dēvāle* gods, designated *kapurāla* or *kapua*, is a man of good caste. He has no special dress. The kapurāla does not usually get into a state of trance. Furthermore, he is not primarily an exorciser. But he can invoke the gods he represents to exorcise demons, by asking the demon to quit the person possessed. The devil speaks through the person possessed, and acquiesces. But if he is stubborn the *kapurāla* beats the possessed individual with a cane, and the demon is eventually exorcised.[21] More commonly people visit the *dēvāle* for temporary favours from the gods—relief from illness, success in lawsuits, and so on.

The demons must be distinguished from the imported Hindu gods. The former were the pre-Buddhist *yaksas* who sank to the status of demi-gods living on the mercy of the foreign gods, and even having to get permission (*varan*) from the latter to injure men and extort offerings.[22] The *yaksas* were probably spirits of the dead worshipped in pre-Aryan times, and are the counterparts of the more recent *Bandāras*. This ancestor worship springs from the common belief among villagers that the dead are re-born as *gevala-yakās* (house-demons) who are malevolent or benevolent.[23] They are responsible for sickness and other misfortunes. The priests of these spirits, named *yakdessa* or *kattadiyas* do not generally officiate regularly at temples, although Knox states that they were attached to *Kōvil* at which they dedicated a red cock when their clients were ill. The *kattadiyas* are really professional itinerant exorcisers, who are sometimes assisted by drummers (*beravayo*). They belong to the sacrificial castes.[24]

The ceremony performed by the *kattadiyas* is as follows : a *maduva* or ceremonial shed is prepared in a clean place, and is well lit (the ceremony is always performed at night). The drummers beat various rhythms and the exorciser,

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19. Bell, op. cit.

20. ibid.

21. The *kapurāla* of Alutnuvara devale recently explained that it was really the demon who was thus chastised, and the possessed individual did not feel that he was being beaten.

22. Pertold : The Ceremonial Dances of the Sinhalese.

23. cf. Bhikku Walpola Rahula ; *Some Aspects of the Early History of Buddhism in Ceylon* (Mss. University of Ceylon, 1950).

24. The Beravayo, washermen, and other sacrificial castes are connected with the inauspicious ritual of death, disease, and decay, e.g. the *Kotahalu* ceremonies Ethnically these castes are perhaps pre-Aryan (cf. R. Pieris : Caste, Ethos, and Social Equilibrium. *Social Forces*, 30/iv, 1952).

wearing a mask, having invoked the demon, begins to dance. Where it is financially possible he is assisted by other dancers. The music gradually becomes louder and wilder, and the gyrations of the dancers become more rapid until the exorciser is possessed by the demon, and falls down in a swoon, thus freeing the sick man from the demon's influence. The whole performance is punctuated by singing ballads relating to the demon in question.[25]

It is evident that in Brodie's account, the *dēvāle* ceremonies are hopelessly confused with the *yakun-natīma*. This is not due to confusion in practice, but to misinterpretation of two cults by an uninitiated observer. It is interesting, however, to note that Brodie clearly distinguishes the *bali* or planetary ceremonies, since in more recent times the *yakun-natīma* and the *bali* ceremony are frequently confused in practice ' because the exorcists know very little of the ancient lore on account of the discontinuance of the tradition ' (Pertold).

RALPH PIERIS

THE BRODIE PAPERS[26]

I

On the Darker Superstitions of the Sinhalese as Prevalent in the North-Western Province

To depict the features of superstition cannot be deemed a trivial or unworthy task, when one reflects upon the many and interesting deductions which may be arrived at by a careful study of the subject, and this remark applies with special force to those forms of it which exercise a constant influence on the everyday life of a people. Such a system is the *dēvāle* oracle which forms the main subject of the following observations.

