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GENERAL INTRODUCTION

The law of infants' contracts in Canada has received surprisingly little attention, despite its considerable practical importance. The rules applicable across the country, except of course in Quebec, are basically those of the common law, though their development since the late Nineteenth Century has been largely independent, as major statutory reform in 1874 in England rendered inapplicable many English cases after that date. Statutory intervention in the law of infants' contracts in Canada on the contrary has been sporadic and has dealt mainly with incidental points.

In recent years the reduction of the age of majority in Alberta from twenty-one to eighteen years perhaps lessened the need for urgent reform in this area of law. This change of course had no direct effect on the law of infants' contracts, but indirectly it did mitigate some of its worst abuses by removing a large and affluent group from a highly privileged legal position. Nevertheless it is still necessary to investigate whether the complex rules relating to infants' contracts, which were developed in the mid-Nineteenth Century, are still appropriate in the present day.

Accordingly this paper is divided into two parts. The first part consists of an examination of the present state of the law of infants' contracts and in the second part a number of the most important movements for reform will be discussed and evaluated.

PART ONE: THE PRESENT STATE OF THE LAW

A. INTRODUCTION

It has been pointed out that the law of infants' contracts has been developed over the centuries on the basis of two conflicting principles.¹ Primarily the law has been most concerned to protect the infant against the consequences of his own inexperience in business transactions, but at the same time the courts have shown some inclination to avoid undue hardship on the part of an adult who deals with an infant in the course of business.

As a result of the conflict between these two principles, the present state of the law is somewhat confused. The law does recognize certain limited classes of infants' contracts as quite valid, but generally the infant is not bound by his contracts because they are voidable or utterly void. Each of these different categories of infants' contracts will be discussed in turn, together with a number of special problems related to an infant's liability for torts connected with a contract, agency and the introduction of an adult party into the infant's transaction.

B. BINDING CONTRACTS

1. Contracts for Necessaries

(i) *General Principles*

It has been long established that an infant can be made liable to pay for any "necessaries" which he purchases. The notion of "necessaries" extends not only to the bare necessities of life,

but also to articles required to maintain the infant in his ordinary social position.² As a result the classification of a necessary will vary with the particular infant according to his age, background and especially his marital status. In a British Columbia case³ for example, the purchase of a house by an infant married couple with one child was held to be a necessary; it is quite likely that a similar purchase by an unmarried infant would be unenforceable on the grounds that it would not be necessary to the same extent.

The vagueness of the test as to which goods can constitute necessities renders it extremely difficult to predict when the courts will find contracts binding on this ground. A few illustrations can give some guidance as to judicial attitudes, but it must be emphasized that they are not definitive of future problems simply because each case, by the very nature of the test for necessities, must depend on its own particular facts.

It seems fairly settled that an infant's contract to purchase a means of transportation for use in going to and from his place of work will be binding.⁴ Of course this does not imply that any contract for the purchase of a car will be binding, for that determination depends upon the use to which the vehicle will be put. Indeed whenever this issue has arisen, Canadian courts

have uniformly refused to regard a car as a necessary⁵ and American courts, despite some conflict in the decisions, have generally taken a similar view.⁶

In contrast courts in both England and Canada have rarely regarded any kind of trading contract as binding an infant, on the theory that he has insufficient discretion to carry on trade and accordingly should not be liable for goods supplied to further his business activities. This rule is so well established that it applies even where the goods are absolutely necessary to the continuance of the infant's occupation. For example, in Pyett v. Lampman,⁷ a contract for the purchase of a car by an infant in the business of selling fish was held not to be a necessary, even though it was essential to the continued existence of his business. The presence of a substantial trading element in a contract therefore considerably reduces the likelihood of it being considered a contract for necessities.

The provision of services to an infant can also be considered a necessary if the services satisfy the same tests as those applicable to the supply of goods. On this basis, contracts for the provision of medical⁸ and legal advice⁹ have been held to be binding. Similarly contracts for certain types of education can be viewed as contracts for necessities, although this determination depends upon the nature of the educational course in question. A basic education is obviously regarded as a necessity, but more

specialized commercial educational programmes may well not fit into this category. For example in International Accountants Society v. Montgomery¹⁰ a correspondence course in accounting was held not to be enforceable on the ground, amongst others, that it was not a necessary. No direct authority exists as to whether a college or university education constitutes a necessary and this question would have to be answered as a matter of fact in the ordinary way. Interestingly, a number of older American decisions¹¹ suggest that it does not, although almost certainly these cases would not be relevant to current social conditions in Canada.

The courts have also regarded loans extended to infants for the purchase of necessary goods or for the provision of necessary services as creating in the infant an obligation of repayment. An illustration of this principle is provided by the Saskatchewan case of Wong v. Kim Yee¹² in which the defendant, while still an infant, borrowed money for car repairs, payment of a life insurance premium, a school transfer fee, daily use, school books and a jacket. Of this list only the school transfer fee, the school books and the jacket were considered necessities and as a result the loans for the other purposes were not considered to create a legal obligation to repay.¹³

However ~~some~~⁸ risk still facts a person who lends money for necessities ~~because~~ in addition to the requirement that the money

must be lent to the infant for the purpose of purchasing necessities, the law demands that it must in fact be spent for that purpose before the infant will be required to repay.¹⁴ The rationale of this is that historically the lender's rights were purely equitable, arising only by way of subrogation to the position of the supplier of the goods. The possibility that the money lent to the infant may be misapplied thus renders the position of the lender somewhat precarious, although the practical importance of this is mitigated by the devices currently employed by lending institutions to create primary liability in an adult third party when money is lent to an infant.¹⁵

Student loans are declared by the Student Loans Guarantee Act¹⁶ to be binding upon the student as if he were of full age at the time the contractual liability arose. The provisions of this Act apply only to courses at various public educational institutions specified in the Students Assistance Act,¹⁷ so that the validity of an educational loan for a course at an institution outside the scope of that Act depends upon the ordinary principles set out above.

Because the test for determining what amounts to a necessary depends so much upon the facts of each individual case, the concept is rather uncertain in application and capable of

causing difficulty for both suppliers and infants, who may find it extremely difficult to assess their legal position. The manner in which the law allocates the burden of proof in these situations perhaps makes it less likely that the goods and services in question will be considered necessities, for it requires the supplier to prove affirmatively that they fall within the legal definition.¹⁸ Even if the supplier shows that the goods are of the general class considered necessities, he must go further and prove that the infant did not already have an adequate supply of them.¹⁹ This places a heavy onus on the supplier, for he is required to prove a negative on the basis of facts which are peculiarly within the knowledge of the other party.

If the infant at the time of contracting is living with a parent or guardian who is capable of supplying him with necessities, and in fact does so as a matter of course, then it will be more difficult for the supplier to prove the necessity of the goods he sold. Indeed some cases have even gone so far as to speak of a presumption that the infant is adequately supplied with necessities when he is living with his parents, because the provision of such goods is normally a matter of parental discretion with which the courts will be reluctant to interfere.²⁰

At common law the plaintiff was required to prove that the

goods were necessary to the infant at the time of delivery. However the Sale of Goods Act appears to have added a technical requirement that the goods must be necessary also at the time of sale, for it defines necessities in the following terms:

"Necessaries in this section means goods suitable to the condition in life of the infant and to his actual requirements at the time of the sale and delivery."²¹

The first step then in establishing liability on the part of the infant is to prove that the goods were necessities. After this stage it must be shown in addition that the contract as a whole is for the infant's benefit.²² For example, in Fawcett v. Smethurst²³, it was considered that a contract for the rental of a car, even if it could be described as a necessary, would cease to bind the infant because of the presence of a harsh or onerous term. The alleged term in that case imposed on the infant an absolute responsibility for all risks in respect of the car, even if it were damaged through no fault of his own. This would have been sufficient to prevent the transaction from being in the infant's best interests and to defeat his normal liability under a contract for necessities.

(ii) Nature of the Infant's Liability

It remains to consider the much disputed question of the nature and extent of an infant's liability under a contract for necessities. His liability is clearly less than that of an

adult of full contractual capacity and it is evident that his contracts, even for necessities, are binding on him only in a limited sense. The substance of the controversy is whether the infant's liability to pay for necessary goods or services is contractual, resulting from his agreement, or quasi-contractual, resulting from the benefit he has enjoyed through the delivery of the goods or services.

The issue is of practical importance in relation to the problem of whether an infant is liable on an executory contract for necessities. If his liability is contractual in nature, then clearly he will be bound by a contract for necessary goods or services to be delivered at a later date; however if his liability is founded in quasi-contract, he will not be bound until the goods have been delivered. There appears to be no directly controlling authority on this debate and the most important arguments for each view must be considered in turn.

Three major arguments can be made in favour of classifying the infant's liability as purely quasi-contractual. Firstly it is well settled that under a contract for necessities, an infant is obliged to pay only a reasonable price for the goods ²⁴ and clearly this may be less than the price stipulated in the contract. This suggests that the basis of the infant's liability is not truly contractual for, if it were, he would be bound by the price he agreed to pay. However it has been pointed out that the

law's interference with just one of the terms of a contract does not necessarily deprive the entire transaction of its contractual character,²⁵ especially in view of the fact that such interference may well be regarded as an extension of the rule discussed above that contracts for necessities must not contain onerous terms.

Secondly it is argued from Section 4 of the Sale of Goods Act that the infant's obligation to pay for necessities is quasi-contractual, because it does not arise until the goods are actually delivered. In addition, as mentioned above, a reading of Section 4 suggests that goods cannot be considered to be necessities before delivery takes place.²⁶

This argument is not however entirely convincing. It has been pointed out that the section applies only to the obligation of infants to pay for necessaries sold and delivered and that the definition of necessities is limited for the purposes of the section.²⁷ It does not purport to extend to the situation where the goods have been sold, but not yet delivered, and its provisions are not inconsistent with the view that an infant may still be liable at common law on an executory contract for necessities.²⁸

Thirdly it has been suggested that because an infant, just as a lunatic, is incapable of making a contract, his obligation to pay for necessities cannot be contractual but only the result of an

imposition by the general law in the interests of fairness. This view was taken by Fletcher Moulton L.J. in the case of Nash v. Inman,²⁹ but it appears to be rather unsatisfactory. In some circumstances even a lunatic has the capacity to make a valid contract³⁰ and in any event the analogy is weak because in many cases a young person may well be capable of giving consent, knowing full well the implications of his action. The same can hardly be said of a lunatic who, for the purposes of the law of contract, is one who does not understand what he is doing.³¹

Therefore it may be concluded that, although there is some authority suggesting that an infant's obligation to pay for necessities is founded in quasi-contract, the arguments for this view are not overwhelming. Indeed on the contrary there are some cases which suggest that the source of the infant's liability is contractual and consequently that an executory contract for necessities is binding.³² It is well settled, for example, that contracts relating to instruction and education, which are commonly regarded as a particular category of contracts for necessities, are enforceable even though executory. In the well-known case of Roberts v. Gray³³, an infant plaintiff was held liable for substantial damages when he wrongfully refused to go on tour with a world-famous billiard player,

in violation of a contract for teaching, instruction and employment. In reaching this conclusion, Hamilton L.J. commented that he was unable to appreciate "why a contract which is in itself binding, because it is a contract for necessaries, can cease to be binding merely because it is still executory."³⁴

Although this line of authority currently applies only to contracts in this small group and not to all contracts for necessaries, it is nevertheless difficult to see why in policy terms executory contracts should be binding for some kinds of necessaries but not for others. For this reason, Cheshire and Fifoot suggest that cases like Roberts v. Gray, involving contracts for education, should be severed from the category of necessaries and considered along with contracts for service which, as will be discussed later, have often been treated separately.³⁵ However this approach cannot be reconciled readily with the court's reasoning in Roberts v. Gray and in any case the distinction between contracts for necessaries and contracts of service is more formal than substantive.

Further support for the view that an infant's liability for necessaries is contractual in nature is provided by Buckley L.J.

who, in Nash v. Inman, adopted a position directly contrary to that taken by Fletcher Moulton L.J. in the same case. In that case, Buckley L.J. stated: "The plaintiff, when he sues the defendant for goods supplied during infancy, is suing him in contract on the footing that the contract was such as the infant, notwithstanding infancy, could make. The defendant, although he was an infant, had a limited capacity to contract."³⁶

In conclusion it appears that the nature of the infant's liability to pay for necessities is at the moment completely unsettled.³⁷ In policy terms, it may well be in the interests of both the infant and the adult if the infant is enabled to make a binding executory contract for necessities. The infant is already well protected by both the definition of the term "necessaries" and by the fact that he will not be bound if onerous terms exist in the contract; in addition obvious hardship may result to the supplier of goods if the infant is permitted to cancel arbitrarily an order for necessities, as the quasi-contractual theory would allow.

2. Contracts of Service

In addition to contracts for necessities, it is clear that an infant may be bound by a class of contracts generally described as contracts of service, which permit him to earn his livelihood or to be trained for some trade or profession. As indicated earlier, such contracts appear to be only a species of contracts for necessities and are considered separately only for the sake of analysis. The

only significant difference between contracts for necessary goods and contracts of service is that it is well settled that the latter, are as fully binding on the infant as if he were an adult³⁸, regardless of whether they are executory or executed.

As with contracts for necessities, contracts of service bind the infant only if, on construction of the whole contract, they are beneficial in the opinion of the court. Because of the wide scope of this test, it is settled that the contract does not cease to be binding merely because some clauses are not to the infant's benefit. For example in Clements v. L.N.W.R.,³⁹ an infant who accepted employment with the defendant railway was required to join a compensation scheme, which in part improved his position in law and in other respects reduced his legal rights in the event that he was injured in the course of his employment. The insurance scheme was to the infant's advantage in that he could be compensated without proving negligence on the part of the company or his superiors, but prejudicial to his interests in that he might well recover less by way of compensation than he would under the general law if the accident was caused by negligence. On balance however the Court held that the contract was for the infant's benefit and consequently binding, although each individual clause was not necessarily to his advantage.

In contrast in the well-known case of De Francesco v. Barnum⁴⁰ a contract, under which the infant plaintiff was apprenticed to a dancing instructor for a period of seven years to learn the art of stage

dancing, was held to be against the best interests of the infant when a number of clauses gave her master too much power and too few obligations. Among the clauses leading to this conclusion were ones which prohibited the infant from marrying during the contract period, prevented her from accepting dancing engagements without her master's permission, permitted her to be paid only if the master found engagements for her and made the whole arrangement terminable at the master's option at any time during the contract period. Construing the contract as a whole, the court decided it was not for the infant's benefit.

The test of whether a particular contract is beneficial appears to be basically pecuniary, as in the Clements case. Occasionally the courts will adopt a wider, more paternalistic test of what is in the infant's best interests. In a more recent case, which involved the son of Charlie Chaplin selling his rather lurid memoirs to a publisher, Lord Denning M.R., in dissent, held that despite the obvious financial benefits of the arrangement, the contract was not beneficial in a broader sense because "it is not good that he should exploit his discreditable conduct for money, no matter how much he is paid for it".⁴¹ The majority of the Court however employed a more pragmatic test and considered the contract beneficial because of the financial gains accruing to the infant. This test appears to be the one more commonly used in relation to contracts of service, though the concept of "benefit" appears to be wide enough to permit other approaches, such as that adopted by Lord Denning.

It must be emphasized that the Courts do not accept the general principle that a contract is binding simply because it is for the infant's benefit. The contract will be considered as creating a legal obligation^{only} if, in addition to being beneficial, it falls into one of the categories of contracts for necessities or contracts of service. However some contracts which are not strictly contracts of service or education, have been held to be sufficiently analogous to them to be considered binding, providing of course that they are for the infant's benefit. In Doyle v. White City Stadium⁴², for example, an infant professional boxer was required to obtain a licence on certain terms before he could pursue his career. The contract under which he received his licence was held to be binding on the ground that he could not earn his living as a boxer without entering into such an agreement. Other similar contracts involving infant professional entertainers have also been held binding on the basis that they are analogous to contracts of service.⁴³

Contracts of apprenticeship are considered to be a branch of contracts of service and are governed by the same principles. In Alberta, the Apprenticeship Act offers additional safeguards to the infant apprentice by specifying the form of the apprenticeship document and the procedures to be followed in making the contract. However the Act expressly does not guarantee the validity of the apprenticeship agreement,⁴⁴ which presumably must be decided in the same way as other service contracts.

Beneficial contracts of service must be contrasted with trading contracts entered into by an infant which, as discussed above,⁴⁵ are not binding. The line between these two types of contracts can be difficult to draw, as is shown by the case of Chaplin v. Leslie Frewin Ltd.⁴⁶, which was mentioned earlier. In this case the infant plaintiff and his wife contracted with a publishing company for the publication of the story of the infant's life, which was to be "ghost-written", and received considerable advance payments. Following completion of the book, the infant had a change of heart and sought to prevent its publication on the ground that the contract by which he had assigned copyright to the publisher was voidable because of his infancy. In denying the infant's claim, Danckwerts L.J. held that the contract was binding on the ground that it enabled him "to make a start as an author and thus earn money to keep himself and his wife."⁴⁷ With respect however, it is difficult to see how a ghost-written book could enable the infant to make a start as an author and to say simply that the contract enabled him to earn a living is clearly insufficient, for the same could be said of many infants' trading contracts which are clearly not binding.⁴⁸ This case must therefore be considered to be close to the borderline between service contracts and trading contracts and to illustrate the difficulty of making a clear distinction between the two categories. One test which has been suggested for this purpose involves asking whether the infant's capital has been risked in the venture,⁴⁹ for

that is said to be the essence of a trading contract. However, there appears to be no direct judicial support for this theory.

The rules discussed above relating to contracts for necessities and beneficial contracts of service are fairly well settled. However in this context the law requires an all or nothing approach for, if a court finds that an infant's contract does not fall within the definition of necessities or beneficial contracts of service, it will be voidable at his option according to the principles discussed in the following section of this paper. As is demonstrated by the fine distinction between trading contracts and contracts of service, it is often difficult to assess when the courts will hold that an infant's contract is binding on one of these two grounds. The law in this area accordingly may be criticized for attaching important practical consequences to what might be a rather arbitrary classification of the facts in each case.

C. VOIDABLE CONTRACTS

1. The Meaning of "Voidable".

At common law infants' contracts which did not involve necessary goods or beneficial service were classed as voidable or, in certain narrow circumstances to be discussed later,⁵⁰ void. However the term "voidable" in this context is extremely confusing, for it is employed by the courts to describe two very different types of contract.

On the one hand the word is used in its normal sense, where the infant is deemed to have incurred a legal obligation which will continue unless he specifically repudiates it, while on the other hand it is also used to describe those contracts by which the infant does not incur any contractual liability unless he actually ratifies the agreement upon coming of age. The legal significance of these two types of "voidable" contracts is obviously very different. In contracts of the former category the infant will be bound if he fails to take positive steps to deny his liability,⁵¹ whereas in contracts of the latter category a similar failure to take action will mean that the infant is not legally bound.

Traditionally the common law classed only four types of contracts as truly voidable, in the sense of binding until repudiated, namely contracts concerning land, share contracts, partnership agreements and marriage settlements. All other infants' contracts for non-necessaries were not binding upon the infant unless he ratified them.⁵² At the outset it must be conceded that Canadian courts do not make this distinction with perfect consistency and in some cases the courts appear to suggest that all infants' contracts for non-necessaries are binding unless they are repudiated. The validity of this distinction in modern Canadian law must therefore be examined.

