Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 65

Legal Capacity and Responsibility of Minors and Pupils

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This Consultative Memorandum is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Consultative Memorandum were submitted by 31 December 1985 All correspondence should be addressed to:-

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Note In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Consultative Memorandum. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected but if no request for confidentiality is made, the Commission will assume that comments on the Consultative Memorandum can be used in this way.

CONTENTS

SCOTTISH LAW COMMISSION

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CAPACITY AND RESPONSIBILITY OF MINORS AND PUPILS

PART 1 - INTRODUCTION

1.1 In this Consultative Memorandum, we seek comments on proposals for reform of the law of Scotland relating to the capacity and responsibility of minors and pupils[1]. These proposals are designed to rationalise the existing law and to bring it into line with modern social and economic conditions. Our preferred option for reform is to confer capacity on young people at 16, with a single tier of incapacity below that age. We also put forward an alternative scheme, involving modification of this proposal to retain limited protection for people aged 16-18. Our proposals are, however, of a provisional nature and will be carefully reconsidered in the light of comments received.

1.2 This Memorandum is issued as the first stage of a major exercise on the law of children[2]. We intend, when the present consultation process has been completed, to

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[1]Pupils are, in this context, children under the ages of 12 (in the case of girls) and 14 (in the case of boys). Minors are young people between 12 or 14 (as the case may be) and 18.

[2]See our Nineteenth Annual Report (Scot. Law Com. No. 89) (1984) para. 3.20.

commence work on a further consultative memorandum (or memoranda) dealing with the law on custody and guardianship of children and parental rights and duties. In accordance with our usual practice, these memoranda will be followed by a report, or series of reports, which will take the results of our consultation into account and which will contain firm recommendations for legislation if any is thought necessary.

Scope of Consultative Memorandum

1.3 In this Consultative Memorandum, we are concerned primarily with legal capacity in areas of private law. Our general approach to reform is to retain a dividing line, in terms of age, between people who have capacity and people who do not. The fundamental question which we will be endeavouring to answer is at what age a young person should acquire capacity to act on his own behalf. At the outset, it is necessary to distinguish between what may be called "active" and "passive" capacity, that is, between a capacity to perform civil acts having legal effect and a capacity simply to hold rights. Both a minor and a pupil are capable of owning beneficial interests in property and therefore have capacity in the passive sense[1].

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[1] For example, where heritable property is purchased by a tutor for his pupil, title to the property is taken in name of the pupil himself. It is not held in trust for his benefit. See Bell, Conveyancing (3rd edn. 1882) p.117; Fraser, Parent and Child (2nd edn. 1906) pp.204-5; Burns, Conveyancing Practice (4th edn. 1957) p.309. Similarly, a pupil may acquire rights by gift or succession.

To this extent, the proposition that a pupil has no legal capacity whatsoever is incorrect.[1] What we are concerned with here is capacity in the active sense, that is, capacity to enter into legal transactions. By this we mean not just contractual capacity - although that forms a large part of the subject-matter of this Memorandum - but capacity to perform any act of significance in the field of private law[2]. Our discussion will therefore include topics such as capacity to consent to medical treatment and capacity to make a will. We will also be considering, separately from the issue of legal capacity, whether there is a need for reform of the present law governing liability of children in delict.

Background to our proposals

1.4 The subject of legal capacity of minors and pupils has been part of our programme of law reform since 1968[3]. To assist us in reaching conclusions in this field of law, we originally set up a Working Party in August 1969, under the chairmanship of Lord Kilbrandon, with the following remit:

> "To examine the legal status of persons below the age of majority in Scotland, with special reference to the provisions of the Age of Majority (Scotland) Act 1969; to consider whether amendment of the law

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[1] E.g. Bell, Principles s.2067: "Pupillarity is, in contemplation of the law, a state of absolute incapacity".

[2] E.g. discharge of legal rights of succession. The term "legal transaction" is used throughout the Memorandum in this very broad sense.

[3] Item 12, Second Programme of Law Reform (Scot. Law Com. No. 8) (1968).

relating to the civil capacity of such persons is called for and to report."

Their Report, submitted in June 1971, has been of great help to us and we wish to thank the members of the Working Party for their assistance.[1] However, until recently we have been unable to progress with work in this area due to other commitments demanding higher priority.[2] In the intervening period, some of the recommendations made by the Working Party have been superseded[3] and the topic of legal capacity of minors and pupils has been subsumed into the wider project on the reform of the law of children. As a result, the scope of this Consultative Memorandum and the tenor of its proposals differ in some respects from the Working Party's remit and Report.