By some it has been maintained that a belief in the existence of demons or malevolent spirits and in the propriety and utility of offering to them marks of respect or adoration, was a dark superstition peculiar to the East and to the islands of the Southern seas. A very few words will be sufficient to show that such an opinion is quite untenable. To pass over the celebrated ' witchcraft cases '

25. Pertold, op. cit.

26. From a Mss. volume of papers by Alexander Oswald Brodie in the Colombo Museum Library. This volume is numbered from page 373, and is apparently the second of a set of two or more volumes. The papers relate to the period 1838-1850. Besides this odd volume, Brodie's unpublished manuscripts have disappeared without a trace; his published work includes several articles in the *Journal of the Royal Asiatic Society* (Ceylon Branch) between 1847 and 1857. For a biographical sketch of an interesting personality, cf. J. R. Toussaint: *Annals of the Ceylon Civil Service* (Colombo, 1935) pp. 128-131. In editing these Papers, which are largely in note form in the Mss., the paragraphing has been altered, and the transliteration modernised. Words in square brackets have been inserted by the editor.

which at no remote date stained the British calendar, it is only necessary to call to remembrance that even at the present day the sturdy raftsmen of the Rhine shudder as the Lurelei song is borne on the gale ; that the Scottish peasant talks with timid civility of the ' good people ' and reverently removes his bonnet as the groups of invisible beings are swept past him on the eddies of the autumn breeze ; that the Kelpie still appears by the side of the lonely mountain loch to lure children to destruction ; and that the Saxon miner still sees in deeply subterranean galleries the glimmering lamp of the industrious Kohold, and shuns to disturb the irascible sprite. The virtues of a horse-shoe must also be familiar to all. These and a thousand other instances which might have been adduced prove that the belief in malicious spirits is universal, and not less so the belief that means can and ought to be taken to avert this displeasure—the removal of the cap is an act of reverence, the horse-shoe is a counter-charm.

The origin of such conceptions is evident. The uneducated man feels within himself an innate conviction that there is somewhere a world inhabited by non-substantial beings. Then, observing that many occurrences in common life (such as the misfortunes of good and prudent men on the one hand, or the unexpected destruction of the wicked on the other) cannot be explained by the ordinary rules which guide the affairs of this world, he concludes that these anomalies can only be accounted for by the active intervention of those spirits : from which follows as a corollary that means must be taken to conciliate these mysterious beings, whether their disposition be benevolent or the reverse. This train of reasoning is undoubtedly loose and unsatisfactory but such as it is, it has at one time or another satisfied every nation, and during well-nigh two thousand years has in Europe withstood not altogether unsuccessfully the attacks of Christianity itself. That the demonology of Ceylon is not identical with that of Europe, that there is so far as I am aware, nothing analogous to a *dēvāle* in the Northern latitudes is undeniable.[27] The difference is however not greater than might have been expected from the variety of circumstances under which each has been fostered, and not proportionally greater that the differences of system in the various kingdoms of Europe.

Persons inhabiting a thinly populated country, or engaged in occupations which separate them frequently and for lengthened periods from the busy stir of the world are peculiarly liable to adopt a belief in the darker superstitions—mountain shepherds, miners, and sailors are proverbial in this respect. To such influences the Sinhalese have during the ages been exposed. Living in small villages or isolated huts which are situated in the depths of interminable forests or scattered along the sides of rugged hills, in a region where the powers of nature, wind, rain, and lightening exert their full violence, it would indeed have been astonishing if they had escaped unscathed. But that circumstance which perhaps more than any other has given form to the prevalent superstitions is the nature of the national religion.

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27. Except among the Red Indians and Esquimaux (marginal note in pencil).

Buddhism is a system of philosophy more pure and elevated than any of ancient Greece or Rome, is yet too refined to be understood by the mass of the people. A thorough knowledge of it has in all ages been monopolised by the priests, and the ignorant have thus been thrown back upon their own vain imaginings or upon superstitions borrowed from their neighbours. Buddhism, denying as it does the existence of one great, good, ever-existent Being, and of one great author of evil, necessarily leaves unexplained those anomalies to which previous reference has been made. The total want of sound principles regarding diseases and the methods of cure proper for these has also not been without its influence. Each sudden or unusual sickness, especially if accompanied by delirium or convulsions, is regarded as the work of some malevolent god or demon and the words uttered by the patient are considered as the effects of inspiration.

In proceeding now to the more immediate subject of this paper, I shall say a few words on each of the three main branches into which it may be divided. These are: Ceremonies of the *Dēvāle*; Influence of the Stars; Charms.