Most commentators on Canadian law have taken the view that the clear common law distinction between these two kinds of voidable contracts is well established in this country.⁵³ Their position is strongly supported by the considered decision on this point of the Ontario Court of Appeal in R. v. Rash, where Rose J. went to some lengths to distinguish between the two subclasses of "voidable" contracts and stated:

"While I suppose that cases arising out of contracts to pay for goods (other than necessities) could be found in which similar language [i.e. suggesting that the contracts are binding unless repudiated] has been used, I have not found anything which leads me to suppose that it is accurately used in respect of such contracts."⁵⁴

Despite this relatively settled principle there have been a number of Canadian cases in recent times which suggest that other kinds of infants' contracts are binding unless specifically avoided. For example, in Blackwell v. Farrow⁵⁵ the plaintiff sought, inter alia, to avoid a contract made during his infancy for the purchase of a dump truck. The Court, having found that the truck was not a necessary, appeared to require that the infant actually repudiate the contract within a reasonable time of reaching full age in order to avoid it. Although the results of this case can be explained equally well by relying upon the plaintiff's ratification after he attained his majority, the language used by Urquhart J. indicates that he considered the contract truly voidable. The view that an infant's contract for

non-necessaries may be binding until repudiated has been echoed in other recent cases, although it has not yet emerged as the basis for any decision.⁵⁶

The reasons for this apparent divergence from principle can only be a matter of speculation. Probably the most significant results from the use of the term "voidable" to describe infants' contracts which are not binding unless ratified as well as those which are binding until repudiated. The more natural meaning of voidable is restricted to the latter situation and it may well be that in recent times courts and counsel have simply forgotten that the term has a wider connotation in this area of law. This confusion may in turn be explained by the fact that two leading digests suggest that infants' contracts not dealing with necessities are voidable meaning "valid until repudiated, not invalid until confirmed."⁵⁷ However Halsbury cites as supporting this proposition only cases relating to marriage settlements, which are indeed voidable in this sense, and the Canadian Encyclopedic Digest (Western) relies on a case which has nothing whatever to do with the point.

The existence of this line of Canadian decisions does raise the policy question of why contracts concerning land, partnership agreements, shares and marriage settlements should be governed by rules different from those applicable to other infants' contracts. The traditional justification is that under these four categories

of contracts the infant acquires "an interest in permanent property to which continuing obligations attach."⁵⁸ But it has been pointed out that this explanation would not cover, for example, an infant's contract to purchase land for a lump sum, because such a contract does not give rise to any continuing obligations.⁵⁹ In principle in modern times there would appear to be no real reason to distinguish any longer between a lease of land, which binds the infant until it is repudiated, and a contract for the rental of a chattel, which does not bind him at all unless he ratifies it.

The apparent irrationality of the distinction between these two kinds of voidable contracts has led one commentator to suppose that the special treatment of the four truly voidable contracts is based on "social and economic factors which have long since passed away."⁶⁰ It is probably this same irrationality which has led some Canadian courts apparently to ignore the distinction and to class all infants' contracts as truly voidable. The really practical problem is that in the cases where this has occurred, the courts have failed to justify their departure from principle or even to recognize that they are making new law. Yet at the same time, other courts in different cases have reiterated the traditional distinction.⁶¹

As a result, it is impossible to set out the present state of the law with any certainty. In theory the distinction between

the two types of voidable contracts is well founded, though arguably irrational. In practice it is sometimes ignored. This situation is patently unsatisfactory, but for the purposes of analysis it is necessary to consider separately the two different types of voidable contracts, bearing in mind that the line of demarcation between them is not as clearly drawn as it once was.

2. Contracts binding upon the Infant until Repudiated

As discussed above, only four categories of infants' contracts are clearly recognized as binding until repudiated: contracts concerning land, share contracts, partnership agreements and marriage settlements. Each of these categories will be considered in turn.

(i) Contracts concerning Land

A strong line of cases classifies an infant's contract which transfers an interest in land as truly voidable. In the words of Ferguson J., of the old Ontario Chancery Division, "when a conveyance passing an estate has been executed by an infant, he must, in order to repudiate, do some distinct act in avoidance of it at or soon after he attains 21, or he will be bound by his acquiescence."⁶²

This requirement of a positive act of disaffirmance in order to avoid legal liability has been held to apply to an

infant's conveyance of land,⁶³ a mortgage entered into by an infant⁶⁴ and, at least in England, a lease entered into by an infant.⁶⁵

The common law in this area has been modified by statute in most Provinces. Under the Alberta Infants Act, for example,⁶⁶ provision is made to render fully binding dispositions by infants of various interests in land. Upon application in the name of the infant by his next friend or guardian, and with the infant's consent if he is over fourteen years old, section 2 of the Act permits a Supreme Court Justice in Chambers to order the sale, lease or other disposition of an infant's interest in land, provided that the judge is of the opinion that such a disposition "is necessary or proper for the maintenance or education of the infant or that for any cause the infant's interest requires or will be substantially promoted by such disposition." A conveyance of an interest in land in this manner is described by Section 4 of the Act as being as effectual as if the infant had been of full age at the time of the conveyance.

Section 8 of the same Act covers the situation in which an infant is seized of the reversion of land subject to a lease, which contains a covenant not to assign or sublet without leave. Under this section the guardian of an infant is permitted, with the approval of a judge of the Supreme Court or Surrogate Court, to

consent to any assignment or transfer of the leasehold interest. Such a consent is as effective as if it had been made by a lessor of full age.

The Act therefore provides a useful mechanism to enable an infant to make a binding disposition of an interest in real property. It must be noted however that this mechanism is not mandatory, in that the Act does not state that any disposition made otherwise than under its terms will be ineffective. Accordingly it appears that if an infant makes a contract concerning an interest in land without following the steps specified in the statute, the rules of the common law will apply and the transaction will be binding on the infant unless he repudiates it.

(ii) Share Contracts

Contracts under which an infant agrees to purchase shares are similarly voidable, with the result that the infant can be liable for calls unless he has previously repudiated the contract.⁶⁷

This principle is vividly illustrated in Canada by reference to early cases in which calls were made on infant shareholders of failed banks for double liability on the par value of their shares. In one case,⁶⁸ the father of an infant had purchased shares in a bank for the infant and had

the shares placed in her name. When the infant had reached the age of 23, winding up proceedings commenced against the bank and she sought to have her name removed from the list of contributories on the ground that she was an infant when the share contract was made. The Ontario Court of Appeal held that the infant was liable as a contributory on the ground that she had not repudiated the share contract within a reasonable time of reaching her majority. The court therefore clearly classified the share contract as binding unless repudiated.

(iii) Partnership Agreements

An infant's capacity to enter into a partnership agreement is not directly covered by the Partnership Acts. The issue accordingly must be governed by the common law, which according to Section 80 of the Alberta Act, continues in force to the extent that it is not inconsistent with the terms of the Act.⁶⁹

At common law it is clear that an infant may be bound to his partners under a partnership agreement until he repudiates it, though the restrictions which the common law places on trading contracts prevent him from incurring trading debts with third parties as a result of the partnership. The implications of this rule are well illustrated by the decision of the House of Lords in Lovell and Christmas v. Beauchamp.⁷⁰

In that case the plaintiffs were creditors of a partnership named Beauchamp Brothers, of which one of the partners was an

infant, and the question concerned the extent of the infant's liability for partnership debts. Lord Herschell on these facts held that the infant was bound by his contract of partnership until he disaffirmed it, although he could not become a debtor in respect of goods ordered for the firm. As a result, the only adverse legal effect on an infant in such a situation is that he is not entitled to a share in the profits or assets of the partnership until its liabilities have been paid off.⁷¹ It has been pointed out that in this way third parties benefit indirectly from the infant's liability to his co-partners, for this may swell the available assets of the partnership.⁷²

No direct authority supports the application of this case in Canada, but there is no reason to doubt its applicability as part of the common law.⁷³

(iv) Marriage Settlements

At common law it is clear that a marriage settlement entered into by an infant is a further example of a contract which is binding upon the infant unless repudiated⁷⁴ and therefore "voidable" in the true sense of the word. The common law in this respect still applies in Alberta, subject only to a small modification contained in the Infants Act.⁷⁵

Sections 11 and 13 of that Act formerly provided that a male infant, who was not less than 20 years old, or a female infant,

of at least 17 years of age, might make a binding settlement of property in contemplation of his or her marriage with the sanction of a Supreme Court Justice in Chambers. However the reduction of the age of majority to 18 under the Age of Majority Act has expressly limited the availability of this mechanism to female infants of not less than seventeen years of age.⁷⁶ As a result the common law rule again applies in Alberta to the effect that all marriage settlements entered into by infants are voidable, unless the settlement is made in accordance with the Infants Act by a female aged seventeen years. This provision now appears to be a legal anachronism, for there is surely no valid reason for treating marriage settlements of seventeen year old females any differently from those of other infants.

Although the common law places only settlements in contemplation of marriage in the special category of voidable contracts, a Saskatchewan court has viewed a separation agreement in the same light.⁷⁷ However the court in that case relied on cases relating to property settlements in contemplation of marriage to support its decision and was very concerned to prevent the plaintiff from ignoring a perfectly fair arrangement. There appear to be no other cases placing separation agreements in this special category of voidable

contracts and in principle they should be treated in the same way as other settlements or compromises of legal rights made by infants which, as will be discussed below,⁷⁸ are either non-binding until ratified or totally void.

(v) Repudiation

(a) Rules Relating to Repudiation

An infant may repudiate liability under a voidable contract at any time during infancy or within a reasonable time of reaching his majority.⁷⁹ If the infant chooses to repudiate during his minority, there is some authority which suggests that he may withdraw his repudiation upon attaining full age.⁸⁰

In the event that a repudiation is made after majority, the courts require it to be made promptly in order to be effective, at least where the former infant is fully aware of his situation and simply fails to do anything to avoid the contract.⁸¹ In addition it appears that an infant's right to repudiate may be lost if he affirms the contract after reaching his majority, even if the reasonable time period has not elapsed.⁸²

The act of repudiation of course must show a clear intention on the part of the infant that he will no longer

be bound by the contract. Accordingly he must repudiate the contract as a whole and he cannot purport to avoid some parts of it and at the same time to remain bound by others.⁸³

(b) Effects of Repudiation

The legal significance of a repudiation of a contract made during infancy can be measured by reference to its effects on three different kinds of obligations: the future and as yet inchoate liabilities of the infant under the contract; the liabilities which have already accrued under the contract; and the recovery of money which he has paid according to the terms of the contract prior to repudiation. Each of these will be considered in turn.

Future Liabilities

It is clearly established that the major effect of a repudiation by the infant is to relieve him from all future obligations, which have not yet become due at the time of repudiation. Hence, for example, an infant lessee who repudiates a lease will be relieved of his liability to pay rent for the remaining portion of the lease.

Accrued Liabilities

The effect of a repudiation upon liabilities which have fallen due under the contract prior to its

avoidance is a matter of much greater dispute. The question of whether these liabilities survive or are extinguished by the repudiation has arisen, for example, in relation to an infant's liability to pay rent which was already owed at the time of repudiation,⁸⁴ and upon this issue the authorities appear to be divided.

In Canada the more supportable view appears to be that repudiation has a retrospective effect and relieves the infant from liabilities which have fallen due, but which have not been discharged at the time of repudiation. In Re Central Bank and Hogg⁸⁵, the petitioner was a shareholder in the Central Bank of Canada, which was in the process of being wound up. An order for calls against the contributories was made in October 1888, though the petitioner did not reach full age until January 1889. In October 1889 she repudiated the share contract by seeking to have her name removed from the list of contributories and the question arose as to whether this relieved her of the existing liability to pay calls. The Court held clearly that she was entitled to be discharged as a contributory and hence imparted retroactive effect to her repudiation. This view of the effect of repudiation is supported by a well-known English case⁸⁶ and on balance appears to be based on sounder authority than the contrary view that infants are bound to discharge liabilities

already owed at the time of repudiation.⁸⁷

Recovery of Money Paid or Property Transferred

The retroactive effect of a repudiation in discharging accrued liabilities does not extend to permit the infant an automatic right to recover money paid or property transferred under a voidable contract. Canadian courts appear to employ different tests in deciding the legitimacy of such a recovery according to whether the infant is seeking the return of money or property. In the former case, the critical point seems to be whether there has been a total failure of consideration, whereas the recovery of property seems to depend upon the infant's ability to effect restitutio in integrum.

Recovery of Money Paid

Generally the infant's claim to money already paid under a repudiated contract will be denied if the other party has performed his part of the bargain.⁸⁸ This principle is illustrated by the Ontario case of Short v. Field,⁸⁹ in which the infant plaintiff agreed to purchase a house and lot from the defendant for \$1,400.00 and paid a deposit of \$200.00 on the transaction.

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Before repudiating the contract, the plaintiff established a new tenant in the house at an increased rent and brought in a land agent to display the house with a view to resale. In view of his exercise of these rights of occupation and possession the Court held that the infant was not entitled to recover the \$200.00, as the consideration under the agreement had not failed completely. Of course his position may well have been different if he had not taken effective possession and under those circumstances he may have recovered his deposit.

Recovery of Property Transferred

In a number of cases involving property transferred under a repudiated contract, the infant's right of recovery has been contingent upon whether he could restore the adult party to the position he was in before the contract was made. For example in Whalls v. Learn,⁹⁰ the Ontario Divisional Court was concerned with the effect of a repudiation by an infant of a contract under which she had transferred her land to the defendant in exchange for \$700.00 and another parcel of land owned by the defendant. While the Court was prepared to concede the infant's right of repudiation, it emphasized that she could only recover her land if she made a complete restoration of the land

and money she had received from the defendants. This case also illustrates the substantially different effect on both parties of making the recoverability of property dependent upon the infant's ability to effect restitutio in integrum rather than upon the failure of consideration test. In Whalls v. Learn there could have been no question of the infant recovering on the latter ground, for the adult had clearly performed his part of the bargain.

It must be emphasized that Canadian Courts have never defined clearly the circumstances governing the application of these two different tests and that they have not made expressly the distinction between the recovery of money and the recovery of property. It simply appears to have been the practice to use the failure of consideration test in the former case and the restitutio in integrum test in the latter. There seems to be no reason in principle why the two situations should be considered differently⁹¹ and as a matter of policy it is perhaps preferable that recovery in both cases should depend upon the infant's ability to restore the adult to his former position.⁹²

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This test appears to be fairer in that the adult party's right to retain money or property rests upon the possibility of the infant preventing further serious loss to him, rather than upon the fortuitous circumstance of whether he has performed his part of the contract.

3. Contracts not Binding upon the Infant until Ratified

(i) *Contracts within this Category*

Subject to some of the inconsistencies in Canadian case law discussed above all infants' contracts, except those for necessities and those which are truly voidable, are not binding upon the infant until they are ratified, unless the contract is so prejudicial to the infant as to be utterly void.⁹³

Contracts falling typically under this heading include infants' purchases of goods for trading purposes⁹⁴ and purchases of goods other than necessities.

In particular it is clear at common law that most settlements of legal actions by infants are, at best, not binding unless ratified⁹⁵ and that they may be totally void, if prejudicial to the infant's interests. The inconvenience of this area of the law has been mitigated somewhat in Alberta by Section 16 of the Infants Act,⁹⁶ which was enacted in 1959. This section

permits an infant, by his guardian, parent or next friend, to make a binding settlement of a personal injury action before a Supreme Court Justice in Chambers, if the judge is of the opinion that the settlement is in the best interests of the infant.

The statutory mechanism however only applies to personal injury actions and not to the settlement of other tort actions, breach of contract actions or even separation agreements. All of these contracts fall within the general rules governing this category of infant's contracts and are entered into at the risk of the adult party. However there is good authority which suggests that settlements of these actions can be rendered binding if they are presented to the court for approval. In these circumstances, the settlement obtains its binding force not from the agreement itself, but from the approval by the judgment of the court⁹⁷ and it is clear that the court will satisfy itself that the settlement is in the best interests of the infant before endorsing it.

(ii) Liability under Contracts not binding until Ratified

(a) Effects of the Contract

The mere fact that an infant's contract in this category does not bind him until it is ratified does not mean that the contract is of no legal effect. In the first place it is well established that the infant

may enforce the contract against the adult party,⁹⁸ although not by way of specific performance, as that remedy would not be available to the adult against him.⁹⁹ In addition third parties cannot rely on the invalidity of the infant's contract, for the privilege of considering the contract avoided is personal to the infant alone. This principle emerges from the case of McBride v. Appleton,¹⁰⁰ where an infant purchased a motorcycle from the plaintiff under a conditional sale contract. After a few weeks he sold the vehicle to a dealer, who resold it to the defendant, with the result that when the infant defaulted on his payments, the plaintiff sought repossession from the defendant purchaser. The Ontario Court of Appeal held, inter alia, that the defendant could not set up the invalidity of the original contract of sale to defeat the plaintiff's claim. In the words of Roach J.A.:

"In the case of a contract which is voidable only, the infant may, on attaining his majority, elect to affirm it and be bound thereby, or even during his infancy elect to disavow it so that ratification or disavowal is something personal to the infant."¹⁰¹

Accordingly the contract is by no means void and can have considerable legal consequences even before it is ratified.

(b) The Infant's Liability

It is clear from the basic nature of a contract which is non-binding unless ratified that if the infant chooses not to stand by the contract, he will be relieved of all future and accrued liabilities.¹⁰² The major issue in this category of contracts concerns the extent of the infant's ability to recover property transferred under the contract prior to its avoidance.

If the infant party has transferred money or property under the contract, his ability to recover it seems dependent in the first place upon whether there has been a total failure of consideration.¹⁰³ This proposition is illustrated by the recent Alberta case of Fannon v. Dobranski,¹⁰⁴ where the infant plaintiff purchased a secondhand car for \$300 cash. He took possession and drove the car 70 miles when the transmission broke down, at which stage he returned the car and purported to avoid the contract. Belzil D.C.J. held that the plaintiff was unable to recover his payment, as he had received valuable consideration for it in the form of the ownership and possession of the car, even for such a short period. In this context of course the test of total failure of consider-

ation requires the actual performance of his promise by the other party before the infant is barred from recovering his property; his mere promise to perform, which is consideration in the normal sense, is insufficient.¹⁰⁵

Other Canadian cases suggest that the true criterion upon which the infant's recovery of money paid or property transferred should rest is his ability to effect restitutio in integrum to the other party. As intimated earlier, this is a wider principle than that of total failure of consideration, for there are many cases in which the infant may have received good consideration for his money and yet still be able to restore the other party to the position he was in before the contract was made.

The restitution principle was set out in the recently reported decision of the Alberta District Court in 1964 of Bo-Lassen v. Josiassen.¹⁰⁶ In this case the plaintiff, at the age of seventeen, purchased an old motorcycle from a secondhand dealer for \$130 cash, subsequently regretted his action and sought the return of his payment. Buchanan, C.J.D.C., held that the infant could effect restitutio in integrum to the plaintiff, as the motorcycle had not been used by him and was still in the same condition as at the time of purchase. Accordingly he could recover his \$130 on condition that he returned the motorcycle to the dealer. It is extremely doubtful

whether the Court could have reached such a conclusion on the total failure of consideration test, because the dealer had clearly performed his part of the bargain.

A possible reconciliation between these two tests, which involve different practical consequences, was provided by Prendergast J. in a rather old Manitoba case. He stated the governing principle in these terms:

"If an infant pay money without valuable consideration, he can get it back; and if he pay money for valuable consideration, he may also recover it; but subject to the condition that he can restore the other party to his former position."¹⁰⁷

This may be a satisfactory statement of the law and it was adopted by the court in the Bo-Lassen decision.¹⁰⁸ However the principle has not been mentioned in the other recent cases and for the purposes of accurate analysis, it is probably correct to say that Canadian courts have used both tests quite arbitrarily.