Social research

1.5 In view of the wide-ranging impact which any reform of the law governing the legal capacity of young people would have, we have commissioned two social research projects to coincide approximately with publication of the Consultative Memorandum. One is to be carried out by

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[1] The members of the Working Party are listed in Appendix B.

[2] See, for example, our Eighteenth Annual Report (Scot. Law Com. No. 81) (1983) para. 3.26.

[3] By the Guardianship Act 1973, s.10(1) (equality of parental rights); by the Law Reform (Husband and Wife) (Scotland) Act 1984, s.3 (abolition of curatory of married minor); and by our Report on Illegitimacy (Scot. Law Com. No. 82) (1984) recommendation 2 (mother of a child born out of wedlock to be the child's tutor and curator) and recommendations 42-45 (rationalisation of the Guardianship of Infants Acts 1886 and 1925).

the Central Research Unit of the Scottish Office. Its purpose is to ascertain the views of 16-18 year olds on our proposals and to obtain factual information on the extent to which they engage in legal transactions. The other survey, to be carried out by System Three Scotland, is to ascertain the reaction of a representative sample of the adult population to our proposals for reform. We hope that the results of both studies will be of value to us in preparing our final recommendations.

Matters not covered

1.6 We are not dealing in this Consultative Memorandum with questions of capacity or with the application of age limits in other areas of the law.[1] We do not therefore examine the age of criminal responsibility or the age limits imposed by common law or statute for the purpose either of defining certain conduct as criminal or of determining the disposal of criminal cases. Nor do we touch on the age of marriage or the age of majority. Furthermore, in presenting our proposals for reform, we have not considered their possible application to the law of succession, although the abolition of the two age bands of pupillarity and minority would have an impact in that area, as regards capacity to act as an executor. We have, however, commenced work on a systematic review of the law of succession and intend issuing a future consultative

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[1] See also para. 5.143 below.

memorandum on the subject. The implications of our present proposals will be examined separately in that exercise.

Arrangement of Consultative Memorandum

1.7 The rest of the Memorandum is arranged as follows. In Part II we outline the present law on the legal capacity of minors and pupils, including their capacity in litigation. Part III is a critical assessment of the present law and in it we identify the policy objectives which we consider that the law should fulfil. Part IV is a comparative survey. We discuss in Part V the options for reform and set out our provisional proposals. In Part VI we examine the liability of children, and of their parents, in delict. Finally, Part VII contains a summary of the propositions and questions on which we invite comment.

PART II - PRESENT LAW

General principles of capacity of minors and pupils

2.1 Scots law, following its Roman origins,[1] divides persons under the age of majority[2] into pupils (boys under the age of 14 and girls under the age of 12) and minors (boys and girls between those ages and 18). A corresponding distinction is made between tutors and curators as the two categories of guardians for pupils and minors respectively.[3] A child's tutors and curators are usually

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[1] In Roman law, the two ages of minority were based on the ability of a young person to bear children and thus prevent the tutor at law succeeding on his intestacy. A child below the age of puberty (fixed at 12 for girls, 14 for boys) was under the tutelage of his nearest male agnate who, being entitled to succeed on his intestacy, had a personal interest in preserving the child's estate. Over the age of puberty and until the age of 25, a young person was under the protective guardianship of his curator. See Kaser, Roman Private Law (2nd. edn. 1968) pp.66-7; Lee, Elements of Roman Law (4th. edn. 1956) pp.87, 92-3 and 258.

[2] Reduced from 21 to 18 by the Age of Majority (Scotland) Act 1969.

[3] We do not deal in this Memorandum with questions of guardianship generally. This area will be examined with a view to reform at a later stage in our work on the law of children. See para. 5.144 below. We have already made recommendations, within the existing framework of tutory and curatory, for removal of discrimination between legitimate and illegitimate children and rationalisation of the courts' powers to make orders: Scottish Law Commission, Report on Illegitimacy (Scot. Law Com. No. 82) (1984) paras. 9.5, 9.11-9.14 and 9.19-9.22. Extension of the courts' jurisdiction to make orders relating to tutory and curatory has also been recommended: Law Commission/ Scottish Law Commission, Report on Custody of Children - Jurisdiction and Enforcement within the United Kingdom (Law. Com. No. 138/Scot. Law Com. No. 91) (1985) para.4.73.