Ceremonies of the Devale

Those beings to whom the ceremonies in the Devale refer are the spirits of the dead. They are designated by the same names which they bore on earth, they are not dreaded in any way, and only respected on account of the oracular answers uttered by their priests at certain moments of inspiration. The favourite spirits in this part of the country are those of Tanniwalli Bahu Rajah, and Kadavara (a *paduva* or matweaver).[28]

In almost every village there is a neatly kept compound which in general is carefully fenced in. It contains a small square mud building having only one entrance, is elevated on short pillars, and is called a devale; two or three open sheds or maduvas for the accommodation of the people, and lastly there is frequently in the centre of the enclosure a neatly carved wooden pillar placed under a thatched canopy and having at one side a niche wherein on festivals a lamp is placed. The entrance to the compound is under a decorated rustic arch. Within the devale is deposited what is called the weapon of the god (*hallmulee*).[29] This is sometimes a hook such as is used by mahouts.

To each *dēvāle* is attached a priest or *Kapurāla* who is allowed to engage in the ordinary business of life, but is expected to abstain from unclean food such as the flesh of pigs, fowls, monkeys, etc. Beef and vegetables are not objected to, but indeed these rules are not much insisted upon. He is not regarded with

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28. A blank space follows, presumably left for insertion of the names of other spirits in the region (North-Western Province). A list is given on another page (cf. post). The caste of matweavers is *Kinneriya*, and not *padu*.

29. Probably *halan*.

any peculiar official respect. The *Kapurāla* retains office during life and when he dies the vacancy continues until some villager discovers that he has been chosen by the god.

Saturday and Wednesday, devoted to the planets Saturn and [Mercury] are those set apart for the ceremonies of the *dēvāle*.[30] On one of these days the villagers assemble at the accustomed place, one anxious to receive information regarding lost cattle, another regarding his health or worldly affairs.

The *Kapurāla* appears neatly dressed and holding in his hand a small vessel containing glowing charcoal. Into this he throws a small quantity of pounded dammer,[31] which instantly rises in dense fumes. Waving the censer round his head he enters the devale and carefully shutting the door stands for some time before the weapon of the god, having his hands raised to his breast, and the palms pressed together. The tom-tom beaters now commence the demon song or *Kolmure*. The *Kolmure* is a generic name, one song being devoted to each of those beings who are supposed to give oracular responses through their priests, and it generally refers to the life on earth of the supernatural being. The *Kapurāla* becomes gradually excited and at last rushes out fantastically dressed and brandishing the sword or trident. The wild music continuing, he sways his body from side to side, dancing in the most grotesque manner, proclaims aloud that he is inspired by such and such a one, at intervals gives to the spectators that information which they came to seek, and ultimately, overpowered by the long continued violent exertion and excitement, falls to the ground in a deep swoon in which he continues for an hour or more.

It is to be observed that the *Kapurāla* is not throughout life inspired by the same being : this depends on the spectators who when making their offerings of betel leaves, request that the oracular responses may be inspired by such and such a one. A clever *Kapurāla* occasionally declines being told by the people what object has brought each of them to the spot, and while dancing reveals not only this, but the wished for reply ; the natives however sometimes confess that the prophecies are often wrong, and that the rest of the mystery is to be explained by the assistance of accomplices who after mingling with the crowd and listening to their conversation, convey themselves furtively into the *dēvāle* and divulge what they have heard to the priest as he stands before the sacred weapon.

I ought perhaps to add that a *Kapurāla* does not consider himself disgraced by uttering responses dictated by the spirit of one who was of lower caste than his own, or of women. Considerable license is allowed to the prophet at the

30. cf. Knox : ' On their Wednesdays, and Saturdays they open their Churches, and perform their Ceremonies '.

31. '. . . the burning of incense and a kind of resin (dummala) producing a blaze and afterwards thick, heavy smoke ' (Pertold).

moment of inspiration. Thus the *Kolmure* regarding —[32] is altogether directed against the Buddhist priests, and when in this character the *Kapurāla* indulges in the most uncourteous and threatening language towards them, and yet although the whole system is opposed to Buddhism the devale frequently adjoins the vihare and the regular priests seldom if ever object to the people attending the oracle—in fact cases occur where *Unnanses* claim a share in the offerings made at the *Dēvāle*.

On the Supposed Influence of the Stars

Astrology, a belief that the stars exercise a direct influence on man, is native to every clime. The notions of the Sinhalese on the subject are very similar to those entertained elsewhere.

At the birth of a child, some astrologer (formerly *Berevayas*, now any one), draws out the horoscope and declares which is the prevalent star. This planet then is supposed to exert a peculiar influence throughout the life of the child, who may however be also temporarily affected by others of the heavenly bodies.