Further confusion as to the rules relating to the recovery of property is provided by the decision of Chaplin v. Frewin, which was discussed earlier.¹⁰⁹ In that case, which was outside the scope of the English Infants' Relief Act and hence governed by the common law, the Court of Appeal

considered whether the infant plaintiff could recover copyright which he had assigned under an avoided contract. Lord Denning, M.R., in dissent, considered that a disposition of property by an infant, by a written document as opposed to by delivery, was voidable because it would be absurd "to hold that a contract to make a disposition is voidable and that the disposition itself is not."¹¹⁰ With respect, this view is not well supported by authority¹¹¹ and it would be equally absurd for the recovery of property to depend upon whether the disposition was accomplished by delivery or by a written document. However the majority of the court took the more orthodox view that the recovery of the infant's property was not automatic and their refusal to allow the return of the copyright can be justified on the basis that restitutio in integrum was no longer possible.¹¹²

The operation of the rules of restitution in this area of law is complicated where the infant has made a partial payment of the price and received the goods under the contract or obtained the goods on credit. For example, in Coull v. Kolbuc,¹¹³ an infant agreed to purchase a second-hand sports car, gave a deposit of \$50 and took immediate delivery. The infant used the car for a short time, apparently about two weeks, and then sought to return it to the vendor and to recover his

deposit. In this situation, Cornack D.C.J. held that the infant could neither recover his deposit nor apparently rescind the contract, for the vendor had performed his contractual obligations. The latter part of this decision is surely contrary to principle, for it confuses the infant's right to rescind with the question of his ability to recover money paid under an avoided contract.¹¹⁴ Clearly the infant in Coull v. Kolbuc ought to have been able to rescind future liabilities under the contract, including his obligation to pay the balance of the purchase price, and the real problem concerned only the recoverability of his deposit.

This issue becomes one of considerable importance if the facts of Coull v. Kolbuc are varied slightly. If the infant in that case had paid a deposit of \$750 on a car valued at \$1,000 and instead of returning the car had simply refused to pay the balance, a genuine dilemma arises assuming that restitutio in integrum is no longer possible. If the Court were to require either that the infant pay the balance or that he return the car and forfeit his deposit, in effect it would be enforcing the contract. If, on the other hand, the infant were required to return the car and the owner to return the deposit, the Court would be permitting the infant to recover money paid where restitutio in integrum was no longer possible and where there had been no total failure of consideration. As a third possibility, if the defence of infancy were to succeed and the court were to leave the parties where they stood, the infant would be unjustly

enriched at the adult's expense.

This point does not appear to be directly covered by authority and the governing law is a matter of considerable doubt. An analogous situation can be found in the well-known Ontario case of Louden Mfg. Co. v. Milmine,¹¹⁵ in which an infant purchased certain merchandise from the plaintiffs to the value of some \$287. He failed to ratify the contract upon reaching full age, but continued to refuse to pay for the goods. On appeal, the infant was held liable to return those goods which were still in his possession when he attained his majority. In reaching this decision, Meredith C.J. considered the following principle as "abundantly clear ":

"It must be that if an infant avails himself of the right he has to avoid a contract which he has entered into and upon the faith of which he has obtained goods, he is bound to restore the goods which he has in possession at the time he so repudiates."¹¹⁶

On this basis it appears that the infant, who had paid a deposit of \$750 on a car worth \$1,000 and who refused to pay the balance, would be required to restore the car.¹¹⁷ He would presumably be unable to recover his deposit as restitutio in integrum was no longer possible.

The apparent harshness of this rule upon the infant is mitigated by the fact that it only applies if he is unable to restore the owner to his former position or if the owner has

performed his part of the contract. In addition it avoids contenance of an unjust enrichment of a blatant nature. However in effect it does mean that the infant may lose his privileged legal position quite easily.

The adult's action for restoration presumably would be framed in detinue and, as one commentator has recently pointed out, the adult could not be met by the argument to be discussed later, that this would amount to the indirect enforcement of a contract by a tortious action. This is explained by the fact that the action is based upon a recognition that the contract has been rescinded by the infant and cannot be enforced.¹¹⁸ The adult is in fact treating the contract as repudiated and seeking to recover his property rather than to enforce the contract.

A considerable amount of confusion as to Canadian law in this context is caused by statements in English textbooks, echoed in at least one Canadian case and somewhat glibly assumed by the Ontario Law Reform Commission to the effect that an infant can both keep and refuse to pay for non-necessary goods.¹¹⁹ The question arises as to why this should be the case when such contracts are in England "absolutely void" under the Infants Relief Act, whereas they are merely voidable in Canada. The answer appears to be a matter of statutory interpretation. Despite the wording of the English statute, it has been held

that title can pass under the "absolutely void" contract.¹²⁰
If this is the case then no action can be taken in detinue or conversion, for the adult has no claim to the goods. However the situation in Canada is different, for although title does initially pass to the infant under a voidable contract, once he elects to treat it as rescinded, he can surely have no claim to possession when confronted with the owner's action , for he has already denied its only possible basis.

Although it is established by the Louden case that an infant is liable to restore any consideration which is still in his possession if he chooses not to perform the contract, it is quite clear that his liability ceases if he no longer has the goods at that time. This point was not actually raised in the Louden case, although the court appeared to work on the assumption that the infant was not liable to restore, or to pay compensation for, those goods supplied by the plaintiff which he had sold to third parties during his minority.¹²¹ Similarly it appears that the infant will not be liable for any depreciation in goods remaining in his possession which he is forced to return.¹²²

It is also clear in these situations that the vendor ought not to be able to recover the goods or their value

from the third party, who purchased them from the infant. The reason for this result is that the contract, though not binding upon the infant until ratification is not a nullity. As mentioned above,¹²³ the privilege of avoiding the contract is personal to the infant and at least until that privilege is exercised, he should be able to give good title to a third party.

(iii) The Requirement of Ratification

At common law an infant who was not otherwise bound by a contract could become liable if he ratified it upon reaching full age.

Some controversy now surrounds this requirement of ratification in some provinces. In strict law the position seems to be that a ratification must be in writing to be of any effect. This requirement results from the fixing of the date of reception of English law in Alberta at 15 July, 1870, for at that date in England, ratification was governed by Lord Tenterden's Act, which provided:

"That no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." ¹²⁴

In principle Lord Tenterden's Act ought to apply in Alberta. This view is confirmed by the existence of express authority which holds that the Act is applicable in Saskatchewan.¹²⁵ In addition the provisions of the English Infants' Relief Act of 1874, which repealed the rules relating to ratification set out in Lord Tenterden's Act, have been held not to be in force in Alberta.¹²⁶ Accordingly, the unrepealed Act must still in theory be applicable in this Province.

As might be expected with a rule, which in present day conditions can only be described as archaic, courts appear to be reluctant to apply it rigorously to cases which it would normally govern. However some indication of the scope of the rule can be gained both from the Saskatchewan case and from those jurisdictions which have specifically re-enacted Lord Tenterden's Act as part of their own Statute of Frauds.¹²⁷

The clearest effect of the Act is to render non-actionable an act by an infant, which would otherwise amount to a ratification, unless it is supported by some written evidence.¹²⁸ If some written evidence can be found which purportedly constitutes a ratification, it is obviously a question of fact whether it does so or not. The test suggested in some Canadian cases, relying on English authority prior to the Infants Relief Act, is whether the

document, if executed by an adult, would have amounted to a ratification of an otherwise unauthorized act of a party acting as his agent.¹²⁹ The ratification must be "an admission of existing liability",¹³⁰ rather than a mere recognition of a debt or contract made during infancy.

In accordance with the general principles of the Statute of Frauds, any ratification which is not in writing is not of course void, but merely unenforceable. Accordingly the requirement of ratification is discharged by execution by the infant and its unenforceability becomes irrelevant.¹³¹

There are however several cases in which courts have appeared to neglect the requirement that a ratification must be in writing, though it is not clear whether this is caused by a dislike or an ignorance of Lord Tenterden's Act. In the Alberta case of Re Hutton in 1926, for example, Ives J. stated boldly that "the ratification does not have to be in writing."¹³² Such a comment can only be taken to have been made per incuriam, but in policy terms it is surely justifiable. In present conditions, there can be no reason why a ratification must be in writing and in the words of one commentator, the requirement can only be viewed as "a relic of a bygone age."¹³³

D. VOID CONTRACTS

1. Contracts Within this Category

There has been considerable controversy as to whether the common

law recognized a category of infants' contracts which was totally void. Sir Frederick Pollock was adamant that no such category existed: he considered that all infants' contracts, other than those for necessities, were voidable and that the addition of a group of void contracts created a distinction "in itself unreasonable" and contrary to "the weight of all modern authority."¹³⁴ Other writers contended that it was well established in common law that certain infants' contracts were void in the true sense, even though they doubted the need for such a rule.¹³⁵

This controversy is of course of great importance in Canada, where there has been no statutory intervention to change the original common law position. It was clearly raised in the Ontario Court of Appeal decision of Beam v. Beatty,¹³⁶ in which Garrow J.A. explicitly rejected Pollock's view. In that case an infant sold 55 shares, valued at \$10 each, to the plaintiff and agreed to secure him against any loss he might suffer by reason of his purchase. To this end, the infant gave a bond in the penal sum of \$1100, conditioned to indemnify the plaintiff against possible loss and obliging the infant to purchase 11 of the plaintiff's shares at a price of \$50 per share if requested to do so at any time after the date of the bond. Some years later, when the shares had become worthless, the court held that the latter obligation was totally

void, relying on a number of old English decisions which classified all bonds with penalties given by infants as void, and not merely voidable.

This case has formed the starting point for a steady stream of Canadian authority which has widened considerably the category of void contracts. In the first stage of the development of the law from Beam v. Beatty, the courts moved to hold void all infants' contracts involving a penalty. For example in one case in which an infant agreed to purchase certain city lots from the defendant on instalment payments, the contract was held void when it appeared that the infant had agreed, in case of any default of more than three months duration, to forfeit all payments previously made and the land itself to the defendant.¹³⁷ This decision may appear to go further than necessary in protecting the infant, for a genuine penalty clause of that nature would have been equally unenforceable against an adult party, by virtue of the established rule of equity providing for relief against penalties.¹³⁸ However if an adult had been involved, the defendant would have been permitted to sue for his actual loss upon the breach of contract, without reference to the penalty clause. The presence of an infant, on the contrary, rendered the whole contract void with the result that the defendant was unable to recover anything by way of damages, though he did retain his land.

From the fairly incontrovertible cases in which contracts involving

penalties were held void, Canadian courts seem to have moved to the position where almost any "prejudicial" contract entered into by an infant will be considered in the same manner. Accordingly in one case in which an infant purchased land valued at \$5000 for \$9000, and gave a mortgage of \$7000 on the land purchased and \$1000 on other land which he owned, the mortgages were considered void on the basis that "the transaction was necessarily to the defendant's prejudice."¹³⁹ In more recent times, the courts have adopted the same theory to declare void a totally improvident sale of an interest in land eleven years after the former infant reached full age,¹⁴⁰ a "wholly unfair" contract whereby an infant agreed to build a house¹⁴¹ and a loan agreement and wage assignment made by an infant.¹⁴²

This extension of the law has rendered it extremely difficult to predict when a court will hold that a contract is void. In particular courts have occasionally held an infant's contract void when a decision that it was voidable would have been ample to protect his rights,¹⁴³ thus indicating perhaps a looseness in terminology rather than a conscious desire to expand the category. In other cases however the courts have been quite explicit in extending the scope of void contracts. Indeed there have even been suggestions that any contract not for the infant's benefit will be void,¹⁴⁴ though this surely goes far beyond what is necessary to protect the infant. At the same time other cases insist on

the existence of a penalty¹⁴⁵ or a clear prejudice¹⁴⁶ to the infant before the contract will be held void. Consequently the present scope of this category of infants' contracts is somewhat uncertain, but it is suggested that the latter, narrow view is more justified in policy terms. The reasons for this position became apparent when the effects of holding a minor's contract void are examined.

2. Effects of a Void Contract

An infant's / ^{void} contract has two different effects when contrasted with a contract which is merely voidable. Firstly the contract cannot be ratified by the infant, even when he reaches full age, and secondly it appears to be governed by different rules for the recovery of property. In addition it may have an indirect, adverse effect upon the position of third parties to the contract.

In several decisions sufficient evidence has existed of acts which would amount to ratification in the case of voidable contracts but this has been considered irrelevant where the contract is void, on the assumption that a void contract is incapable of ratification.¹⁴⁷ This rule, which permits the former infant to avoid an improvident bargain even in the face of an unequivocal recognition of its binding nature after the

age of legal maturity, appears to be unduly protective of the infant's rights. In contrast, if the infant had actually entered the contract as an adult, rather than merely ratifying it, he would clearly be bound notwithstanding that it was against his interests. The distinction seems somewhat arbitrary for it appears to ignore the general principle that an adult will be bound by a contractual act, simply because the act can be related back to a bargain made during infancy. This reasoning would apply a fortiori if the courts adhered strictly to the requirements of ratification discussed earlier in this paper.

It appears that if an infant's contract is held to be void, he may recover back money paid or property transferred regardless of any benefits he has received and of his ability to make restitution to the other party.¹⁴⁸ If the contract is indeed void this rule seems consistent with both principle and authority, but in one case it was suggested that the infant's right of recovery only existed if there had been a failure of consideration.¹⁴⁹ However the authority of this decision is not strong, for the court based its conclusion upon cases involving voidable contracts and, in any event, it appeared to allow recovery despite the fact that the infant had received some benefit under the contract.¹⁵⁰

This extensive right to recover money paid or property transferred illustrates the unfairness caused by the existence of a large group

of void contracts. Not only is it extremely difficult for a court to decide whether a given contract is on balance prejudicial, but it can also be argued that even if the contract is against his best interests, the infant is well protected if it is held voidable and not utterly void. Williston cites these reasons for the abandonment by American courts of the category of void contracts¹⁵¹ and it is submitted that they have considerable merit. The general limitations on the infant's right to recover property transferred under a voidable contract, namely that there must have been a total failure of consideration or that he can effect restitutio in integrum, are surely founded on principles of fairness, unless the adult party has taken blatant advantage of an infant's immaturity. The extension by Canadian courts of the notion of void contract appears to ignore these principles, which represent a reasonable compromise between the interests of both infant and adult.

Finally it must also be noted that the apparent willingness of the courts to hold an infant's contract void could well seriously affect the position of third parties to the contract. If a third party were to purchase goods from an infant which the latter had obtained from the original seller under a void contract, then presumably the goods could be recovered by the original seller

under the rule nemo dat quod non habet. In other words, the risk of loss is transferred from the party who originally dealt with the infant to an innocent third party. If on the other hand, the contract between the infant and the original seller is merely voidable, the third party will be able to resist the original seller's claim to the goods.¹⁵²

This undesirable effect of holding an infant's contract void can only be evaded if the innocent third party can allege that the original owner is estopped from denying the infant's authority to sell.¹⁵³ This possibility arose in the earlier discussed decision of the Ontario Court of Appeal in McBride v. Appleton,¹⁵⁴ which involved the sale of a motorcycle to an infant under a conditional sale agreement. Roach, J.A., dissenting,¹⁵⁵ held that the contract between the owner and the infant was void, but that the owner was estopped from relying on this in an action to recover the motorcycle against an innocent third party purchaser by the fact that he had signed an application for the transfer of the motorcycle permit. This enabled the infant to acquire his own permit and to appear as the registered owner of the vehicle. Although this exception to the nemo dat rule offers some protection to third parties, it must be appreciated that the requirements of estoppel are rather strict.¹⁵⁶ In other cases where there is less evidence to support an estoppel, the position of the third party will be

completely undermined. He will lose the goods to the owner's superior claim and have no recourse against the infant for a failure to give good title, for at this stage the latter presumably will have elected to avoid the contract with him.

The adverse effect on third parties has been of little concern to the courts in those cases in which they have held infants' contracts void. It is surely a further good reason against the apparently continued expansion of this category of contracts, when the infant is well protected by a decision that his bargain is merely voidable.

E. LIABILITY FOR TORTS CONNECTED WITH THE PERFORMANCE OF THE CONTRACT

1. General Principles of Liability

The general rule has long been established that an infant is ordinarily liable for his torts, unless he is of tender years and the tort in question requires some specific mental element such as malice or negligence.¹⁵⁷ It is equally clear however that the infant will not be held liable in tort if the effect of this would be to enforce against him indirectly an otherwise unenforceable contract.

The principles governing this area of the law were clearly set out by Sir Frederick Pollock in a manner which has been specifically approved in Canada.¹⁵⁸ He adopted the following distinction:

- (a) "He (i.e. an infant) cannot be sued for a wrong, when the cause of action is in substance ex contractu, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract
- (b) But if an infant's wrongful act, though concerned with the subject matter of a contract, and such that, but for the contract, there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable."

The locus classicus of the first branch of this rule is found in the old case of Jennings v. Randall,¹⁵⁹ in which an infant hired a horse which was to be "moderately ridden". He was held not to be liable in tort for inflicting harm on the horse by "wrongfully and injuriously" riding her for, in the view of Lord Kenyon, the true basis of the plaintiff's action was in contract. In his words, "if it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants."¹⁶⁰

This case is the foundation of a strong trend of authority in both English and Canadian common law. A more modern application of the same principle can be found in the New Brunswick case of Noble's Ltd. v. Bellefleur,¹⁶¹ where an infant purchased a new car under a conditional sale contract which provided that the car would be at his risk and that he would insure against the possibility

of physical damage. Within a few hours of taking possession, the infant was involved in an accident resulting in the total destruction of the car. The plaintiff's action in negligence against the infant failed on the ground that he had clearly contemplated the possibility of physical damage caused in this manner, as was evidenced by the insurance and risk provisions of the contract. Accordingly to permit the plaintiff to recover in tort under these circumstances would be tantamount to enforcing the provisions of an otherwise unenforceable contract. However the court appeared to leave open the possibility that the infant might be liable in tort if he had damaged the car by some act totally outside the purview of the contract.¹⁶²

This possibility of course refers to the second branch of Pollock's rule, which states that an infant may be liable for a tort which, though connected with a contract, is independent of it. This rule was established by the old case of Burnard v. Haggis,¹⁶³ in which an infant student hired a horse for riding, but expressly not for jumping. The infant was held liable in trespass when the horse was fatally injured through being jumped by a friend to whom he had lent her. Willes J. considered the action of the infant as much a trespass as if he had simply gone into a field, taken someone's horse and jumped it in such a way as to cause her death. In his words:

"It was a bare trespass, not within the object and the purpose of the hiring. It was not even an excess. It was doing an act towards the mare which was altogether forbidden by the contract."¹⁶⁴

Similarly in more modern times an infant who rented an amplifier and microphone was held liable in detinue when he was unable to return the goods because he had wrongfully disposed of them to a third party.¹⁶⁵ Again the infant had not merely performed an authorized act in a tortious manner, but had acted totally beyond the scope of the contract.

Although Pollock's distinction between independent torts and torts directly connected with contracts is well established, it appears to be open to objections from the standpoint of both practice and policy.

In practical terms, the distinction is extremely artificial and difficult to apply with any certainty. Even the two leading cases of Jennings v. Randall and Burnard v. Haggis, which are taken as illustrating each branch of the principle, are not easy to distinguish. The actions of the defendants in both cases were equally breaches of a term of their respective contracts. Traditionally their different results have been rationalized by considering that the contract in the former case was for riding, so that however immoderate it might have been, the

defendant's conduct was of the kind authorized by the contract; in the latter case on the contrary, jumping was expressly forbidden by the contract.¹⁶⁶ However it can be argued that "moderate riding" only was within the contemplation of the contract in Jennings, and that immoderate riding was as far removed from it as jumping was from the contract in Burnard.¹⁶⁷ Nor can it be said that the distinction rests entirely upon the fact that in the latter case, the defendant had lent the horse to another and thus stepped completely beyond the contract of bailment. This factor alone was not viewed by the judges as decisive¹⁶⁸ and there is no sound reason why the infant's liability should depend solely upon the existence of this type of breach.