his parents[1]. The general approach of the law is based on the incapacity of the pupil, whose tutor must, in principle, act on his behalf in all legal transactions, and the limited capacity of the minor who, in principle, must act with his curator's consent. As a consequence of this approach, there are five separate sets of circumstances in which questions of capacity can arise:

(1) where a pupil enters into a legal transaction with or without the tutor's consent;
(2) where a tutor enters into a legal transaction on behalf of a pupil;
(3) where a minor who does not have a curator enters into a legal transaction;
(4) where a minor with a curator enters into a legal transaction with the curator's consent; and
(5) where a minor with a curator enters into a legal transaction without the curator's consent.

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[1]At common law, the father is the natural guardian and administrator-in-law of his legitimate child. The mother has equal rights by virtue of section 10(1) of the Guardianship Act 1973. Under the present law, neither parent of an illegitimate child is the child's tutor or curator, but in our Report on Illegitimacy we recommend that the mother should automatically be the child's tutor or curator and that the father should be able to apply to the court to be appointed as such: Scot. Law Com. No. 82, paras. 2.3 and 2.9.

Each of these situations will be examined in turn.

Pupil acting alone

2.2 The authorities disclose two approaches to the fundamental question whether a pupil has capacity to perform legal acts. On one view, a pupil has no legal capacity whatsoever. Any contracts entered into by him are void and all legal acts must be performed on his behalf by his tutor.[1] Where a pupil has no tutor or, having a tutor, purports to contract on his own behalf, he cannot be sued on the contract.[2] The alternative view qualifies this general rule to the extent that, although a contract entered into by a pupil is void against him, it is valid and enforceable by the pupil if it is beneficial to him.[3] It is in this sense a "limping" contract. The other contracting party is bound by his obligation and cannot rely on the pupil's lack of capacity in order to have the contract set aside. Although this is the view taken by the later writers, the matter remains unresolved by judicial decision.[4]

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[1]Stair, I.6.35. and I.10.13; Erskine, Principles I.7.8; Bell, Principles s.2067 and Commentaries I.128. See also Sinclair v. Stark (1828) 6 S.336 per Lords Craigie and Cringletie at p.340; Hill v. City of Glasgow Bank (1879) 7 R.68 per L.P. Inglis at p.74; Whitehall v. Whitehall 1958 S.C. 252 per Lord Mackintosh at p.259.

[2]Erskine, Institute I.7.14; Bell, Principles s.2084; Fraser, Parent and Child (3rd edn. 1906)(cited as "Fraser") pp.204-5; Gloag on Contract (2nd edn. 1929) (cited as "Gloag") p.77.

[3]Erskine, Institute I.7.33; Fraser, p.206: Brown, A Treatise on the Law of Sale (1821) p.162; Gloag, p.77.

[4]This approach was approved obiter by L.P. Clyde in Drummond's Trustees v. Peel's Trustees 1929 S.C. 484 at p.493.

2.3 It is not clear what effect a "limping" contract has so far as the pupil's obligation is concerned. Bankton suggests,[1] in the context of a contract beneficial to a minor, that if the minor takes the benefit of the contract or, in other words, decides to enforce the contract, he must perform his part to the other contractor. The same reasoning would presumably apply in the case of a contract beneficial to a pupil. Brown gives a similar view, that a pupil is bound by a contract in so far as he receives benefit from it, but bases his proposition on the rule of Roman law "which forbids anyone to be enriched at the expense of another."[2]

2.4 The general rule of incapacity is subject to two further qualifications. One is that if money is lent to a pupil and expended on his estate or if money is otherwise spent for his benefit (in rem versum) he will be liable in so far as he has thereby been enriched.[3] The other relates to the supply of "necessaries". Gloag suggests[4] that, on the analogy of cases relating to minors, a pupil is obliged at common law to pay for necessaries supplied to him. It is thought that the present statutory

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[1] Institute I.7.56.

[2] A Treatise on the Law of Sale (1821) p.162. However, it is probably an overstatement to say that a pupil is bound by his contract in these circumstances. Liability founded on principles of unjust enrichment is regarded as quasi-contractual and does not arise from the terms of the contract itself. See para. 2.44 below.

[3] Scott's Trustee v. Scott (1887)14 R. 1043.