Should a native be seized with any sickness of a violent or unusual nature, this is supposed to be caused either by the incantations of an enemy or by the malign influence of a star. In either case a *Berevaya* or tom-tom beater is sent for. He appears, ascertains the day and hour of the patient's birth, casts the horoscope, and then declares the origin of the disease. If it results from witchcraft the counter-charm of cutting limes [cf. post] is immediately performed by one of the friends. Should it, however, arise from the influence of a planet, the *Berevaya* proceeds to the ceremony of the *Bali*. His first care is to provide himself with a large oblong frame or hurdle of coarse basket work: on this he moulds in high relief a figure (six or seven feet in height) representing the spirit which presides over that star which has caused the sickness. This effigy is then carefully coloured and placed beside the patient. The *Berevaya* sitting down then continues beating the tom-tom and singing one of the songs called —[33] until morning, when having received his fees, he departs. Occasionally before going away he declares the result of the disease, and should his prophecy prove incorrect, his ready excuse is that false data for the horoscope were given to him.

On solemn occasions such as births, marriages, commencement of journeys, etc. the stars are always consulted in order that a fortunate moment may be selected, and till such arrives no active step can be taken in the matter.

It is almost unnecessary to state that the astrologers are men of no attainments, that they know nothing of astronomy or calculation, and draw out the

32. This word is omitted in the Mss.

33. Not inserted in Mss.

horoscopes quite mechanically from a sort of calendar [*lita*] which is annually renewed.

Note on Cutting of Limes

Cutting of limes or *Dehi-käpīma* is the cutting of a certain number of limes with an arecanut cutter, reciting a peculiar charm or mantra at every cut. The person who does this is called *Yakdessa* or *Kattadiya*. When two persons get angry with each other and if one of them happens to get sick soon after, it is thought that the sickness was caused by the other by means of charms, which is called *Soonian-kerewala*. It is to be cured of such diseases that the cutting of limes is performed.

Charms

The superstitions of Ceylon, like those of other countries, have peopled the woods, the mountains, and the streams with invisible but active beings, and have not failed to assign to individual spirits the guardianship of particular streams, mountains, or woods. Of these some have always been non-substantial, while others are the spirits of wicked men destined to this state of existence as a punishment for their crimes. They are always invisible and are greatly dreaded, but no particular places are set apart for their worship. By way of protection the natives use little rolls of ola on which few words in Sinhalese are written and which are deposited in small silver or copper capsules tied to the arm or neck.

When the *Berevaya* comes to perform the *Bali* ceremony, it sometimes occurs that he finds all the planets favourable—upon which he at once declares that the sickness has been caused by the machinations of an enemy, and directs the employment of a counter-charm, which consists in cutting with betel clippers successive discs from a lime, certain magical words being uttered before each slice is separated. Charms of this nature are in constant use for protection against wild beasts, poverty, sickness, etc.; and I have frequently heard the natives say that it was useless to shoot at such and such a tank (?) because some one 'had made prayers there' so that even if game were killed, it would suddenly disappear. I have met some persons who professed to be shot-and bullet-proof, but have never been able to meet one who was willing that his powers should be practically tested.

Sometime ago I procured two or three small pieces of copper on which human figures are rudely stamped. There are . . . [The Mss. ends abruptly here.][34]

34. The reference is apparently to talismen or amulets which are used as magical antidotes against the evil eye, etc. (cf. W. L. Hildburg: Notes on Sinhalese Magic. *Journal of the Royal Anthrop. Inst.* XXXVIII, 1908).

II

Notes on Sinhalese Belief and Ceremonial[35]

The Buddhists do not admit the existence of any supreme being, but they say that there are many gods, and by this they mean the Hindu gods such as Siva, Vishnu, etc. When they say that Brahma made the world, they do not mean that Brahma made the heaven and earth, but [that] the world was peopled by those who came from Brahmalova, that is, the world of Brahma.

That they deny a supreme being is evident by their alleging that Brahma, who alone has to do with this world, was the only being who existed before this world, [and] had himself worshipped Buddha. At the same time he arrived to the Buddhahood. This Maha Brahma is not eternal, for he dies and attains *Nirvāna*.

The present Brahma is named Sahampati, the one who existed previous to him named (Backale) Backlerachma having died and attained *Nirvāna*.

There have been many Brahmas, and there will be many. [They are different beings, for each of the past has attained *Nirvāna*, and that implies extinction.