The deficiencies of Pollock's test in other than the most obvious situations are similarly illustrated by its more modern applications in Canada. In the case of Victoria U Drive Yourself Auto Livery Ltd. v. Wood,¹⁶⁹ an infant plaintiff was held liable in tort when the car which he had hired was severely damaged by another infant whom he had permitted to drive. The majority of the British Columbia Court of Appeal considered that this amounted to an independent tort, despite the fact that it must have been very close to enforcing a term of the contract

which required the infant to make good all damages. Some 27 years later the same Court took a different view in the case of Dickson Bros. v. Woo Wai Jing,¹⁷⁰ which involved similar facts except that it was the negligence of the hirer himself which caused the destruction of the car. In that case Davey J.A. considered that to hold the infant liable in tort would amount to enforcing the contract against him, on the ground that the contract itself envisaged the possibility of negligence by requiring the infant to indemnify the owner against damage to his property and against liability for personal injuries. The Victoria U Drive case was distinguished on the basis that there the accident was caused by a person whom the infant had permitted to drive in contravention of the contract of bailment. This approach suggests that the infant's liability in Victoria U Drive arose because he had done something forbidden by the contract, whereas in the Dickson Bros. case the infant had merely done negligently the authorized act of driving. If this is the result of these two cases, then it is extremely artificial for apparently the owner's ability to recover in future cases will depend upon whether he has in his contract an express prohibition of the activity in question or a mere indemnity against its consequences. In other words, major practical results will flow from minor differences in contractual drafting.

The case of Dickson Bros. v. Woo Wai Jing also illustrates an extremely capricious result in policy terms of the current approach of Canadian courts. Pollock's test speaks of an infant being liable for a tort "independent of the contract in the sense of not being an act of the kind contemplated by it." As mentioned above, Davey J.A. in that case appeared to regard the fact that the contract itself envisaged the possibility of negligence as showing that the tort was not independent of the contract and therefore not actionable.¹⁷¹ This leads to the odd result that a well drawn contract, intended to indemnify the bailor for property damage, in fact worked against him for his action then clearly involved the enforcement of the contract. If however his contract was less carefully worded and made no reference to liability for negligence, then a much better argument could be made that the infant's acts were totally outside the contract and therefore a possible foundation for tortious liability.¹⁷²

At the present time, it is suggested that there is no clear test for determining when an infant will be liable for a tort connected with a contract. Perhaps the best approach is that suggested in Anson's Law of Contract, where the learned editor suggests three factors which are relevant, though not in themselves decisive, in assessing whether the tort is independent of the contract. These factors are: firstly the terms of the agreement;

secondly the presence or absence of an express prohibition ;
and thirdly the nature of the subject matter of the contract.¹⁷³
In addition, the loss caused to the plaintiff and the degree of
culpability exhibited by the infant appear to be strong influences
on the approach of the courts.¹⁷⁴

2. Liability for Fraudulent Misrepresentation

(i) The General Rule

It is well established that an infant's immunity
from tortious liability in performing the contract extends
to prevent him from being liable in deceit for a fraudulent
misrepresentation which induces the contract.¹⁷⁵ Again the
rationale for this rule is that if an action for deceit
were to lie in these circumstances, the protection afforded
to infants could be circumvented by an adult simply obtaining
a representation as to full age prior to contracting, for
example by including a statement to that effect in his
standard form contract.

It must also be noted that for similar reasons the courts
will not permit the infant's misrepresentation to estop him
from pleading the defence of infancy.¹⁷⁶ Therefore an infant's
fraudulent misrepresentation does not alter his common law right
to avoid a contract for goods other than necessities, though

of course it may well deprive him of equitable remedies, and he remains subject to the ordinary rules regarding property or money transferred under the contract.¹⁷⁷

(ii) Effect of Fraud in Equity

Although it is clear that fraud does not alter the infant's legal position, it can have some effect in equity.

Before assessing these equitable effects of an infant's fraud, it is first necessary to discuss exactly what constitutes the "fraud" necessary to attract equity's attention. Traditionally it has been considered that only an express, false representation by the infant that he is of full age will amount to fraud. But in more recent times Professor Atiyah has pointed out that the equitable conception of fraud has always been much wider than this and that in his opinion "for an infant to attempt to obtain something for nothing is, in equity, fraudulent conduct."¹⁷⁸ Although it is conceded that Atiyah's argument accords with the spirit of equitable principle, it is not supported by any direct authority. Indeed in Canada, as well as in England,¹⁷⁹ there are strong dicta which suggest that only an actual

fraudulent misrepresentation by an infant will support the intervention of equity. For example, in an old Ontario Court of Appeal decision, Hagerty C.J.O. stated emphatically:

"It seems to be clear that to form an equitable defence to the plea of infancy, which could not avail at law, there must be some actual misrepresentation by the infant as to his age."¹⁸⁰

This statement appears to reflect accurately the existing state of the law, though there is much to be said for Atiyah's wider definition of fraud. However, as will be pointed out shortly, the need to prove any kind of fraud may be much less in Canada than it is in current English law.

The effect of an infant's fraud in equity is two-fold:

(a) Release of Obligations

As has been mentioned earlier¹⁸¹ the normal result when an adult contracts with an infant, unless the contract involves necessities, is that the infant may enforce the contract though the adult cannot. However when the contract has been procured by the infant's fraud, the court will permit the adult party to be released from his obligations. Hence in Lempriere v. Lange¹⁸² a landlord was permitted to set aside a lease, which had been induced by an infant's fraudulent misrepresentation of his age, even though the infant apparently wished to retain the premises.

(b) Restoration of Benefits

In English law, it is clear that the major effect of an infant's fraud upon his legal position is to force him to restore anything he acquired by virtue of his fraud. A simple illustration of the operation of this rule is provided by the case of Noble's Ltd. v. Bellefleur, the facts of which have been discussed already in another context.¹⁸³ In that case, where an infant had obtained possession of a car under a conditional sale contract induced by his own fraud and subsequently destroyed it, the New Brunswick Court of Appeal considered that the equitable doctrine of restitution required the infant to restore only the remains of the car and nothing more. The essence of this equitable doctrine is therefore that the infant is obliged only to restore those goods which remain in his possession.

The obligation to restore in these circumstances illustrates the vital importance of proving fraud in English law, for the most commonly accepted view in England is that an infant who purchases goods other than necessities on credit may, in the absence of fraud, both keep and refuse to pay for the goods. However if the view

of Canadian law taken earlier¹⁸⁴ is correct, namely that an infant must restore any goods still in his possession if he chooses not to be bound by a contract for non-necessaries, then proof of fraud is far less essential in this country.

Accordingly it is suggested that the obligation to restore imposed by equity in cases of fraud may not be important where the goods are still in the infant's possession. The only situation in which equitable restitution may be relevant in Canada is where the infant has already disposed of the goods when he chooses not to perform the contract. In these circumstances he is clearly under no legal obligation to compensate the owner,¹⁸⁵ but there is some controversy as to whether equity might require the infant to restore the proceeds of any such disposition in some situations.

The source of this argument is to be found in the case of Stocks v. Wilson,¹⁸⁶ in which an infant purchased some furniture on credit from the plaintiff under a contract induced by a fraudulent misrepresentation as to his age. Clearly if the infant still had the furniture in his possession, he would be compelled to restore it, but in this case he had sold the goods to a third person for £30. On

these facts Lush J. held that the infant must account for the proceeds of his disposition to the plaintiff, although not for the true value of the goods if that exceeded the amount which he received.

This decision was however seriously doubted one year later by the Court of Appeal and its current validity is extremely uncertain. In the celebrated case of Leslie v. Shiell,¹⁸⁷ an infant borrowed the sum of £400 from a firm of moneylenders, who lacked the usual circumspection of their profession, on the strength of a fraudulent misrepresentation as to his age and was held not liable to restore the money when he had apparently spent it. In reaching this decision, Lord Sumner distinguished Stocks v. Wilson and apparently restricted its operation to very narrow circumstances indeed. By virtue of his famous dicta to the effect that in equity "restitution stopped where repayment began",¹⁸⁸ he clearly contemplated that the infant's equitable obligation required the return of property still in his possession but did not extend to demand an accounting of the proceeds of any prior sale of the property.

To this extent these cases add nothing to the right of an adult to recover his property or its value from a

fraudulent infant in Canadian law. However the court did appear to leave open the slight possibility that the principle of Stocks v. Wilson might apply to compel the infant to refund the proceeds of any sale of property obtained under the avoided contract where the money could still be "traced". Although several English writers urge that this gives rise to a real possibility of forcing the infant to make restitution, it is suggested that an argument along these lines is unlikely to succeed in Canada for the following reasons.

The "tracing" referred to by the Court of Appeal in Leslie v. Shiell might occur at common law or in equity. Common law tracing requires strictly that the property in money or goods must not have passed before there is any possibility of a remedy. As a result, it is unlikely to be very useful in Canada where the vast majority of infants' contracts are merely voidable, though it may be a possibility in England where most infants' contracts are void under the Infants' Relief Act.¹⁸⁹ The only situation in which the remedy might apply in Canada would be where the contract is so prejudicial as to be void. Even in these circumstances, it would scarcely be possible

for an adult to allege that he should recover his property on the ground that he succeeded in making his contract sufficiently onerous to be void, when a more deserving adult, whose contract was fair and consequently voidable, clearly would be barred from recovery. Equitable tracing too would seem to be little more than a theoretical possibility in this country because of the requirement that before a claimant can establish a right of property in equity, there must be a fiduciary relationship between him and the defendant who holds the property.¹⁹⁰ Such a relationship, it is submitted, would be difficult to imply between an adult trader and an infant purchaser in normal circumstances.

Accordingly, although the theoretical possibility of compelling a fraudulent infant to disgorge the proceeds of any sale of property is left open by Leslie v. Shiell, its practical utility is severely limited by the technical obstacles outlined above. This has the effect of permitting a fraudulent infant in most cases to avoid his restitutionary obligations by simply exchanging the goods obtained by fraud for something else. In this respect, Canadian law appears to treat the fraudulent and innocent infant on virtually the same footing insofar as restitution is concerned. It

is submitted that this goes beyond the bounds necessary to protect an infant against his own indiscretion and that the fairly rigid rule limiting the infants' obligation to restore only those goods still in his possession be modified to permit some compensation to the adult party in limited circumstances.

3. Liability in Quasi-Contract

A further offshoot of the desire to avoid the indirect enforcement of an infant's contract apparently has precluded the quasi-contractual action for money had and received as a means of preventing the unjust enrichment of the infant. The only situation in which this action traditionally lies against an infant is where the true cause of action is tortious and completely independent of contract,¹⁹¹ although even this has been doubted.¹⁹²

The leading authority against the availability of the action for money had and received against an infant is Cowern v. Nield.¹⁹³ In this case, the plaintiff ordered hay and clover from the infant defendant and paid him in advance. The hay was never delivered and the plaintiff properly refused to take delivery of the clover because it was rotten. Nevertheless, the plaintiff was unable to recover his money unless he could prove that his action for money had and received was based on an independent tort and not on contract. Accordingly

the case was sent back for trial on the issue of fraud. Similarly in Leslie v. Shiell¹⁹⁴ the action was denied to moneylenders seeking to recover £400 lent to an infant, on the ground that an unenforceable contract could not be circumvented by a claim based on an implied contract.

Although these two cases have been widely taken in England to establish that the action for money had and received is not available against an infant in the absence of an independent tort,¹⁹⁵ the issue is not so clear cut in Canada either in principle or on authority.

In principle, the English cases appear to have been decided on the assumption that quasi-contractual liability depends on an implied contract and that if an infant cannot be made liable on an express contract, then still less should he be liable on an implied one.¹⁹⁶ This assumption in England has been described as "objectionable"¹⁹⁷ and in this country it appears to be contrary to a Supreme Court of Canada decision which suggests that the basis of quasi-contract is to be found, not in implied contract, but in an independent obligation created by the law.¹⁹⁸ Once this confusion is cleared, as it appears to be in Canada, there should be no objection to permitting an action for money had and received to lie against an infant where this would not amount to an indirect enforcement of the contract. On this basis, Cowern v. Nield would not be followed in Canada as the quasi-contractual

action would not be aimed at enforcing the contract, but rather at recovering the purchase price where consideration has totally failed. The decision in Leslie v. Shiell, on the contrary, would remain good law as the recovery of the £400 lent to the infant even by a quasi-contractual action would amount to an indirect enforcement of the contract, since the main object of the infant's contractual obligation was to return the money lent.

In addition to this argument in principle, there is some slender authority in Canada to suggest that the action for money had and received may be available against an infant in these circumstances. In Molyneux v. Traill,¹⁹⁹ the plaintiff agreed to purchase from an infant six steers for \$300 and paid him a deposit of \$50 on the purchase price. When the infant refused to deliver the cattle, the plaintiff was of course prevented by the defence of infancy from claiming damages but he was nevertheless permitted to recover his deposit. Unfortunately neither Cowern v. Nield nor Leslie v. Shiell was cited in this case, but it certainly appears to permit an action for money had and received against an infant, for there is no other explanation of the recovery of the deposit.

F. INFANTS AND AGENCY

The capacity of an infant to appoint an agent is a question of considerable practical importance given the current proliferation of

infant entertainers and professional athletes and yet it poses a number of problems on which only scant authority can be found. For the purpose of analysis these problems will be divided into four categories: the relationship between an infant principal and his agent; the relationship between an infant principal and the third party; the infant as agent; the infant and the power of attorney.

1. The Relationship Between an Infant Principal and his Agent

The nature of an agency relationship with an infant principal has been the subject of much confusion, even in very recent times. In 1953 for example, Lord Denning in discussing an infant's powers, stated categorically:

"If he purports to appoint an agent, not only is the appointment itself void, but everything else done by the agent on behalf of the infant is also void and incapable of ratification."²⁰⁰

This view of the law, if correct, not only would give rise to great practical inconvenience for infants, but also would go far beyond what was necessary to protect them and apparently contradict basic principles of agency. However the notion that an infant's contract of agency is void conflicts with a number of well-known English cases in which the Courts appeared to assume, without expressly considering the point, that an infant could create a valid agency relationship in some circumstances.²⁰¹

In Canada, the position has been far more settled owing to the widely-cited case of Johansson v. Gudmundson,²⁰² which adopts the sensible rule that an infant's contract of agency should be considered on the same footing as other infants' contracts. In that case the father of the infant plaintiffs had agreed as their agent to purchase the defendant's farm for \$500. The defendant refused to carry out the contract and set up as a defence that the father had no right to act as the plaintiff's agent. In upholding the plaintiffs' claim for damages, Howell C.J.A. gave the following view of the law:

" the appointment of an agent is void or voidable just like any other act, undertaking or contract of the infant If an agent is appointed to execute a bond with a penalty, the appointment would be void. An infant can appoint an agent to purchase necessities, to dispossess a trespasser, to receive livery of seisin, to repudiate a contract, to elect on a contract and for many other purposes." ²⁰³

In recent times the authority of this case has been strengthened by Lord Denning's reversal of his earlier position and adoption of a principle similar to that of Johansson v. Gudmundson in a decision of the English Court of Appeal. In that case, the learned Master of the Rolls formulated the principle that "wherever a minor can lawfully do an act on his own behalf, so as to bind himself, he can instead appoint an agent to do it for him."²⁰⁴

The application of this principle to infants' contracts of agency means that they can be placed in the same four classes as infants' contracts generally.²⁰⁵ They may be binding (if related to the purchase of necessities or to beneficial contracts of service), truly voidable (if related to the purchase of land, shares, etc.), non-binding unless ratified (if related to, for example, the purchase of non-necessaries), or void (if related to a prejudicial contract). By extension of this approach, the cases appear to suggest that the classification of the agency contract as binding, voidable or void depends entirely upon the nature of the primary contract with the third party.²⁰⁶ Some objection has been taken that the agency contract should be assessed independently of the primary contract, "without regard to the validity of the transaction which the agent is to effect on the infant's behalf."²⁰⁷ This may indeed be technically correct, for there is no good reason why the agency contract should always inherit the status of the primary contract. For example, out of sheer extravagance or laziness, an infant might appoint an agent to purchase a necessity on his behalf, when he could well make the purchase himself. The contract of purchase would surely be binding, but the contract of agency would be voidable or even void in the same way as any trading contract, as it could not be described as a contract for a necessary. However the practical

results wrought by this approach do not seem to be very different, for there must be few, if any, cases in which an infant could validly appoint an agent to do something which he himself was unable to do.²⁰⁸

2. The Relationship between the Infant Principal and the Third Party

From the foregoing account it can be concluded that, in relation to the third party, the acts of the agent will have the same effect as if they were the acts of the infant himself.²⁰⁹ Accordingly if the contract is for necessities or truly voidable, he may be sued for breach in some circumstances by the third party. However if the contract is void or voidable, in the sense of non-binding unless ratified, the infant may presumably resist any action by the third party.

This categorization also affects the rights of the third party against an agent representing an infant principal, for if the contract of agency is void the agent will be liable to the third party for breach of warranty of authority, unless he disclaims such authority or the third party is aware that he lacks it.²¹⁰ Strictly the agent may be similarly liable if the agency contract is classified as non-binding unless ratified, because there will be no contractual basis for his authority in the absence of ratification.

3. The Infant as Agent

It appears to be generally accepted that an infant can act as an agent and that the principal cannot plead the infancy of his agent

in order to avoid the primary contract.²¹¹ Of course the extent to which the agency contract is binding upon the infant is governed by the general principles discussed elsewhere in this paper.

However the third party who deals with the infant agent may incur two disadvantages.²¹² Firstly, where an infant is acting for an undisclosed principal, the third party's election to treat either the agent or the undisclosed principal as the contracting principal will be purely nominal, for the infant agent should be able to rely on his normal contractual incapacity to defend any action against himself. Secondly, the third party may well be deprived of any action for breach of warranty of authority against the infant as agent. Although it is uncertain whether this action is contractual or quasi-contractual in nature, its availability would appear to defeat the normal legal protection given to the infant by limiting his capacity. Of course the third party might have a remedy if he could show a fraudulent misrepresentation, upon which to found a separate action for deceit.

4. The Infant and the Power of Attorney

It is generally accepted that, whatever the rule in relation to agency created in other ways, an infant's grant of power of attorney is void.²¹³ Although this proposition is well established, it is difficult to understand the reasoning behind it in modern conditions,

for a power of attorney is nothing more than an appointment of an agent by deed and should surely be considered on the same basis as other types of agency.

G. SECURING PERFORMANCE BY INTRODUCING A THIRD PARTY

In view of the wide restrictions upon the infant's ability to contract, which in many cases prevent the infant from acquiring what he wants and force the tradesman to lose potential business, efforts have been made to render the transaction binding by the introduction of an adult party. This may be accomplished successfully by taking an indemnity from the adult or by joining the adult as a principal party to the transaction. Each of these devices will be examined in turn.

1. An Indemnity from an Adult Party

It is clear that a businessman may protect himself in a contract with an infant by taking an indemnity from an adult party. It is most important however that this security in law constitute an indemnity and not a mere guarantee, for there are severe doubts about the enforceability of the latter device in this situation.