[4] At p.78, footnote 6.

obligation on a minor to pay a reasonable price for necessaries applies also to pupils.[1]

2.5 Since, under the general rule, a pupil's legal acts are void against him and not merely voidable, they do not have to be set aside by the court: they are null without reduction.[2] An action of reduction is nonetheless competent at the instance of the pupil or in his interest and may be necessary if there is some dispute as to whether or not the act in question is in fact void.[3]

Tutor acting on pupil's behalf

2.6 This situation will be dealt with more fully in a later memorandum when we discuss the law on the powers and duties of guardians. For present purposes, it is only necessary to note that even although a transaction has been validly entered into by a tutor on behalf of a pupil it can still be set aside on the ground of minority and lesion, if it is seriously to the pupil's prejudice. Any challenge of the transaction by the pupil on this ground must be made before he attains the age of 22.[4]

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[1] See paras. 2.14-2.19 below.

[2] Bruce v. Anon (1577) Mor. 8979.

[3] The right of challenge is discussed at paras. 2.40-2.42 below.

[4] Bell, Commentaries I.128. The age of 22 is arrived at by adding 4 years (the so-called quadriennium utile) on to the age of majority, which is now 18.

Minor without curators

2.7 The general rule is that a minor without curators has full capacity to perform all legal acts subject to the qualification that his actings may be reduced at his instance within four years of his attaining majority on the ground of minority and lesion.[1] In other words, his powers are the same as those of an adult. He can, for example, sell his property, both heritable and moveable,[2] create a trust over his property,[3] dispose of his moveable property as a gift,[4] enter into a partnership,[5] convey property in security[6] and be subjected to ordinary diligence for debt.[7]

2.8 There are two exceptions to this rule. First, a minor cannot dispose of his heritable property by a gratuitous inter vivos deed.[8] Second, while a minor without curators can give a valid receipt or discharge

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[1] Stair, I.6.44; Erskine, Institute I.7.34; Bell, Principles s.2098; Hill v. City of Glasgow Bank (1879) 7 R. 68 per L.P. Inglis at pp.74-5.

[2] Thomson v. Stevenson (1666) Mor. 8982, 8991; Brown's Trustee v. Brown (1897) 24 R. 962.

[3] Mackenzie Stuart, The Law of Trusts (1932) p.49.

[4] Erskine, Institute I.7.18 and I.7.33; Fraser, p.437.

[5] Hill v. City of Glasgow Bank, supra at p.75.

[6] Dempster v. Potts (1837) 15 S. 364.

[7] Thomson v. Ker (1747) Mor. 8910.

[8] Marquis of Clydesdale v. Earl of Dundonald (1726) Mor. 1265, 8964; Erskine, Institute I.7.33.

for payments of capital or income, he cannot compel his debtor to make a capital payment, as opposed to a payment of interest or income, unless he first gives security that the money will be properly invested or otherwise used for his benefit.[1] This is to protect the debtor from challenge on the ground of minority and lesion.[2]

Minor acting with curator's consent

2.9 A minor acting with the consent of his curator is in principle in the same position as a minor without curators. His legal acts are accordingly valid but open to challenge within four years of his attaining majority on the ground of minority and lesion.[3] He is under the same disability as a minor without curators in relation to gratuitous dispositions of heritable property and the power to compel payment of a capital debt.[4]

Minor with curator, acting alone

2.10 The contractual powers of a minor are limited if he has a curator. Where he acts without the consent of his

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[1] Kirkman v. Pym (1782) Mor. 8977; Jack v. North British Railway Co. (1886) 14 R. 263.

[2] See para. 2.35 below.

[3] Erskine, Institute I.7.34; Lord Blantyre v. Walkinshaw (1667) Mor. 8991; Harkness v. Graham (1833) 11 S.760.

[4] See previous para.

curator, the validity of the transaction depends on its nature. The general rule is that the minor's position is similar to that of a pupil who enters into a transaction in place of his tutor. His contracts are not voidable, but void.[1] Some institutional writers state simply that the transaction is null.[2] Others hold that, notwithstanding the nullity, the transaction is a "limping" contract if it is to the minor's advantage.[3] In other words, it is binding on the other party but not on the minor unless he take the benefit of the contract.

2.11 There are a number of exceptions to this rule, some depending on the nature of the transaction, others on the circumstances or manner in which the minor has acted.