Each demon has his peculiar weapon, such as the sword of the demon Kadavara, the goad of Paniki Bandara, and the bill-hook of Yapa Bandara.

The *Kapurāla* comes to the devale dressed in clean clothes, and taking burning charcoals in a vessel, throws it into some pounded dammer [dummala], weaves it round his head, after which he goes to the place where the weapon of the demon is placed and stands with his hands joined. Then the tom-tom beater[s] or *Berevayas* begin to sing the *Kolmure*. The *Kapurāla* having stood thus for a while as if waiting to receive the orders of the demon, begin[s] to shudder, and coming before the *dēvāle* and all the people who assembled to obtain information respecting their stolen goods, etc. and then prophesised. There is no book which treats of upon the origin of demon worship.

It is not the *Kapurāla* that performs the ceremony of *Bali*, but there is a set of people called *Berevayo*.

The natives have nine great planets. The names of these are *Iru, Candraya, Angaharuva, Budahu, Brahaspati, Sikura, Senasura, Ketu, Rahu,* and every man is considered to be always under the influence of one or other of these. When a person get[s] sick they ascertain (by means of the horoscope which is generally made out by astronomers at the birth of a native) under whose influence such person is at the time, and then make the *bali* assigned to that particular planet.

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35. These notes appear in the Mss. without a title. From the grammar and composition, they appear to have been written by a Sinhalese, for Brodie's information.

Iru. Sunday. Irida.
Chandeya. Monday.
Angaharuva.
Budahu Mercury. Became rock. Attachments on earth not broken.[36]

III

Notes of a Conversation with a Buddhist Priest, Boodhooroowe Kande, 17th June, 1849.[37]

' He who does wrong will in his next life be a yakka, and if still wicked, in the third a *prētaya* then a wild beast, but ultimately he will return to the shape of man and have a fresh chance. If he acts aright he will be removed to the heaven of the gods (*dēva lōkaya*) but must again return to the world and become a rahat and so obtain nirvana, or else he may become a Buddha and so attain *nirvāna*, i.e., it is not necessary to become Buddha to attain *nirvāna*—a *rahat* can attain this ultimate stage.

' A *rahat* is distinguished by the power of working miracles: he can fly through the air, turn the world topsy-turvy, and hold the great rock Meru in his hand. Most *rahats* have been ordained, but it has occurred that some holy men when being shaved previous to the ordination have obtained the miraculous powers. A man can only become a *rahat* by being on earth during the manifestation of a Buddha, or at least before his doctrine has been lost '.

' There is no God—all occurs by chance '.

Query : ' Why did Buddha give Lanka into the charge of Sakkraya if all goes by chance—Chance is in this case meaningless '.

This puzzled the hamuduruvo for a time, then he said, ' Sakkraya can do something, for instance if a father prays to him for progeny, he will grant the request by ordering some being now in another world and which is about to enter the world of men, to appear as the child of the applicant '.

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36. The Mss. tails of with these obscure words.

37. This Socratic dialogue was presumably recorded to correct the current impression that Buddhists did not believe in gods (i.e., spirits). Brodie's exposition of the Christian reconciliation between free-will and determinism is hardly more convincing than the naive Buddhist monk's explanation of *karma* (inappositely rendered ' chance '). Elsewhere Brodie confessed that he had an extremely low opinion of the Buddhist monks of the day : most of them were selfish, idle, and inconsistent, and were ignorant of their own history and religion, acknowledging that they had never even read the copies of the *Mahavamsa* which they possessed. The *Sangha* had suffered from years of persecution and neglect after the deposition of the Kings, and in the decades after 1815 had reached its nadir. ' If no external aid be afforded to the religion, it will soon be practically extinct ' (Brodie. *Topographical and Statistical Account of the District of Nuwarakalawiya. J.R.A.S.*, C.B. III/1 1856-1858). The revival of Buddhism began only in the latter half of the century. Meanwhile the Sinhalese folk-religion continued to flourish.

Query again : ' If this occurs in obedience to the order of Sakkraya, all things are not ruled by chance '.

After some shuffling this is granted Q.E.D.

' Who is Brahma ? '

' He is the god ruling over sixteen worlds of gods (Sakkraya has only this and another) and must ultimately be born as man and so attain nirvana '.

Q.: ' If he has charge of these sixteen worlds, chance cannot rule there '.