The liability imposed by a guarantee is of course strictly secondary; it only arises if there is a debt, default or miscarriage

by the party primarily liable. Accordingly if it happens that no debt is actually owing from the party thought to be primarily liable, then the responsibility of the guarantor ceases. This was the case in Coutts & Co. v. Browne-Lecky²¹⁴, in which an adult's guarantee of a loan made to an infant by way of overdraft was held to be unenforceable. The loan to the infant was absolutely void by statute and therefore there could be no default by the infant to render the adult liable under the guarantee. The principle of Browne-Lecky's case would presumably apply in Canada to render unenforceable guarantees of the small category of infants' contracts which are prejudicial and therefore void. It does not necessarily follow that the same rule would apply to guarantees of the vast majority of infants' contracts, which of course are merely voidable in this country.

This point does not appear to be directly covered by authority in Canada, although in one case Meredith C.J.C.P. did urge caution in applying to the very different Canadian problems in this area English cases involving contracts which were void under the Infants' Relief Act.²¹⁵ The matter must therefore be examined on principle.

In favour of the guarantee being held valid, it is well established in other contexts that the privilege of considering the primary contract avoided is strictly personal to the infant and that others

cannot normally share in this protection.²¹⁶ As a consequence in American law, sureties have not been permitted to avoid liability on the ground that the infant's contract is voidable.²¹⁷

On the other hand, the liability of the guarantor only arises when the infant has refused to perform his part of the contract and disaffirmed it. As the infant is entitled to do this without legal penalty, there is arguably no longer any debt or default to attract the liability of the guarantor. This strong argument against the liability of a guarantor of a voidable infant's contract can be further supported by reference to cases in the general law of guarantees relating to contracts voidable for reasons other than infancy.

A situation closely analogous to that of a voidable infant's contract was considered in the Australian decision of Insurance Office of Australia Ltd. v. T.M. Burke Pty. Ltd.²¹⁸ In this case the plaintiffs had sold land to the debtor under a contract providing for the payment of the price in instalments and had taken a guarantee from the defendant for the due performance of all the debtor's obligations. After defaulting on his payments, the debtor rescinded the contract, as he was entitled to under a Moratorium Act and the plaintiff sought to make the guarantor liable for the unpaid balance. However the New South Wales Supreme

Court held that the plaintiff's rescission destroyed all future obligations under the contract and that the guarantor's liability disappeared with the obligations to which it was collateral. Although there appear to be no Canadian or English authorities on the point covered in the Burke case, it is suggested that it may well be taken in this country as preventing the enforcement of a guarantee of a contract which an infant elects to avoid. This is particularly possible as the reasoning employed by the court in the Burke case was also used by a strong High Court of Australia in another case involving the guarantee of a contract for the sale of land, which the purchaser elected to rescind in accordance with the terms of his contract. In that case, Starke J. stated the general principle that, "a surety, however, is not liable on his guarantee where the principal debt cannot be enforced, because the essence of the obligation is that there is an enforceable obligation of a principal debtor."²¹⁹

It therefore appears that the better view of current Canadian law is that a guarantee of an infant's voidable contract is not enforceable. If this is the legal position, it may not be easily justified in policy terms. It has been pointed out that guarantees perform a useful function in permitting a minor to get credit where he would otherwise be unable to do so and that it seems strange that adult guarantors should be permitted to escape a liability which they

undertook with full knowledge of what they were doing,²²⁰ although they may not always be aware that their normal right of subrogation against the principal debtor will be useless. Because the present rule does not endanger those interests of the infant which the law seeks to protect, the Latey Commission in England has recommended that guarantees of infants contracts be made enforceable by statute.²²¹ In Canada, the Quebec Civil Code already has a provision to this effect,²²² in common with many civil law countries.

Whatever the difficulties relating to the effect of an adult's guarantee of an infant's contract, it is clear that they may be avoided if the adult undertakes a principal liability by way of indemnity.²²³ This raises the vexed distinction, so familiar in Statute of Frauds cases, between a guarantee and an indemnity. One judge has recently described this as "a most barren controversy" which "has raised many hair splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public."²²⁴ This is not the place to discuss the complexities of the distinction, but it may be commented that it seems odd that such major legal consequences for the creditor depend on an

extremely technical categorization. It is particularly difficult for a tradesman to avoid this pitfall, for the whole question rests, not upon what the transaction is called, but upon its "essential nature",²²⁵ which is derived from minutely detailed factors which are likely to be far beyond the ordinary businessman's normal sphere of knowledge.

2. The Adult as Principal Party

It has long been clear that an infant's lack of contractual capacity can be overcome if an adult undertakes a primary liability on behalf of the infant²²⁶ or if he is joined as a principal party to the transaction.

The Alberta decision of Feldman v. Horn and Rae²²⁷ illustrates the operation of the latter device. The plaintiff sold a car to an infant under a conditional sale contract and took a promissory note for the amount of the debt. Both documents were signed jointly by the infant and the defendant adult. Upon the default of the infant the defendant was held liable for the balance owing, as by signing the note she had become a principal in the transaction, jointly and severally liable with the infant. There could therefore be no question of this being merely an unenforceable guarantee given by the defendant.

The same reasoning applies if the adult signs a promissory note as a principal to secure the extension of credit to an infant, even though he is not a party to the actual contract. For example in the Ontario case of Pearson v. Calder²²⁸ an infant agreed to purchase a millinery business, together with the stock in trade, under a bill of sale from the plaintiff. After a delay in payment by the infant, the plaintiff threatened to take back her property, but desisted when the defendant gave her a promissory note for the purchase price. The infant was not a party to the note, or indeed to any part of the transaction between the plaintiff and the defendant. In an action upon the note, the Court rejected the defence that the defendant had given a mere guarantee and held that she was fully liable as a principal. As in other cases in this area of law, the court was much influenced in holding that the defendant was not a mere guarantor by the fact that a contrary decision would have rendered the whole transaction a sham. Where the unenforceability of the infant's promise is the entire reason for introducing the adult party into the transaction, it is a reasonable inference that the parties intend that he undertake an independent enforceable obligation. In the words of Meredith C.J.C.P.:

"Milliners may make fantastical 'creations' in the way of their trade; but no milliner, nor anyone else, would

make such a ridiculous creation as that in the way of a contract to pay money."²²⁹

Generally therefore an adult who knowingly signs a promissory note independently or jointly with the infant, for credit extended to the infant will be unable to take advantage of the infant's legal disability. The possibility exists that the adult party may raise the equitable defence that he in fact signed the note as a surety, although he appeared on the face of it to be a principal.²³⁰ However such a defence would be most unlikely to prevail where the parties were aware of the infant's incapacity, for it would mean that the adult party had knowingly entered into an arrangement for the advancing of money on a promissory note under which no one was liable. To permit the adult to escape liability in these circumstances would be, in the words of Farwell L.J., "a gross libel on equity."²³¹

In summary, under the present law it is possible for a businessman to protect himself in contracting with an infant by taking an indemnity from an adult or by introducing an adult as a principal party. But in both situations he must ensure that the adult assumes a primary and not a secondary liability, for otherwise there is a considerable risk that these devices will fail.

H. CONCLUSION

This survey of the law of infants' contracts shows that despite the reduction in the age of majority, the law in this area is indeed ripe for reform. Probably the most serious defect is that much of the present law is extremely uncertain, even on basic questions. Instances of this uncertainty are to be found on such fundamental issues as the nature of an infant's contract for non-necessaries, whether it is truly voidable or non-binding unless ratified or even void, the requirement of ratification itself and especially the restitutionary obligations of an infant when he elects to avoid his contract. It may be speculated that there is not much prospect that this unpredictability will be diminished by the development of the common law, because many of the basic principles are now obscured in a mass of conflicting decisions and because few cases on infants' contracts now reach the higher courts, perhaps for the reason that they rarely involve large sums of money.

Those rules which can be discerned in the current law often create arbitrary and rather irrational distinctions. Their roots are to be found in the nineteenth century and even earlier periods and they often bear little relationship to present day realities. It is perhaps only necessary to refer to the strangely disparate group of contracts classified as truly voidable and to the treatment of the fraudulent infant in contrast to the innocent infant to support this contention.

Accordingly, on the basis that the present law requires a thorough overhaul to serve better the interest of both infant and adult, the second part of this paper will examine the major trends in reform of this complex subject.

A. INTRODUCTION

The reform of the law of infants' contracts has been thoroughly studied recently in three Commonwealth jurisdictions: England, New South Wales and New Zealand. Within these reform movements, three major currents of thought are discernible, which cover a large range of policy alternatives. Firstly the view has been taken in New South Wales that the majority of infants' contracts ought to be binding. At the opposite end of the spectrum it has been proposed in England that as a matter of principle all infants' contracts should be unenforceable with no exceptions, but subject to the imposition of certain restitutionary obligations upon the infant. Finally a compromise between these two views has been adopted in New Zealand, where there is a statutory presumption that minors' contracts are unenforceable, but the presumption can be rebutted by the courts in certain circumstances.

The detailed scheme of each of these trends in reform will be considered in turn.

B. THE NEW SOUTH WALES SOLUTION

Probably the most innovative and comprehensive attempt at reforming the law of infants' contracts is to be found

in the Minors (Property and Contracts) Act, which was passed in New South Wales in 1970.¹

1. THE GENERAL SCHEME

The scheme of the New South Wales legislation applies to any "civil act", which is defined so as to include, in addition to a contract, contractual elections, receipts, the grant of any leave or licence or generally to "any act relating to contractual or proprietary rights or obligations or to any chose in action."² The general principle of the Act is that where a minor participates in any civil act which is beneficial to him, the civil act is "presumptively binding on him."³ The phrase "presumptively binding" in this context bears a specialized meaning, for apparently it in effect means that the act is as binding as if the infant were of full age when he participated in it. The presumption is rebuttable only by some general defence, such as fraud or duress, but not on any ground related to infancy.⁴ This principle applies unless the infant lacks, by reason of youth, the understanding necessary for his participation in the civil act in question.⁵

The effect of this reform is to make the beneficial nature of the transaction the sole criterion of its enforceability, thus abolishing the distinction between necessary and non-necessary goods. In addition, the minor may be granted full legal capacity generally or for specific transactions by court order, if the court deems such an order to be for the minor's benefit.⁶ If the minor's contract is non-beneficial, it is not binding on him, unless he affirms the contract after reaching full age or unless the court affirms the contract on his behalf during his minority.⁷ There is no requirement of form for the affirmation and indeed affirmation will be deemed to have occurred unless the minor specifically repudiates the contract prior to his nineteenth birthday.⁸

A minor's contract which is not for his benefit, and hence not presumptively binding, must therefore be repudiated in writing during minority or before the minor becomes 19. Where a repudiation does take place, the courts are given an almost unfettered discretion to adjust the rights of both parties.⁹ The Act makes it clear that the purpose of this adjust-

ment of rights is to restore the parties to the status quo, either by ordering specific restitution or by requiring compensation for goods delivered or services rendered.

The only restriction upon the court's discretion in this context arises out of a provision which renders most transfers of property virtually irrevocable. The Act states that where a minor makes a disposition of property and receives consideration for it, the disposition is presumptively binding unless the consideration is manifestly inadequate.¹⁰ Once the disposition has been made, even though it is under a non-binding contract, the court apparently is forbidden to re-open it¹¹ without the consent of the person adversely affected. This provision thus protects both the immediate transferee of the property from the infant and third parties who may have obtained the property from the transferee.

Conversely where a disposition is made to a minor, it is presumptively binding, unless the consideration is manifestly excessive.¹² This section, it must be noted, only serves to make the disposition binding. It does not, save in exceptional circumstances, render binding the

minor's promise to pay in exchange for the disposition of property to him, for that would have the effect of enforcing against him a non-binding contract. If the minor refuses to pay, the seller must ask the court to either affirm or repudiate the contract. Presumably it can only repudiate it, for by definition when these issues arise the contract is not beneficial and does not bind the minor. At this stage, the court must use its power to adjust the position of the parties by, for example, ordering the infant to pay compensation.

Where an adult wishes to deal with an infant and ensure that the disposition of property is binding, he may employ a procedure similar to that used in Alberta's Guarantees Acknowledgement Act. The disposition will be binding if a certificate is given by an independent solicitor or the Public Trustee, stating that the minor makes the disposition freely and understands its nature and that the consideration is not manifestly inadequate.¹³

2. MISCELLANEOUS PROVISIONS

In addition to the fundamental changes in the law of infants' contracts outlined above, the New South Wales legislation clarifies or reforms a number of more incidental points.

(i) Agency

The Act makes it clear that an infant may appoint an agent, whether by power of attorney or otherwise, and that any act done by the agent is as valid as if it was the act of the minor himself. The ability of a minor to act as an agent is also confirmed.¹⁴

(ii) Contracts of Guarantee

The common law doubts about the enforceability of an adult's guarantee of an infant's obligation are dispelled by Section 47. That section states quite simply that a guarantor of an obligation of a minor is bound by the guarantee to the extent to which he would be bound if the minor were not a minor.¹⁵

(iii) A Minor's Liability for Tort

The Act radically changes the common law position in relation to an infant's tort connected with a contract. It imposes general tortious liability upon the infant, whether or not his tort is connected with a contract and whether or not the cause of action in tort is in substance a

cause of action in contract.¹⁶

3. ASSESSMENT

The general scheme of the New South Wales legislation raises two fundamental policy problems concerning uncertainty in infants' transactions and the methods of resolving that uncertainty. In addition, some objection may be taken to some of the specific applications of the legislation, even if the general scheme is accepted.

(i) Uncertainty

The initial response to legislation which classifies all beneficial minors' contracts as binding must concern the uncertainty of the concept of benefit. Obviously a large number of minors' contracts will be clearly beneficial and it will be possible to classify a number of transactions as non-beneficial. But the concept appears to leave open many of the same difficult situations as are produced by the present distinction between necessities and non-necessaries. For example, if an infant chooses to purchase on credit an expensive set of skiing equipment, surely it cannot be ascertained with confidence in advance

whether that contract will be considered beneficial. However the New South Wales legislation is a major improvement over the present law in that the wide restitutionary powers make a decision that the contract is non-beneficial, and hence not binding, much less severe for the adult party. This ensures that the adult party has at least a good chance of being restored to the status quo, even if the contract is validly repudiated.

(ii) Methods of Resolving Uncertainty

The draftsmen of the Act foresaw this and other problems of uncertainty and provided a statutory mechanism for their resolution. Sections 26 and 27 adopt a provision from earlier New Zealand legislation, which permits a minor to obtain a court approval for a specific transaction from the Supreme Court or from a court of petty sessions if the amount involved is of less than \$A 750. The effect of this approval is to render the transaction presumptively binding. Its purpose is to enable a party dealing with a minor to obtain a conclusive determination in advance of whether the contract will be binding.

This mechanism may well be useful when a minor is contemplating a large transaction, such as the purchase of a house or an expensive car. Its utility is surely marginal in smaller transactions in view of the time, trouble, and, certainly if a lawyer is required, expense involved. In many cases at the present time, the New South Wales legislation must therefore still be regarded as rather uncertain.

A comment may also be made upon the propriety of the method by which the legislation seeks to avoid this and a number of other uncertainties. In addition to the situation set out above, a judicial determination may be sought, upon the application of the minor or any interested person, to either affirm or repudiate any existing contract depending upon whether it is for the minor's benefit. Further, as mentioned earlier, a disposition of property by the minor may be approved by an independent solicitor or a court of petty sessions. As a matter of policy, perhaps this need to provide extensive access to the courts illustrates an important deficiency in the New South Wales scheme. Surely one of the objects in any reform of infants' contracts must be to reduce the need, as far as possible, for time-consuming and expensive

judicial determinations. The fact that this has not been possible may suggest that the New South Wales legislation is not an ideal model.

(iii) Non-Recovery of Property

Even if the New South Wales model is accepted in principle, some of its detailed provisions require lose scrutiny. As has been seen, the Act renders a disposition of property by or to a minor binding in almost all circumstances. The effect of this is to prevent a minor from either recovering his own property, which he has transferred under a non-binding contract, or from returning property which he has received, even if it is an expensive luxury. This appears unnecessarily harsh and it can be strongly argued that the minor should be able either to return or to recover the property in question if restitutio in integrum can still be effected. This principle would allow a non-beneficial contract to be undone without substantially prejudicing either party. This principle still protects third parties, for if their rights were involved, restitutio would be impossible and the property could not be returned or recovered.

(iv) Tortious Liability

While the general provision imposing general tortious liability upon infants, even if the tort is connected with a contract, may well be justified, it can work extreme hardship in one instance. In order to avoid any of the adverse effects of the Act, all a merchant must do is to extract a misrepresentation as to his age from the infant, either orally or in his standard-form contract. The merchant will then be able to recover any loss he might suffer in an action for deceit and to undermine completely the legal protection of the infant. Surely this provides an excessively simple means of avoiding the general policy of the Act to guard the infant against the consequences of his own indiscretion.

C. THE LATEY COMMITTEE

In 1967 the Lord Chancellor's Committee on the Age of Majority (The Latey Committee) reported in England offering suggestions concerning the reduction of the age of majority and, inter alia, the reform of the law of infants' contracts.¹⁷ Its recommendations on the latter subject have not yet been

incorporated into legislation, but are apparently being considered by the Law Commission as part of its study on contracts generally.

1. THE GENERAL SCHEME

The recommendations of the Latey Committee are based upon two principles:

- (a) Nothing should be done to make it more difficult for an infant to withdraw from an unwise transaction;
- (b) But the infant must not be allowed to profit materially from his incapacity, as the present law permits.¹⁸

Accordingly the Committee proposed the general rule that all contracts, without any exceptions, should not be binding upon the infant.¹⁹ However the infant would be liable to restore benefits received if he were unwilling to perform his part of the contract. An infant's contract would be described as "unenforceable against the infant", with the implication that the infant may enforce the contract against the adult, but only if he is willing to perform himself.

Accordingly all infants' contracts would be subject to the same rule and the categories of necessities, void and voidable contracts would be abolished. Obviously the acceptability of the scheme depends upon the effectiveness of the infant's restitutionary obligations. In this regard, two questions must be distinguished:

(i) Recovery of Money or Goods from the Infant

This question covers the situation where, for example, an infant receives goods under an unenforceable contract and refuses to pay for them.

The Committee suggests that under these circumstances, where the infant receives money, property or services under a contract which he fails to perform, he should be liable to account to the other party for the benefit he has received. In addition the court should be empowered to relieve the infant from his obligation to account in its discretion, for example where the adult party has taken advantage of the infant's inexperience.²⁰

(ii) Recovery of Money or Goods by the Infant

Where the infant has parted with money or property under a contract which is unenforceable against him,

he should be entitled to the return of the money or property, subject to his obligation to account to the other party for any benefit received.²¹ This right should apply in the opinion of the Committee only while the contract is still executory and not once it is fully executed, but no firm conclusion was expressed on this point.²²

Again it must be emphasized that the Committee envisages these rules applying to all infants' contracts, including those which are currently binding. They would even apply to loan contracts, so as to require the infant to repay any money which he has borrowed if he elects to avoid the contract. The court would of course be able to relieve the infant wholly or partly of this liability if it saw fit.

2. MISCELLANEOUS PROVISIONS

(i) Tortious Liability of the Infant

In this area, the Committee distinguishes between a fraudulent misrepresentation made by the infant, leading to a tortious action in deceit, and other torts.

In the former case, it recommends that the infant should be liable in deceit for a fraud not corrected with his age, even though indirectly this would enforce against him an unenforceable contract.²³ However the Committee does not recommend that the infant be liable for a fraudulent misrepresentation as to his age for, as pointed out earlier, this offers an easy route to circumvent the whole law of infancy. The new restitutionary provisions are envisaged as sufficient to protect the adult generally, even where the infant has been fraudulent.²⁴

The Committee chose to make no recommendations on the infant's liability for other torts, such as negligence, connected with the performance of a contract.

(ii) Guarantees and Indemnities

It was recommended that an adult's guarantee of an unenforceable infant's contract should be binding and that no distinction should be made in this context between guarantees and indemnities.

It was also proposed that there be some warning to bring home to the guarantor the nature of the

liability which he might incur. Such a provision might perhaps be redundant in Alberta owing to the Guarantees Acknowledgement Act.²⁵

(iii) Ratification after Full Age

In line with the general principle that an adult is normally bound by a contractual act, the Committee was of the opinion that the former infant should be bound by a ratification after full age, without any requirement of form.²⁶

3. ASSESSMENT

Criticisms of the approach suggested by the Latey Committee fall into three main categories:

(i) Reduction in the Protection Offered to Infants

Perhaps surprisingly in view of the trends elsewhere, the Ontario Law Reform Commission took the view that the Latey approach would substantially erode the present protection enjoyed by infants.²⁷ It considered that the general restitutionary obligation imposed on the infant might well amount to an indirect enforcement

of his contract and that perhaps in the interests of fairness he should only be forced to account for a retained benefit.

With respect, this criticism cannot be entirely acceptable, for the notion that the infant must only account for retained benefit surely permits the infant to profit out of his own incapacity. For example, the Committee questions whether the infant ought to account if he borrows money and spends it in such a way that he retains no benefit in the form of cash or goods, e.g., for a vacation.²⁸ In this situation any decision other than one requiring the infant to make compensation, as the Latey approach demands, would countenance a blatant unjust enrichment. If the infant has been extremely rash, or taken advantage of, the court can use its wide discretion to take this into account in fixing the appropriate compensation. But otherwise, can there be any major objection to require him to pay for what he has enjoyed?

(ii) Uncertainty

This discretionary power to order restitution has also led to the criticism that it would render

the law unpredictable. This is some merit in this criticism, but it should be remembered that the Committee envisages restitution by the infant if he repudiates the contract as the normal situation. Only in special circumstances will the Court alter the usual obligation to restore the other party or pay him compensation. Indeed this threat may well be necessary still to discourage tradesmen from taking advantage of minors' immaturity or from overreacting.

(iii) Distinction between Executed and Executory Contracts

The Ontario Law Reform Commission has also questioned why an infant is to be protected under an executory contract, which he may avoid, and not under an executed contract.²⁹

Again there appears to be no good reason save convenience why the infant should lose protection merely because the contract is performed. It would seem worthy of consideration that he should be able to resile from an executed contract, at least so long as restitutio in integrum is still possible.

D. THE NEW ZEALAND SOLUTION

The New Zealand Minors' Contracts Act of 1969, as amended, represents perhaps a middle ground between the English and the New South Wales approaches.³⁰

The Act creates a special category of minors, aged between eighteen and twenty with full contractual capacity, but only the law dealing with unemancipated minors will be considered here.

The general principle, established by Section 6 of the Act, is that a minor's contract shall be "unenforceable against the minor but otherwise shall have full effect as if the minor were of full age." However this principle is rebuttable for, in the event of proceedings upon the contract or upon application, the court may enforce the contract or declare it binding on the minor if it considers it "fair and reasonable."³¹

The discretion bestowed on the courts in this regard is to be exercised after a consideration of the circumstances surrounding the making of one contract, the subject matter and nature of the contract, the nature and value of any property involved, the age and means of the minor and all

other relevant circumstances.³²

The New Zealand courts are granted wide powers to make any restitution and compensation which they deems just, not only in relation to the parties to the contract, but also in relation to guarantors and indemnifiers and persons claimaing through them.³³

The old provision of New Zealand law is that a minor may enter into a fully binding contract with the approval of the Magistrate's Court is repeated in the new Act.³⁴ New Zealand statistics show that in fact this mechanism is used surprisingly often, though possibly this is partly because the procedure is well established.

As recommended in the Latey Report and enacted in New South Wales, adult guarantors and indemnifiers of minors' obligations are made liable to the extent that they would be if the minor were of full age.

In assessing the New Zealand approach, it should be pointed out that the same criticisms apply to it as apply to the Latey Committee Report. The major significant difference is that in New Zealand the unenforceability of a minor's contract is really only a presumption and thus, if the court so chooses, the minor may be fully

bound by his contract.

E. CONCLUSION

The general schemes adopted in New South Wales, England, and New Zealand represent the major policy alternatives available in reforming this area of law. The only remaining realistic possibility would be to abolish all special rules governing infants' contracts and to apply to them the ordinary principles of the general law of contracts. It must be pointed out however that despite recent developments, the general law of contracts does not possess many weapons to deal with inadvisable transactions entered into as a result of immaturity, senility, gullibility, weakness of mind or for any other reasons. In particular it lacks the flexible restitutionary powers which the reform movements in all three jurisdictions have suggested or implemented. Accordingly it may well be advisable to retain a separate set of rules governing infants' transactions at this stage.

FOOTNOTES TO PART II

1. 1970 (N.S.W.).
2. Id., s. 6(1).
3. Id., s. 19.
4. Id., s. 6(3). See also Harland, The Contractual Capacity of Minors - A New Approach (1973), 7 Sydney L. Rev. 41, 45-46.
5. Id., s. 18.
6. Id., s. 26, s. 27.
7. Id., s. 30.
8. Id., s. 31.
9. Id., s. 37.
10. Id., s. 20(1).
11. Id., s. 37(3).
12. Id., s. 20(2).
13. Id., s. 28, s. 29.
14. Id., s. 46.
15. Id., s. 47.
16. Id., s. 48.
17. Cmnd. 3342.
18. Para. 289.
19. Para. 299.
20. Para. 309.
21. Para. 310.
22. Paras. 311-314.
23. Para. 351.
24. Para. 354.
25. Para. 366.
26. Paras. 337-340.
27. Report on the Age of Majority and Related Matters (1969) 50-51.
28. Id. at 51.
29. Id. at 52.
30. 1969, No. 41.
31. Id., s. 6(2).
32. Id., s. 6(3).
33. Id., s. 7.
34. Id., s. 9.
35. Id., s. 10.

THE INFANTS ACT

CHAPTER 185

Short title

- 1.** This Act may be cited as *The Infants Act*.
[R.S.A. 1955, c. 158, s. 1]

Infant's
estate

2. (1) Where an infant is seized, possessed of or entitled to any real estate in fee or for a term of years, or otherwise, and the Supreme Court is of the opinion that a sale, lease or other disposition of the real estate, or of a part thereof, is necessary or proper for the maintenance or education of the infant or that for any cause the infant's interest requires or will be substantially promoted by such disposition, the Court

(a) may order the sale, or the letting for a term of years, or other disposition of the real estate, or any part thereof, to be made under the direction of the Court or of one of its officers, or by the guardian of the infant, or by a person appointed for that purpose, in such manner and with such restrictions as are deemed expedient, and

(b) may order the infant to convey the estate.

(2) No sale, lease, or other disposition shall be made contrary to the provisions of a will or conveyance by which the estate has been devised or granted to the infant or devised or granted for his use. [R.S.A. 1955, c. 158, s. 2]

Application
by next
friend or
guardian

3. The application shall be made in the name of the infant by his next friend, or guardian, but shall not be made without the consent of the infant if he is of the age of fourteen years or upwards unless the Court otherwise directs or allows. [R.S.A. 1955, c. 158, s. 3]

Conveyance
by sub-
stitute

4. Where it is deemed convenient, the Court may direct some other person to convey the estate in the place of the infant. [R.S.A. 1955, c. 158, s. 4]

Deeds on
behalf of
infants

5. Every such conveyance, whether executed by the infant or by a person appointed to execute it in his place, is as effectual as if the infant had executed it, and had been of the age of twenty-one years at the time.

[R.S.A. 1955, c. 158, s. 5]

Application
of proceeds
of sale

6. The money arising from the sale, lease or other disposition shall be paid out, applied and disposed of in such manner as the Court directs. [R.S.A. 1955, c. 158, s. 6]

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Surplus
money
upon sale of
real estate

7. (1) For the purposes of descent or distribution the nature and character of any estate sold or otherwise disposed of as hereinafter provided shall not be deemed to be changed.

(2) The heirs, next of kin, or other representatives of the infant have the like interest in any surplus of the estate that remains at the decease of the infant as they would have had in the estate sold or disposed of if no such sale or other disposition had been made.

[R.S.A. 1955, c. 158, s. 7]

Assignment
of lease

8. Where an infant is seized of the reversion of land subject to a lease and the lease contains a covenant not to assign or sublet without leave, the guardian of the infant may with the approbation of a judge of the Supreme Court or of a judge of the surrogate court having jurisdiction in the judicial district in which the land, or any part of it, is situate, consent to any assignment or transfer of the leasehold interest, in the same manner and with the like effect as if the consent were given by a lessor under no such disability.

[R.S.A. 1955, c. 158, s. 8; 1969, c. 2, s. 73]

Order for
maintenance
where estate
settled for
life

9. Where, by a will or other instrument, property is given beneficially to any person for his life with a power of devising or appointing the property by will in favour of his children, or of one or more of them, the Supreme Court may, on the application, or with the consent, of the tenant for life, order that such portion of the proceeds of the property, as it deems proper, be applied towards the maintenance or education of any infant child in whose favour the power might be exercised, notwithstanding

(a) that there is a gift over in the event of there being no children to take under the power, or

(b) that there is a right conferred upon the tenant for life, or upon some other person in such event to make a disposition of the property in favour of some person other than the children.

[R.S.A. 1955, c. 158, s. 9]

Dividends
of stock
belonging
to infants

10. (1) The Supreme Court,

(a) by an order to be made on the application of the guardian of an infant

(i) in whose name any stock or money by virtue of any statute for paying off any stock is standing, and

(ii) who is beneficially entitled thereto,
or

(b) if there is no guardian, by an order to be made in any action, cause or matter depending in the Court, may direct all or any part of the dividends in respect of

INFANTS

the stock or any such money to be paid to the guardian of the infant or to any other person for the maintenance and education, or otherwise for the benefit, of the infant.

(2) The guardian or other person to whom payment is directed to be made shall be named in the order and his receipt for the payment is as effectual as if the infant had attained the age of twenty-one years and had signed and given the receipt.

(3) The Court may order the costs and expenses of and relating to the application to be made and raised, in such manner as the Court deems proper, out of or from the stock or dividends in respect of which the application is made.

(4) This section is a full and complete indemnity and discharge to all banks, companies and societies and their officers and servants for all acts and things done or permitted to be done pursuant hereto.

[R.S.A. 1955, c. 158, s. 10]

Marriage settlements

11. (1) Every infant upon or in contemplation of his marriage may, with the sanction of the Supreme Court, make a valid and binding settlement or contract for a settlement, of all or any part of his property over which he has a power of appointment, whether real or personal and whether in possession, reversion, remainder or expectancy.

(2) Every conveyance, appointment and assignment of such property or contract to make a conveyance, appointment or assignment thereof, executed by the infant, with the approbation of the Court, for the purpose of giving effect to the settlement, is as valid and effectual as if the person executing the same were of the full age of twenty-one years.

(3) This section does not extend to a power that is expressly declared not to be exercised by an infant.

[R.S.A. 1955, c. 158, s. 11]

Sanction of the Supreme Court

12. (1) The sanction of the Court to any such settlement or contract for a settlement may without the institution of an action be given upon the application of the infant or his guardian.

(2) Where there is no guardian of the infant to make the application, the Court

(a) may, if it thinks fit, require a guardian to be appointed, and

(b) may require that any person interested or appearing to be interested in the property be served with notice of the application. [R.S.A. 1955, c. 158, s. 12]

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Application
of sections
11 and 12

13. Nothing in sections 11 and 12 applies

- (a) to a male infant under the age of twenty years, or
 - (b) to a female infant under the age of seventeen years.
- [R.S.A. 1955, c. 158, s. 13]

Practice on
application
to Court

14. The practice and procedure on applications to the Court under this Act are governed by the Alberta Rules of Court.

[R.S.A. 1955, c. 158, s. 14]

Exercise of
powers of
district court

15. (1) Except where otherwise provided in this Act the surrogate court referred to in this Act is the surrogate court having jurisdiction in the judicial district in which the infants or any or either of them reside.

(2) The powers conferred by this Act on the Supreme Court may be exercised by a judge of the Supreme Court in Chambers. [R.S.A. 1955, c. 158, s. 15; 1969, c. 2, s. 73]

Order con-
firming
settlement

16. (1) Where an action is maintainable on behalf of an infant in respect of an injury to the infant and the guardian, parent or next friend of the infant acting on behalf of the infant has, either before or after the commencement of an action, agreed on a settlement of the claim or action with the person against whom the claim is made or action brought, the guardian, parent or next friend of the infant or the person against whom the claim or action is made or brought may, on ten days' notice to the opposite party and to the Public Trustee, apply, by originating notice or notice of motion, as the case may require, to a judge of the Supreme Court sitting in chambers, for an order confirming the settlement.

(2) Notwithstanding subsection (1), where the amount agreed on as settlement of the claim or action is one thousand dollars or less the application may be brought before a judge of the surrogate court.

(3) Where on the application it appears to the judge that the settlement is in the best interests of the infant, the judge may confirm the settlement.

(4) Where a settlement is confirmed, the person against whom the claim is made or action brought is *ipso facto* discharged from all further claims arising out of or in respect of the injury to the infant.

(5) On the application for a confirmation of a settlement, the judge may order that the money from the settlement be paid to the guardian where letters of guardianship have been issued, or to the public trustee under *The Public Trustee Act*.

[1959, c. 37, s. 1; 1961, c. 39, s. 2; 1969, c. 2, s. 73]

SALE OF GOODS ACT

PART I

FORMATION OF CONTRACT

Contract of Sale

Contract
of sale

3. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.

(2) There may be a contract of sale between one part owner and another.

(3) A contract of sale may be absolute or conditional.

(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(5) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

[R.S.A. 1955, c. 295, s. 3]

Capacity
to buy
and sell

4. (1) Subject to subsection (2), capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.

Chap. 327

4882

SALE OF GOODS

(2) Where necessaries are sold and delivered to an infant or minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

(3) "Necessaries" in this section means goods suitable to the condition in life of the infant or minor or other person and to his actual requirements at the time of the sale and delivery.

[R.S.A. 1955, c. 295, s. 4]

Contracts
made on
Sunday

5. All sales and purchases and all contracts and agreements for sale or purchase of any personal property made by any person or persons on the Lord's Day are utterly null and void.

[R.S.A. 1955, c. 295, s. 5]



ANALYSIS

- Title
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 2. Interpretation
 3. Act to bind the Crown

Contractual Capacity of Minors

4. Married minors
5. Contracts of minors of or over the age of eighteen years, certain contracts concerning life insurance, and contracts of service
6. Contracts of minors below the age of eighteen years
7. Compensation or restitution
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10. Guarantees and indemnities
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- Schedules

1969, No. 41

An Act to restate and reform the law relating to minors' contracts [29 September 1969]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Minors' Contracts Act 1969.

(2) This Act shall come into force on the first day of January, nineteen hundred and seventy.

2. Interpretation—(1) In this Act, unless the context otherwise requires,—

“Court” means the Supreme Court or a Magistrate's Court that has jurisdiction under section 14 of this Act:

"Property" means land, money, goods, things in action, goodwill, and every valuable thing, whether real or personal, and whether situated in New Zealand or elsewhere; and includes obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property.

(2) In sections 5, 6, 9, 10, and 12 of this Act the term "minor" does not include a minor who is or has been married.

3. Act to bind the Crown—This Act shall bind the Crown.

Contractual Capacity of Minors

4. Married minors—(1) Subject to section 16 of this Act, a minor who is or has been married shall have the same contractual capacity as if he were of full age.

(2) Subject to section 16 of this Act, any compromise or settlement of a claim agreed to, and any discharge or receipt given for any purpose, by any such minor shall have effect as if the minor were of full age.

5. Contracts of minors of or over the age of eighteen years, certain contracts concerning life insurance, and contracts of service—(1) Subject to the provisions of this section, every contract which is—

(a) Entered into by a minor who has attained the age of eighteen years; or

(b) Entered into pursuant to section 75 of the Life Insurance Act 1908; or

(c) A contract of service entered into by a minor; shall have effect as if the minor were of full age.

(2) If the Court is satisfied in respect of any contract to which subsection (1) of this section applies that, at the time the contract was entered into,—

(a) The consideration for a minor's promise or act was so inadequate as to be unconscionable; or

(b) Any provision of any such contract imposing an obligation on any party thereto who was a minor was harsh or oppressive,

it may, in the course of any proceedings or on application made for the purpose, cancel the contract, or decline to enforce the contract against the minor, or declare that the contract is unenforceable against the minor, whether in whole or in part, and in any case may make such order as to com-

pensation or restitution of property under section 7 of this Act as it thinks just.

(3) For the purposes of subsection (2) of this section, the Court may receive evidence of commercial practice in contracts of the same kind.

(4) Nothing in subsection (2) of this section shall apply to—

- (a) Any contract of apprenticeship to which the Apprentices Act 1948 applies; or
- (b) Any indenture of apprenticeship to which section 29 of the Shipping and Seamen Act 1952 applies; or
- (c) Any indenture of apprenticeship entered into under section 10A of the New Zealand Army Act 1950, section 22A of the Post Office Act 1959, section 83B of the Government Railways Act 1949, section 175B of the Coal Mines Act 1925, or section 70 of the State Services Act 1962; or
- (d) Any agreement entered into under section 4A of the Maori Housing Amendment Act 1938.

(5) Nothing in this section shall apply to—

- (a) Any contract approved by a Magistrate's Court pursuant to section 9 of this Act; or
- (b) The compromise or settlement of any claim for money or damages made by or on behalf of any minor (whether alone or in conjunction with any other person).

6. Contracts of minors below the age of eighteen years—

(1) Subject to the provisions of this section, every contract (other than a contract to which paragraph (b) or paragraph (c) of subsection (1) of section 5 of this Act applies) entered into by a minor who has not attained the age of eighteen years shall be unenforceable against the minor but otherwise shall have effect as if the minor were of full age.

added
Act
1471
“(2) The Court may, in the course of any proceedings or on application made for the purpose, inquire into the fairness and reasonableness of any contract to which subsection (1) of this section applies at the time the contract was entered into and—

“(a) If it finds that any such contract was fair and reasonable at that time it shall not be obliged to make any order but it may in its discretion—

“(i) Enforce the contract against the minor:

“(ii) Declare that the contract is binding on the minor, whether in whole or in part:

“(iii) Make such order entitling the other parties to the contract, on such conditions as the Court thinks just, to cancel the contract:

“(iv) Make such order as to compensation or restitution of property under section 7 of this Act as it thinks just; and

“(b) If it finds that any such contract was not fair and

(i) Subject to the contract.
“(ii) Make such order entitling the minor, on such conditions as the Court thinks just, to cancel the contract:

“(iii) Make such order as to compensation or restitution of property under section 7 of this Act as it thinks just.”

(3) In exercising its discretion under subsection (2) of this section the Court shall have regard to—

(a) The circumstances surrounding the making of the contract:

(b) The subject-matter and nature of the contract:

(c) In the case of a contract relating to property, the nature and the value of the property:

(d) The age and the means (if any) of the minor:

(e) All other relevant circumstances.

(4) Nothing in this section shall apply to—

(a) Any contract approved by a Magistrate's Court pursuant to section 9 of this Act; or

(b) The compromise or settlement of any claim for money or damages made by or on behalf of any minor (whether alone or in conjunction with any other person).

(5) Nothing in this section shall limit or affect section 20 of the Trustee Act 1956.