' It does, and Brahma has no power '.

Q.: ' In what then is he a god ? '

' In the contemplation of his own happiness '.

Q.: ' Then Sakkraya having power and Brahma having none, the former is greater than the latter '.

Priest became confused, but acknowledged it must be so.

Q.: ' If all in this world occurs by chance, I might as well imprison men for having long noses as for stealing cattle '.

Puzzled again, then ' No, all things do not occur by chance—Some misfortunes occur because they are fated, but some crimes are committed by the bad will of the actor '.

Q.: ' Then again all are not ruled by chance '.

' No '.

Q.: ' But the cattle stealer can by his own power do something, Brahma can do nothing. Ergo, the cattle stealer is greater than Brahma '.

Here a laugh was produced. I urged the priest about Brahma being placed over worlds in which he has no authority, and after some time he answered: ' Brahma stops there because he has no other place to go to '.

The idea of a god singing with the starling, ' I cannot get out ' was too ludicrous for the priest himself.

Q : ' A being who has once or even repeatedly been degraded to the rank of yakka may yet by subsequent reformation become a Buddha '.

' Buddha is not. No he has ceased to be like all who have attained nirvana '.

I now allowed the priest to put questions. I forget exactly how the first was stated, but it was to the effect that he had read in Sinhalese books that the creator god had one head, two eyes, and so on. He wanted to know why a great God was thus formed.

I explained that the Christian's God has not a bodily form, but is a spirit like a soul or a thought (it is very difficult to explain this owing to a want in Sinhalese of the various abstract terms). I stated at the same time that God knows all things while man knows very few and therefore man can only form a very imperfect knowledge of God's principles or motives of action '.

' Lanka is said in the books to be 1600[38] yodun long, and there are perhaps other countries as great. He who made these must have a very great and beautiful dwelling. Where is that ? '

Corrected the geographical errors first, then showed that in asking this he had been led by the notion that existence is necessarily connected with an outward form : a spirit requires no house or shelter. God is everywhere.

Q.: ' If God has no body how can he utter a sound ? '

' God being all-powerful could assume any form he chose and can produce any effect he likes '.

Q.: ' Can you see God ? '

' Can you hear, see, feel, taste, or smell a thought or a soul ? '

Q.: ' Why are some men blind, or lame or otherwise deformed ? '

' Man is not wise enough to know God's reasons in each case, but it is probable that very often such temporary inconvenience is allowed by the Creator for the purpose of restraining the man from wicked acts and thoughts which would have resulted in eternal misery. Thus a man, if he had the full power of his limbs, would have been a robber : being born a cripple [he] is not tempted to steal. He is confined to the house, reads good books, and obeys the laws of God '.

Q.: ' Why are any men allowed to do that which is wrong ? '

' The wrong act of one man may bring about the salvation of fifty, and besides, if it had been impossible for man to choose between right and wrong he would have been a mere machine, like a watch. There could have been neither merit or demerit '. (Of course I was meeting him on his own ground) ' But man has been formed a noble and intelligent being '.

Q.: ' But if I knew that my servant, if allowed to go to the village, would get into mischief, I would not allow him to go at all, and so would avoid the necessity of punishing him '.

Same as the previous answer, with illustrations.

38. Inserted in pencil.

It is all stuff about Buddhists not believing in a god—they all do. But as the Germans deny God in name and ascribe all to Nature, so the Buddhists will talk of Providence but not of God.

IV

Names of Demons

1. Caddewarea Yakka, [i.e. *Kadavara*, a name given to various demons. A Kadavara kavi in the form of an exorcism describes the kadavara yakas as having formerly dwelt at Sitana Bintänne, and now residing on Santana Gala and Balahela.[39]]

2. Weeremonde Yakka, [i.e. Vira-munda. A god said in Viramunda-alankaraya to have been born after a prophetic dream by his mother. For his youthful misbehaviour he was sentenced to death, but escaped and sailed to Kolamba (Colombo). Came to Iriyagama and at Vil-bava constructed shrines. He fed demons in Ceylon, broke the legs of many Demalas (Tamils) warred against the gods of Ceylon (who were led by the Kataragama God), and made Pattini's bangle cease to rattle. He has a red silk kerchief on his head, a red and blue cock in his right hand, and a golden sword and wand.[40]]

3. Calloo Cumare Yakka, [i.e. kalu kumara yakka. Members of aristocratic families figure in the list of demons. Kalu Appuhāmi, for example, was one of the kadavaras. cf. also the various Bandāras mentioned below.]

4. Cabbela Yakka. [Kaberi, Kaffir (?)]

5. Devol Yakka. [A Demon in the troop of Dadimunda. 60,000 spirits of this name were created by Gange Bandāra.]

6. Gara Yakka. [The Gara-Yak-paliya gives a ritual to heal sickness by a bali offering to Yaksa Giri, and sacrifices to Kumara Devatar, Vata Kumara, Sanni Yaka, and Gara, adding instructions for distinguishing the kinds of sickness caused by the Yakas Sanni, Riri, Bhuta, Gara, Vata, Kadavara, Gopalu, Bhairava, Sohon,

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39. L. D. Barnett : *Alphabetical Guide to Sinhalese Folklore from Ballad Sources* (Bombay 1917).

40. ibid. Knox mentions that in cases of sickness, a red cock was dedicated to the god supposed to have caused the malady ; when the patient recovers the bird is dressed and sacrificed by the yadessa at the Kovil.

Pilli, and Huniyan. A Gara Yaku is mentioned in the Kota-halu rite (i.e., a rite of purification performed for a maiden attaining puberty), and is propitiated in the Yak-pidanvila, and kovila-pevima.[41] The Gara-yakuma an all-day dance to propitiate the Gara Yakku, or spirits of poverty, used to be performed by masked dancers of the Oliyo caste.[42]]

7. Yahpa Bandāre.
8. Calloo Cumare Bandāre (Black prince, son of a good family) [i.e. Kalu Kumara, or Kalu Bandara (Velasse Bandara). A spirit associated with the sanctuary of Visnu at Bintenna, Velasse, Dumbara, Yakini-gal, Runu, the heights of Kalu-gal and Dati gal, and the Kalu ganga river. He recited pirit at Mahiyagama and burned up the yakas. Hence Buddha took him under his protection.[43]]
9. Menik Bandāre, [i.e. Mānik Bandāra. A demon. One of the nine offspring of a mother who bathed at Diya-kelina-vala, Kandy. They were worshipped as spirits, and perehara processions made in their honour ever since a man named Vanatunga became insane after blood fell on his face as he was cutting down a na tree in a forest. Subsequently he and his kinsmen died. A cloth that had been dipped in the pool in which the mother bathed, took fire and burned like a torch.[43]]
10. Odoowaireye Bandara. [Vairava (Bhairava) is a demon propitiated in yakpidanta. He is worshipped by Tamils with a victim (preferably human, especially an unblemished first-born boy) to gain his help in searching for jewels.[43]]
11. Colembe Cumara Bandare, i.e. Kolamba Kumara Bandāra.
12. Hittee Bandāra.
13. Naatchy Cumare Bandāre.
14. Calloo Deniatta Bandāre.
15. Eiyenake Bandāre.
16. Tannievelli Bandāre.
17. Dewattah Bandare, [i.e. Devata Bandāra. A god invoked in Malyahan-kavi, apparently one of the names under which Gange Bandāra is invoked.]

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41. Barnett, op. cit.

42. cf. W. H. Gilbert : The Sinhalese Caste System (*Journal of the Washington Academy of Sciences* 35/iii and iv, 1945).

43. from Barnett, op. cit.

18. Waahelle, Bandare [i.e. Vahala Bandāra (Senevi-ratna). The Senivi-ratna-devi-kadavara-kavi relates that when the Asuras tried to prevent the sun from rising in the Dawn-mountain (udagiri), Kataragama Dēva and the gods with the sacred cock fought against them, but as they failed Kataragama Dēva bade Senivi-ratna attack them. He did so, and enabled the sun to rise. For this he received Ceylon and the title Senevi, 'general'. Apparently he rose from the water. He observes the Buddhist Perfections (paramita) in order to become a Buddha. He has charge of Ceylon for 5,000 years. As he guards the portal of Kataragama Dēva he is called Vahala Bandāra. He smites sinners with sickness, gripping them by the throat. He punished the sixty priests who broke the tank. He has blue silken robes, a golden girdle, a red turban, a golden scarf on his shoulder, and a golden armlet; he carries a wand, or a glittering fiery sword.[43]]

R. P.

43. from Barnett, op. cit.