7. Compensation or restitution—(1) Where the Court exercises any of the powers conferred on it by subsection (2) of section 5 of this Act or where it may exercise any of the powers conferred on it by subsection (2) of section 6 of this Act (whether or not it exercises any of those powers), the Court may grant to—

(a) Any party to the contract; or

(b) A guarantor or indemnifier under a contract of guarantee or indemnity relating to a contract to which subsection (1) of section 5 or subsection (1) of section 6 of this Act applies; or

(c) Any person claiming through or under or on behalf of any such party, guarantor, or indemnifier, such relief by way of compensation or restitution of property as the Court in its discretion thinks just.

(2) The Court may by any order made pursuant to subsection (1) of this section vest the whole or any part of any property that was the subject of, or the whole or any part of the consideration for, the contract in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.

8. Applications under section 5 or section 6 of this Act—

(1) An application under subsection (2) of section 5 or subsection (2) of section 6 of this Act may be made by—

- (a) Any person to whom the Court may grant relief pursuant to section 7 of this Act; or
 - (b) Any other person where it is material for that person to know whether the Court will exercise the powers granted to it by the subsection.
- (2) Any order made under subsection (2) of section 5 or subsection (2) of section 6 or pursuant to section 7 of this Act, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit.

9. Minor may enter into contract with approval of Magistrate's Court—(1) Every contract entered into by a minor shall have effect as if the minor were of full age if, before the contract is entered into by the minor, it is approved under this section by a Magistrate's Court.

(2) An application to a Magistrate's Court under this section may be made—

- (a) By the minor or any other person who will be a party to the proposed contract; or
- (b) By a guardian of the minor.

(3) The Court may, in its discretion, refer any such application to a guardian of the minor, or, where the Court deems it necessary for the purposes of the application, to a solicitor nominated by the Court, or to the Public Trustee or Maori Trustee, or to any other person, and may make such order as it thinks fit for the payment of the reasonable costs and expenses of any person to whom the application is so referred.

(4) Any person to whom any such application is referred under subsection (3) of this section may file a report in the Magistrate's Court setting out the results of his consideration and examination of the application and making in respect thereof such recommendations as he thinks proper, and may appear and be heard at the hearing of the application; but no such person shall be under any obligation to consider or examine any such application until his reasonable costs and expenses have been paid or secured to his satisfaction.

"(5) A Magistrate's Court shall not approve a contract under this section where the contract relates to property held on trust and the Court is of the opinion that it is a case in which it would be more appropriate for an application to be made under section 64 or section 64A of the Trustee Act 1956."

Added 1970
Statute #83

Miscellaneous Provisions

10. Guarantees and indemnities—Every contract of guarantee or indemnity whereby any person (other than a minor) undertakes to accept liability in the event of the failure of a minor to carry out his obligations under a contract shall be

enforceable against that person (in this section hereinafter referred to as "the surety") to the extent that it would be if the minor had been at all material times a person of full age, and that liability shall not be affected by any other provision of this Act or by any order made pursuant to any other provision of this Act; but the liability of the minor to the surety and the surety's right of subrogation against the minor may be affected by the other provisions of this Act or by any order made under subsection (2) of section 5 or subsection (2) of section 6 or pursuant to section 7 of this Act.

11. Contracts to marry—No contract to marry any person entered into by a minor (other than a minor who has been married) shall be binding on either party, and nothing in section 5 or section 6 of this Act shall apply to any such contract.

12. Settlement of claims by minors—(1) Where any money or damages are claimed by or on behalf of a minor (whether alone or in conjunction with any other person) then—

"(a) If the claim is not the subject of proceedings before any Court in New Zealand, any agreement for the compromise or settlement of the claim entered into by the minor, or on his behalf by a person who in the opinion of a Court of competent jurisdiction is a fit and proper person to do so, shall be binding on the minor if it or a release of the claim is in writing and is approved by a Court of competent jurisdiction; and"

(b) If the claim has not been ~~compromised~~ or settled in accordance with paragraph (a) of this subsection, and has become the subject of proceedings before any Court in New Zealand, no settlement, compromise, or payment and no acceptance of money paid into Court, whenever entered into or made, shall so far as it relates to that minor's claim be valid without the approval of the Court.

(2) An application for the approval of the Court under subsection (1) of this section may be made by or on behalf of the minor or any other party to the agreement or proceedings.

(3) The Court, in its discretion, may refuse any application for its approval under subsection (1) of this section or may grant its approval either unconditionally or upon or subject to such conditions and directions as it thinks fit, whether as to the terms of the agreement or of the compromise or settlement, or as to the amount, payment, securing, application, or protection of the money paid, or to be paid or otherwise.

(4) Without limiting subsection (3) of this section, where the Court directs that the whole or any part of any money or damages awarded to a minor in any cause or matter or of any money to which a minor is entitled under an agreement, compromise, or settlement approved under subsection (1) of this section shall be held on trust for the minor under this subsection by the Public Trustee or any other person then, except so far as the Court directs any immediate payment

As Amended
1970
Statute # 53

- (a) The amount shall be invested and held by the trustee upon trust—
 - (i) To make such payment (if any) to the minor out of the income and capital of the amount as the Court may specify; and
 - (ii) To apply the income and capital of the amount or so much thereof as the trustee from time to time thinks fit for or towards the maintenance or education (including past maintenance or education) or the advancement or benefit of the minor:
- (b) The minor shall have no power, either by himself or in conjunction with any other person or persons, to terminate the trusts upon which the amount is held or to modify or extinguish those trusts:
- (c) The interest of the minor in the income and capital of the amount shall not, while it remains in the hands of the trustee, be alienated, or pass by bankruptcy, or be liable to be seized, sold, attached, or taken in execution by process of law.
- (5) Upon any minor attaining the age of twenty-~~one~~ years or marrying under that age while any amount is held on trust for his benefit under subsection (4) of this section, the balance of that amount and of the income therefrom remaining in the hands of the trustee shall be paid to the minor except in so far as the Court may have ordered before the payment is made that the whole or any part of that amount shall continue to be held on trust under that subsection:

Provided that where the trustee has made an application or received notice that an application has been made to the Court for such an order he shall not make any payment under this subsection until the application has been disposed of.

(6) Where the trustee appointed by an order under this section is the Public Trustee subsection (3) of section 66 of the Public Trust Office Act 1957 shall apply in respect of all money paid to him pursuant to the order as if it were money paid to him pursuant to the said section 66.

(7) For the purposes of this section the expression "Court of competent jurisdiction" means a Court in which proceedings could be taken to enforce the claim or, in the case of a claim that could not be the subject of proceedings in New Zealand, a Court in which proceedings could be taken to enforce a similar claim in New Zealand.

(8) Nothing in this section shall limit or affect—

(a) The Deaths by Accidents Compensation Act 1952; or

(b) Section 50 of the Magistrates' Courts Act 1947; or

(c) The Workers' Compensation Act 1956.

Cf. 1945, No. 40, s. 35; 1957, No. 36, s. 66

13. Variation of certain orders made under section 12—

(1) The Court may at any time vary any order made by it under section 12 of this Act or under section 35 of the Statutes Amendment Act 1945 or in respect of a minor under section 66 of the Public Trust Office Act 1957, whether or not the order has been varied under this section, in so far as the order relates to the payment, investment, or application of money held on trust or the income therefrom.

(2) Any order under this section may be made by the Court of its own motion or on an application made by:

(a) The minor; or

(b) The trustee; or

(c) Any other person who adduces proof of circumstances which in the opinion of the Court make it proper that he should make the application.

14. Jurisdiction of Magistrates' Courts—(1) A Magistrate's Court shall have jurisdiction to exercise any of the powers conferred by any of the provisions of sections 5 to 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of any civil proceedings (other than an application made for the purposes of subsection (2) of section 5 or subsection (2) of section 6 of this Act) properly before the Court; or

(b) The value of the consideration for the promise or act of any minor under the contract is not more than \$2,000; or

(c) The parties agree, in accordance with section 37 of the Magistrates' Courts Act 1947, that a Magistrate's Court shall have jurisdiction to hear and determine the application.

(2) For the purposes of section 43 of the Magistrates' Courts Act 1947, an application made to a Magistrate's Court pursuant to subsection (2) of section 5 or subsection (2) of section 6 of this Act shall be deemed to be an action.

15. Act to be a code—(1) The provisions of this Act shall have effect in place of the rules of the common law and of equity relating to the contractual capacity of minors and to the effect, validity, avoidance, repudiation, and ratification of contracts entered into by minors and to any contract of guarantee or indemnity in respect of any such contract.

(2) This Act shall apply only to contracts made, compromises and settlements agreed to, and discharges and receipts given, after the commencement of this Act.

(3) Nothing in this Act shall limit or affect any provision of any other enactment whereby a contract is made binding on a minor and nothing in section 5 or section 6 of this Act shall apply to any such contract.

(4) Nothing in this Act shall limit or affect the rule of law whereby a minor is not liable in tort for procuring a contract by means of fraudulent representations as to his own age or any other matter, but the Court shall take any such representations into account in deciding whether to exercise any of its powers under subsection (2) of section 5 or subsection (2) of section 6 or section 7 of this Act.

16. Trusts not affected—Nothing in this Act shall entitle—

(a) A trustee to pay money or deliver property to a minor otherwise than in accordance with the terms of the trust:

(b) A minor to enter into an agreement whereby a trust is extinguished or the terms of a trust are varied.

but nothing in this section shall prevent any contract approved pursuant to section 9 of this Act from having effect according to its tenor".

17. Insurances by minors and dealings by minors with policies—(1) The Life Insurance Act 1908 is hereby amended by repealing section 75 (as substituted by section 3 (1) of the Life Insurance Amendment Act 1958), and substituting the following section:

"75. (1) Subject to subsection (2) of section 5 of the Minors' Contracts Act 1969, a minor of or over the age of sixteen years may do, execute, suffer, and perform all acts, deeds, matters, and things necessary or proper for the purpose of effecting a policy on his own life.

Am. 1970.
S.M.C. #88
S.2(2)

“(2) A minor of or over the age of sixteen years may—

“(a) Surrender any policy effected on his own life and owned by him, whether the policy has been effected before or after the minor attained the age of sixteen years and whether or not the policy has been effected in the first place by the minor:

“(b) Give discharges for the money payable under any such policy:

“(c) Dispose of any such policy by will in accordance with the provisions of section 6 of the Wills Amendment Act 1955 or section 2 of the Wills Amendment Act 1969:

“(d) Dispose of any such policy or interest therein or deal with the same in any manner authorised by this Act:

“Provided that subsection (2) of section 5 of the Minors' Contracts Act 1969 shall apply to the surrender or discharge of any such policy by any such minor and to every contract entered into by any such minor in relation to any such policy.

“(3) So far as concerns the company issuing any policy, and so far as concerns any person claiming under any disposition of a policy made bona fide and for valuable consideration, it shall be conclusively presumed that the person who effected or disposed of the same was, at the time when he so effected the same or so disposed thereof, of or over the age of sixteen years:

“Provided that this presumption shall not apply where the company issuing the policy, or the person claiming as aforesaid, had at the time of the issue or disposition as aforesaid actual knowledge that the person purporting to effect or dispose of the policy was under the age above-mentioned.

“(4) Nothing in this section shall limit or affect the provisions of section 4 of the Minors' Contracts Act 1969 (which confers full contractual capacity on married minors).”

(2) Section 3 of the Life Insurance Amendment Act 1958 is hereby consequentially amended by repealing subsections (1) and (2).

18. Consequential amendments—The enactments specified in the First Schedule to this Act are hereby amended in the manner indicated in that Schedule.

19. Repeals and revocation—(1) The enactments specified in the Second Schedule to this Act are hereby repealed.

(2) Rule 59 of the Magistrates' Courts Rules 1948 is hereby revoked.

Minors (Property and Contracts).

(6) The amendments made by subsection (1) of this section to Part V of the Conveyancing and Law of Property Act, 1898, apply to and in respect of a surrender or renewal made after the commencement of this Act. No. 60, 1970

(7) The amendments made by subsection (1) of this section to the Usury, Bills of Lading, and Written Memoranda Act, 1902, do not apply to a promise or ratification made before the commencement of this Act.

4. (1) This Act (except subsection (1) of section 3) does not affect the operation of the provisions relating to age in the enactments specified in the Second Schedule to this Act. Savings.

(2) This Act does not affect any power or authority which any person would have if this Act had not been passed, to give consent or to acquiesce in relation to a person under the age of twenty-one years where, under any law of the Commonwealth, such consent or acquiescence is required or permitted.

5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities. The Crown.

6. (1) In this Act, unless the context or subject matter otherwise indicates or requires— Interpretation.

“Civil act” means—

- (a) a contract;
- (b) an election to rescind or determine a contract for fraud, mistake, breach or otherwise;
- (c) a disposition of property;
- (d) a disclaimer;
- (e) an acknowledgment of receipt of property;
- (f) a discharge or acquittance;

(g)

Minors (Property and Contracts).

No. 60, 1970

- (g) an exercise of a power under a contract or under a settlement, will or other instrument;
- (h) an assent or consent to, acquiescence in, or acknowledgment or waiver of, any matter by a person affecting his rights or obligations under a contract or relating to property;
- (i) a release of any cause of action;
- (j) a grant of any leave or licence;
- (k) an election in relation to rights under a will or other instrument, or in relation to conversion as between realty and personality; or
- (l) an act done—
 - (i) in relation to the formation;
 - (ii) in relation to becoming or ceasing to be a member or officer; or
 - (iii) as a member or officer—
 of a partnership, or of an association, company or society, whether a corporation or not;
- (m) without limiting the generality of the foregoing, any act relating to contractual or proprietary rights or obligations or to any chose in action—

whether having effect at law or in equity.

“Disposition of property” includes—

- (a) a conveyance, transfer, assignment, appointment, settlement, mortgage, delivery, payment, lease, bailment, reconveyance or discharge of mortgage;
- (b) the creation of a trust;

(c)

Minors (Property and Contracts).

(c) the release or surrender of any property; No. 60, 1970 and

(d) the grant of a power in respect of property—
whether having effect at law or in equity.

“Minor” means a person under the age of eighteen years; and “minority” has a corresponding meaning.

“Minor participant”, in relation to a civil act, means a person who, while he is a minor, participates in the civil act.

“Party”, in relation to a civil act, includes a person who does, makes, accepts, suffers or joins in the civil act; and “participate” and “participant” have corresponding meanings.

“Property” includes real and personal property and any estate or interest in property real or personal, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any other right or interest. cf. Act No. 6, 1919, s. 7 (1); Act No. 47, 1920, s. 3 (1).

(2) The making of a will, whether in exercise of a power of appointment or otherwise, or the revocation of a will, is not a civil act and is not a disposition of property for the purposes of this Act.

(3) Where a person participates in a civil act while a minor and by this Act the civil act is or becomes presumptively binding on him—

(a) the civil act is, at and after the time of his participation, as binding on him and on his personal representative and has effect as if he were not under the disability of infancy at the time of his participation; and

(b)

Minors (Property and Contracts).

(c) the release or surrender of any property; No. 60, 1970
and

(d) the grant of a power in respect of property—
whether having effect at law or in equity.

“Minor” means a person under the age of eighteen years; and “minority” has a corresponding meaning.

“Minor participant”, in relation to a civil act, means a person who, while he is a minor, participates in the civil act.

“Party”, in relation to a civil act, includes a person who does, makes, accepts, suffers or joins in the civil act; and “participate” and “participant” have corresponding meanings.

“Property” includes real and personal property and any estate or interest in property real or personal, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any other right or interest. cf. Act No. 6, 1919, s. 7 (1); Act No. 47, 1920, s. 3 (1).

(2) The making of a will, whether in exercise of a power of appointment or otherwise, or the revocation of a will, is not a civil act and is not a disposition of property for the purposes of this Act.

(3) Where a person participates in a civil act while a minor and by this Act the civil act is or becomes presumptively binding on him—

(a) the civil act is, at and after the time of his participation, as binding on him and on his personal representative and has effect as if he were not under the disability of infancy at the time of his participation; and

(b)

Minors (Property and Contracts).

No. 60, 1970

- (b) except where other provision is made by this Act, the civil act is binding and has effect as mentioned in paragraph (a) of this subsection in favour of all persons.

This and
other Acts
cumulative.

7. (1) Where, under any Act, a civil act in which a person participates while under the age of twenty-one years is given any force or effect, that force or effect is not vitiated or diminished by anything in Part II or Part III of this Act.

(2) Where, under any provision in Part II or Part III of this Act, a civil act in which a person participates while under the age of twenty-one years is given any force or effect, that force or effect is not vitiated or diminished by anything in any other Act.

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PART II.

CAPACITY AT EIGHTEEN YEARS.

Civil acts
generally.

8. A person is not under the disability of infancy in relation to a civil act in which he participates when aged eighteen years or upwards and after the commencement of this Act.

Full age,
etc., gener-
ally.

9. (1) After the commencement of this Act—

- (a) for the purposes of any rule of law; and
- (b) except so far as the context otherwise requires, for the purposes of—
 - (i) any Act, whether passed before or after the commencement of this Act; and

(ii)

ex

Minors (Property and Contracts).

No. 60, 1970

- (b) a consent given after the commencement of this Act;
- (c) a person who is volens after the commencement of this Act; and
- (d) a risk voluntarily assumed after the commencement of this Act.

(3) This section does not affect such operation as the doctrines mentioned in subsection (1) of this section may have in the case of a minor.

Domicile.

15. (1) The acts and state of mind after the commencement of this Act of a person aged eighteen years or upwards have, as regards the domicile of himself or of any other person, the same effect as if he were aged twenty-one years or upwards.

(2) The acts and state of mind after the commencement of this Act of any person have, as regards the domicile of a person aged eighteen years or upwards, such effect only as those acts and state of mind would have if the latter person were aged twenty-one years or upwards.

PART III.**CAPACITY OF MINORS.**

Application.

16. This Part applies in relation to a civil act in which a minor participates after the commencement of this Act.

Pre-liminary.

17. Where a minor participates in a civil act, the civil act is not binding on him except as provided by this Act.

18.

Minors (Property and Contracts).

18. This Part does not make presumptively binding on a minor a civil act in which he participates, or appears to participate, while lacking, by reason of youth, the understanding necessary for his participation in the civil act.

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Age of
under-
standing.

19. Where a minor participates in a civil act and his participation is for his benefit at the time of his participation, the civil act is presumptively binding on him.

Beneficial
civil act.

20. (1) Where—

Disposition
for con-
sideration.

- (a) a minor makes a disposition of property for a consideration received or to be received by him;
- (b) the consideration is not manifestly inadequate at the time of the disposition; and
- (c) he receives the whole or any part of the consideration—

the disposition is presumptively binding on him.

(2) Where—

- (a) a disposition of property is made to a minor for a consideration given or to be given by him; and
- (b) the consideration is not manifestly excessive at the time of the disposition—

he disposition is presumptively binding on him.

(3) Save to the extent to which, under Part III of the Sale of Goods Act, 1923, or otherwise, a promise may operate as a disposition of property, subsection (2) of this section does not make presumptively binding on a minor a promise by him which is the whole or part of the consideration for a disposition of property to him.

(4) Where the burden of, or arising under, a covenant or other promise runs with property so as to impose an obligation or restriction on a person to whom a disposition

of

Minors (Property and Contracts).

No. 60, 1970 of the property is made in any manner or circumstances, subsection (2) of this section does not make presumptively binding on a minor a disposition of that property to him in that manner or those circumstances.

Gift. **21.** Where a minor makes a disposition of property wholly or partly as a gift, and the disposition is reasonable at the time when it is made, the disposition is presumptively binding on him.

Act pursuant to duty. **22.** Where a minor participates in a civil act pursuant to a contractual or other duty binding on him, the civil act is presumptively binding on him.

Investment in government securities.
cf. Act No. 14, 1925, s. 14 (2) (a), (b).

23. An investment by a minor in—

- (a) any public funds or government stock or government securities of any State of Australia or of the Commonwealth; or
- (b) any debentures or securities guaranteed by the Government or by the Treasurer—

is presumptively binding on the minor.

Protection of strangers. **24.** Where a minor participates in a civil act and a person who is not a party to the civil act—

- (a) acquires property affected by the civil act or any estate or interest in property so affected for valuable consideration; or
- (b) acts, otherwise than as a volunteer and so as to alter his position, on the basis of the validity of the civil act—

in either case without notice that the minor participant is at the time of his participation in the civil act a minor, the civil act is, in favour of that person and in favour of any person claiming under that person, presumptively binding on the minor participant.

Minors (Property and Contracts).

25. A receipt by a married minor for rents, profits or other income or for accumulations of income is presumptively binding on him.

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Receipt
by married
minor.

Act No. 6,
1919,
s. 151B.

26. (1) The Supreme Court, on application by a minor, may, by order—

Capacity
by order
of Supreme
Court.

(a) grant to the minor capacity to participate in any civil act or in any description of civil acts or in all civil acts; and

(b) rescind or vary an order under paragraph (a) of this subsection.

(2) The Court may make an order under subsection (1) of this section on such terms and conditions as the Court thinks fit.

(3) The Court shall not make an order under this section unless it appears to the Court that the order is for the benefit of the minor.

(4) A civil act in which a minor participates is, if authorised by a grant of capacity under this section, presumptively binding on him.

(5) An order of rescission or variation under paragraph (b) of subsection (1) of this section does not affect the validity of a civil act in which the minor has participated before the making of the order of rescission or variation.

27. (1) A contract made by a minor or a disposition of property made by or to a minor pursuant to an approval under this section is presumptively binding on him.

Approval of
contract
or dis-
position.

(2) A court of petty sessions may, on application by a minor, by order approve a contract proposed to be made by a minor or a disposition of property proposed to be made by or to a minor.

cf. N.Z. Act
No. 86, 1908
s. 12A (1).

(3) The powers of a court of petty sessions under this section may be exercised only by a stipendiary magistrate sitting alone.

(4)

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(4) A court of petty sessions may make an order under this section on such terms and conditions as the court thinks fit.

(5) A court of petty sessions shall not make an order under this section unless it appears to the court that—

(a) the minor would not undertake obligations under the proposed contract or dispose of property under the proposed disposition of property to the value of seven hundred and fifty dollars or upwards; and

(b) the order is for the benefit of the minor.

(6) A refusal to make an order under this section or the making of an order subject to any terms or conditions does not prevent the minor making a further application, whether on evidence of the same or other facts, to the Supreme Court under section 26 of this Act.

(7) Part V of the Justices Act, 1902, does not apply to an order under this section.

Certified
disposition
by a minor.

28. (1) Where a minor makes a disposition of property for consideration and a certificate in respect of the disposition is given in accordance with this section, the disposition is presumptively binding on him.

(2) A certificate for the purposes of this section in respect of a disposition of property made by a minor for consideration must—

(a) be given before, but not more than seven days before, the making of the disposition;

(b) be given—

(i) by a solicitor instructed and employed independently of any other party to the disposition; or

(ii) by the Public Trustee; and

(c)

Minors (Property and Contracts):

- (c) state that the person giving the certificate has No. 60, 1970 satisfied himself that—
- (i) the minor understands the true purport and effect of the disposition;
 - (ii) the minor makes the disposition freely and voluntarily; and
 - (iii) the consideration is not manifestly inadequate.

29. (1) Where a disposition of property is made to a ^{Certified} minor for consideration and a certificate in respect of the ^{disposition} disposition is given in accordance with this section, the ^{to a minor.} disposition is presumptively binding on him.

(2) A certificate for the purposes of this section in respect of a disposition of property made to a minor for consideration must—

- (a) be given before, but not more than seven days before, the making of the disposition;
- (b) be given—
 - (i) by a solicitor instructed and employed independently of any other party to the disposition; or
 - (ii) by the Public Trustee; and
- (c) state that the person giving the certificate has satisfied himself that—
 - (i) the minor understands the true purport and effect of the disposition;
 - (ii) the minor takes the disposition freely and voluntarily; and
 - (iii) the consideration is not manifestly excessive.

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(3) Save to the extent to which, under Part III of the Sale of Goods Act, 1923, or otherwise, a promise may operate as a disposition of property, this section does not make presumptively binding on a minor a promise by him which is the whole or part of the consideration for a disposition of property to him.

(4) Where the burden of, or arising under, a covenant or other promise runs with property so as to impose an obligation or restriction on a person to whom a disposition of the property is made in any manner or circumstances, this section does not make presumptively binding on a minor a disposition of that property made to him in that manner or those circumstances.

Affirmation. 30. (1) Where a person participates in a civil act while he is a minor, the civil act may be affirmed—

- (a) while he remains a minor, on his behalf by order of a court having jurisdiction under this section;
- (b) after he attains the age of eighteen years, by him;
or
- (c) after his death, by his personal representative.

(2) The court may affirm a civil act on behalf of a minor participant in the civil act under paragraph (a) of subsection (1) of this section on application by the minor participant or by any other person interested in the civil act.

(3) Subject to section 36 of this Act, the court shall not affirm a civil act on behalf of a minor participant in the civil act under paragraph (a) of subsection (1) of this section unless it appears to the court that the affirmation is for the benefit of the minor participant.

(4)

Minors (Property and Contracts).

(4) Where a civil act is affirmed pursuant to this section by or on behalf of a minor participant in the civil act, or by the personal representative of a deceased minor participant in the civil act, the civil act is presumptively binding on the minor participant. No. 60, 1970

(5) An affirmation of a civil act under this section by a minor participant in the civil act or by the personal representative of a deceased minor participant in the civil act—

(a) may be by words, written or spoken, or by conduct; and

(b) need not be communicated to any person.

31. (1) Where a minor has participated in a civil act, then, subject to sections 33 and 35 of this Act and subject to subsection (2) of this section, the minor participant may repudiate the civil act at any time during his minority or afterwards but before he attains the age of nineteen years. Repudiation by minor.

(2) A repudiation of a civil act by a minor participant in the civil act does not have effect if it appears that, at the time of the repudiation, the civil act is for the benefit of the minor participant.

32. (1) Where a minor has participated in a civil act and dies before attaining the age of nineteen years, then, subject to sections 33 and 35 of this Act and subject to subsection (2) of this section, his personal representative may repudiate the civil act at any time before the end of nineteen years after the birth of the minor participant or before the end of one year after the death of the minor participant whichever is the earlier. Repudiation by representative of deceased minor.

(2) A repudiation of a civil act by the representative of a deceased minor participant in the civil act does not have effect if it appears that, at the time of the repudiation, the civil act is for the benefit of the estate of the deceased minor participant.

Minors (Property and Contracts).

No. 60, 1970 **33.** (1) Where a civil act is repudiated under section 31 or section 32 of this Act—

Notice of repudiation.

- (a) the repudiation does not affect any person unless notice in accordance with subsection (2) of this section is served on that person or on a person under whom that person claims;
- (b) the repudiation has effect against a person served with the notice and against a person claiming under the person served as if made on the date of service of the notice.

(2) A notice of repudiation must be in writing and signed by the person making the repudiation or by his agent.

(3) A notice of repudiation may be served as provided in section 170 of the Conveyancing Act, 1919.

Repudiation by court for minor.

34. (1) Where a minor has participated in a civil act, then, subject to section 35 of this Act and subject to subsection (2) of this section, a court having jurisdiction under this section may, by order, repudiate the civil act on behalf of the minor participant at any time during his minority.

(2) The court shall not repudiate a civil act on behalf of a minor participant if it appears to the court that the civil act is for the benefit of the minor participant.

(3) Where the court repudiates a civil act on behalf of a minor participant, the court shall give such directions as it thinks fit for service of notice of the order of repudiation on persons interested in the civil act.

Restriction on effect of repudiation.

35. (1) Where a civil act is presumptively binding on a minor participant in the civil act in favour of another party to the civil act or in favour of any other person, a repudiation of the civil act under any of sections 31, 32 and 34 of this Act by or on behalf of the minor participant, or, if the minor participant has died, by his personal representative, does not have effect as against that other party or person.

(2)

Minors (Property and Contracts).

(2) Where a person becomes a member of an association while he is a minor and after he becomes a member any civil act in which he has participated for the purpose of becoming a member of the association, or as a member of the association, or otherwise in relation to the association, is repudiated under any of sections 31, 32 and 34 of this Act by him or on his behalf, or, if he has died, by his personal representative, the repudiation does not affect such right as any other member of the association or a creditor of the association may have for the application of the interest of the firstmentioned person, or if he has died the interest of his estate, in the property of the association in or towards satisfaction of any liability of the association which accrues before the repudiation or which accrues by reason of anything done or omitted before the repudiation.

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(3) For the purposes of subsection (2) of this section, "association" includes a partnership but does not include a corporation.

36. Where, on application to a court having jurisdiction under this section by a person interested in a civil act, it appears to the court that the civil act is not presumptively binding on a minor participant in the civil act in favour of the applicant, the court shall either affirm the civil act under section 30 of this Act or repudiate the civil act under section 34 of this Act on behalf of the minor participant.

Election
by court.

37. (1) Where a civil act is repudiated under any of sections 31, 32 and 34 of this Act, a court having jurisdiction under this section may, on the application of any person interested in the civil act, make orders—

Adjust-
ment on
repudiation.

- (a) for the confirmation, wholly or in part, of the civil act or of anything done under the civil act; or
- (b) for the adjustment of rights arising out of the civil act or out of the repudiation or out of anything done under the civil act.

Minors (Property and Contracts).

No. 60, 1970 personal representative or by a court on his behalf within the times respectively fixed by those sections, the civil act is presumptively binding on the minor participant.

**Enforce-
ability by
minor par-
ticipant.**

39. Subject to section 37 of this Act, a court shall not give any judgment or make any order in favour of a minor participant in a civil act, or in favour of the personal representative of a deceased minor participant in a civil act, for the enforcement of the civil act, unless the civil act is presumptively binding on the minor participant in favour of the person against whom the judgment is given or order is made.

PART IV.**COURTS.**

**Jurisdic-
tion.**

40. (1) The courts having jurisdiction under sections 30, 34, 36 and 37 of this Act are as specified in this section.

(2) The Supreme Court has jurisdiction without limitation as to value.

(3) A district court has jurisdiction where it appears to the district court that the matter in question, so far as concerns any minor participant in the civil act to which the proceedings relate, does not amount to a value exceeding six thousand dollars.

(4) A court of petty sessions held before a stipendiary magistrate sitting alone has jurisdiction where it appears to the court of petty sessions that the matter in question, so far as concerns any minor participant in the civil act to which the proceedings relate, does not amount to a value exceeding seven hundred and fifty dollars.

(5)

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(5) A district court or court of petty sessions has jurisdiction as provided in this section whether or not any party to the proceedings is present or resident in the district of the court and whether or not the subject matter of the proceedings has any connection with the district of the court.

41. (1) This section applies to proceedings under any of sections 30, 34, 36 and 37 of this Act. Removal
into
Supreme
Court.

(2) A district court or a court of petty sessions before which proceedings are pending may, at any time before final order in the proceedings, order that the proceedings be removed into the Supreme Court.

(3) The Supreme Court, on application by a party to proceedings in a district court or a court of petty sessions made before final order in the proceedings, or made pursuant to a summons or other document filed in the Supreme Court before final order in the proceedings, may, on such terms as the Supreme Court thinks fit, order that the proceedings be removed into the Supreme Court.

(4) On the making of an order for removal under this section the registrar or clerk of the court from which the proceedings are removed shall send the record of the proceedings to the Supreme Court.

(5) In proceedings removed into the Supreme Court under this section the Supreme Court—

- (a) has the jurisdiction which it would have if the application commencing the proceedings had been made in the Supreme Court; and
- (b) may vary or rescind any order made in the proceedings by any court from which the proceedings have been removed under this section or transferred under section 42 of this Act.

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Transfer.

42. (1) A district court or court of petty sessions before which proceedings under this Act are pending may, by order and subject to such terms as it thinks fit, direct that the proceedings be transferred to another district court or court of petty sessions as the case may be.

(2) On the making of an order under subsection (1) of this section the registrar or clerk of the court in which the order is made shall send the record of the proceedings to the registrar or clerk of the court to which the proceedings are transferred.

(3) In proceedings transferred to a court under this section the court to which the proceedings are transferred—

- (a) has the jurisdiction which it would have if the application commencing the proceedings had been made in that court; and
- (b) may vary or rescind any order made in the proceedings by any court from which the proceedings have been transferred under this section to the same extent as it might vary or rescind the order if the order were its own order in the proceedings.

Reference
of questions
of benefit,
etc.
cf. N.Z. Act
No. 86,
1908, s. 12A
(3).

43. (1) Where, in proceedings under any of sections 19, 26, 27, 30, 31, 32, 34, 37 and 50 of this Act, a question arises whether a civil act or some other matter is or was for the benefit of a person who at any material time is a minor, the court may—

- (a) refer the question to a parent of the minor or to a guardian of his person or of his estate or to any other person; and
- (b) order any party to the proceedings to pay the reasonable costs and expenses of the referee.

(2)

Minors (Property and Contracts).

(2) A referee under this section may—

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- (a) subject to any order of the court, make inquiries and otherwise conduct himself in the matter of the reference in such manner as he thinks fit, whether or not in accordance with the principles of natural justice;
- (b) file in the court a report of his consideration and examination of the question and making such recommendations as he thinks fit in respect of the question; and
- (c) appear and be heard in the proceedings.

(3) A referee is under no obligation to do anything under the reference unless he consents to the appointment and until his reasonable costs and expenses have been secured to his satisfaction.

(4) Where a referee has filed a report under this section—

- (a) any party to the proceedings who is interested in the question referred may inspect and make a copy of the report; and
- (b) the court may, in determining the question referred, have such regard to the report as the court thinks fit.

(5) Subject to paragraph (a) of subsection (4) of this section, the court may make such orders as it thinks fit for the purpose of preventing or limiting publication of a report filed under this section.

44. A court may, in proceedings under any of sections 30, 34, 36 and 37 of this Act, make such order as it thinks fit as to the costs of the proceedings including, in the case of proceedings removed under section 41 of this Act or proceedings transferred under section 42 of this Act, the costs of the proceedings before removal or transfer and may assess the whole or any part of any costs.

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Allowance
of time.

45. (1) A court making an order or giving judgment (whether under this Act or otherwise) against a minor participant in a civil act in civil proceedings in respect of the civil act (in this section called "the substantive order or judgment") may, on such terms and conditions as the court thinks fit, by order—

- (a) give to him an extension of time to obey or satisfy the substantive order or judgment;
- (b) stay execution or enforcement of the substantive order or judgment against him; or
- (c) alter or rescind an order made under this section.

(2) The court may make an order under this section at the time when the substantive order or judgment is made or given or at any later time or times, but not after the minor participant attains the age of eighteen years.

(3) This section does not authorise an extension or stay enduring beyond the time when the minor participant reaches the age of eighteen years.

(4) This section applies in relation to a civil act in which a minor participates after the commencement of this Act.

PART V.

GENERAL.

Agency.

46. (1) After the commencement of this Act, a person under the age of twenty-one years—

- (a) may appoint an agent by power of attorney or otherwise; and
- (b) may, by an agent, participate in any civil act and otherwise do or suffer anything which a person aged twenty-one years or upwards may participate in or do or suffer by an agent.

(2)

Minors (Property and Contracts).

(2) A civil act in which a minor participates by an agent after the commencement of this Act and anything which a minor otherwise does or suffers by an agent after the commencement of this Act has no greater validity or effect as against the minor than it would if participated in or done or suffered by the minor without an agent. No. 60, 1970

(3) After the commencement of this Act, a person may, by an agent under the age of twenty-one years, participate in any civil act and otherwise do or suffer anything which a person may participate in or do or suffer by an agent aged twenty-one years or upwards.

47. (1) A guarantor of an obligation of a minor is bound by the guarantee to the extent to which he would be bound if the minor were not a minor. Guarantee.
cf. *Coutts & Co. v. Brown-Lecky* (1947) K.B. 104.

(2) For the purposes of subsection (1) of this section a minor has, under a civil act in which he participates, the obligation which he would have if he were not a minor at the time of his participation.

(3) This section applies to a guarantee given after the commencement of this Act.

48. Where a person under the age of twenty-one years is guilty of a tort, he is answerable for the tort whether or not— Liability for tort.
cf. *R. Leslie Ltd. v. Sheill* (1914) 3 K.B. 607.

(a) the tort is connected with a contract; or

(b) the cause of action for the tort is in substance a cause of action in contract.

49. (1) Where medical treatment or dental treatment of a minor aged less than sixteen years is carried out with the prior consent of a parent or guardian of the person of the minor, the consent has effect in relation to a claim by the Medical and dental treatment.

minor

Minors (Property and Contracts).

No. 60, 1970 minor for assault or battery in respect of anything done in the course of that treatment as if, at the time when the consent is given, the minor were aged twenty-one years or upwards and had authorised the giving of the consent.

(2) Where medical treatment or dental treatment of a minor aged fourteen years or upwards is carried out with the prior consent of the minor, his consent has effect in relation to a claim by him for assault or battery in respect of anything done in the course of that treatment as if, at the time when the consent is given, he were aged twenty-one years or upwards.

(3) This section does not affect—

- (a) such operation as a consent may have otherwise than as provided by this section; or
- (b) the circumstances in which medical treatment or dental treatment may be justified in the absence of consent.

(4) In this section—

“dental treatment” means—

- (i) treatment by a dentist registered under the Dentists Act, 1934, in the course of the practice of dentistry; or
- (ii) treatment by any person pursuant to directions given in the course of the practice of dentistry by a dentist so registered; and

“medical treatment” means—

- (i) treatment by a medical practitioner in the course of the practice of medicine or surgery; or
- (ii) treatment by any person pursuant to directions given in the course of the practice of medicine or surgery by a medical practitioner.

Minors (Property and Contracts).

50. (1) Where a minor is beneficially entitled at law or in equity to property, the Supreme Court may, on such terms as the Court thinks fit, make orders authorising a person, either generally or in any particular instance—

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Property
of minor.

- (a) to make any disposition of the property;
- (b) to receive the proceeds of disposition of the property;
- (c) to call for a disposition of the property to the person so authorised or as he directs;
- (d) to receive the income of the property;
- (e) to sue for and recover any chose in action comprised in the property;
- (f) to invest the property; or
- (g) to apply the capital or income of the property for the benefit of the minor.

(2) The Court shall not make an order under this section unless it appears to the Court that the order is for the benefit of the minor.

51. (1) Rules of court not inconsistent with this Act may be made for the regulation of the practice and procedure in proceedings under this Act.

Rules of
court.

(2) Rules of court so made shall—

- (a) be published in the Gazette;
- (b) take effect on and from the date of publication or a later date to be specified in the rules; and
- (c) be laid before each House of Parliament within fourteen sitting days of that House after the date of publication.

(3)

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—

(3) If either House of Parliament passes a resolution, of which notice has been given within fifteen sitting days of that House after the rules have been laid before it, disallowing any rule or part of a rule, that rule or part thereupon ceases to have effect.

(4) For the purposes of subsections two and three of this section, sitting days shall be counted, whether or not they occur during the same session.

(5) The power to make rules given by this section may be exercised—

- (a) in relation to proceedings in the Supreme Court, by the judges of the Supreme Court or any five of them;
 - (b) in relation to proceedings in the District Courts, by a majority of the District Court judges; and
 - (c) in relation to proceedings in courts of petty sessions, by the Governor.
-