A. Exceptions depending on the nature of the transaction

(1) Marriage[4]

2.12 A marriage between persons either of whom is under 16 is void.[5] A minor who has attained that age may marry without his curator's consent and his marriage is not liable to reduction on the ground of minority and lesion.[6]

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[1] Lady Cardross v. Hamilton's Reps. (1708) Mor. 8951; Boyle v. Woodypoint Caravans 1970 S.L.T. (Sh. Ct.) 34. But see Faulds v. British Steel Corporation 1977 S.L.T. (Notes) 18 where a discharge granted by a minor without the curator's consent was reduced on proof of enorm lesion.

[2] Stair, I.6.33; Bell, Principles s.2088.

[3] Erskine, Institute I.7.33; Bankton, I.7.56.

[4] The effect of marriage on a minor's capacity is discussed at para. 2.25 below.

[5] Marriage (Scotland) Act 1977, s.1.

[6] Erskine, Institute I.7.38; Fraser, p.489.

As a corollary of the former common law rule permitting minors below the age of 16 to marry,[1] a minor of any age may also enter into an agreement to marry[2] or an ante-nuptial marriage contract.[3] However, following the passing of the Law Reform (Husband and Wife) (Scotland) Act 1984, a minor's capacity to enter into an agreement to marry is of no practical significance as he no longer incurs any legal liability thereby.[4]

(2) Wills

2.13 At common law, a minor could dispose of his moveable property by will and the consent of his curator was not required.[5] Gratuitous alteration of the successio to his heritable property was, however, prohibited.[6] This was intended to protect the interests of the family whose standing was traditionally thought to depend on

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[1] Abolished by the Age of Marriage Act 1929.

[2] See Whitehead v. Philipps 1903 10 S.L.T. 577 where it wa held that the engagement was not reducible on grounds of minority and lesion.

[3] A marriage contract may be reduced on grounds of minorit and lesion, in so far as it is prejudicial to the minor: Bruce v. Hamilton (1854) 17 D. 265.

[4] Section 1 of the 1984 Act provides that an engagement no longer has effect to create any legal rights or obligations and abolishes the action for breach of promise to marry. The Act implements our Report on Outdated Rules in the Law of Husband and Wife (Scot. Law Com. No. 76) (1983).

[5] Yorkston v. Burn (1697) Mor. 8950.

[6] Erskine, Institute I.7.33; Cunynghame v. Whitefoord (1797) Mor. 8966.

landed estate rather than moveable property.[1] A limited exception was made to this rule in 1918[2] which was superseded by a general provision in the Succession (Scotland) Act 1964[3] giving a minor full legal capacity to dispose of heritable as well as moveable property by will. The consent of his curator is unnecessary.[4]

(3) Necessaries

2.14 At common law, a minor is bound to pay for necessaries supplied to him.[5] The obligation is regarded by some writers as contractual,[6] although Erskine appears to base it on principles of recompense.[7] Necessaries are described variously as "necessaries of life",[8] "necessary furnishings of clothes or other

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[1] Bankton, I.7.59.

[2] Wills (Soldiers and Sailors) Act 1918, s.3(2), in respect of wills made during active service.

[3] s.28.

[4] By contrast, a pupil is regarded as incapable of making a will as he lacks "the use of reason": Stair, 3.8.37. Neither can a tutor make a will on his behalf: Fraser, p.351 et seq.

[5] Inglis v. Sharp's Executors (1631) Mor. 8941.

[6] Gloag, p.83, footnote 5; Brown, A Treatise on the Law of Sale (1821) p.169; Brown, Sale of Goods Act 1893 p.15. Cf. Stair, I.6.44: restitution is barred if the deed in question was profitable "as that the sum in question was wared upon the minor for meat and clothes".

[7] Institute, I.7.33. See also Fraser, pp.523-5.

[8] Erskine, Institute I.7.33.

articles"[1] or articles furnished to the minor which are "suitable to his circumstances".[2] What constitutes necessaries has not been precisely defined in Scotland although the term has been more fully developed in English law.[3] At a minimum, it includes food, clothes, lodging and medical attention.[4] It is not, however, restricted to goods strictly necessary for the support of life, but applies also to articles fit to maintain the particular person in the state, station and degree in life in which he is.[5] It has been held to include the fees of a tutor,[6] a horse[7] and, in England, a racing bicycle[8] and a funeral for a member of the minor's family.[9] It does not include a loan of money although that may be recoverable on general principles if it has been spent to the minor's benefit.[10] At common law, if

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[1] Brown, A Treatise on the Law of Sale (1821) p.169.

[2] Fraser, p.525.

[3] See Keane v. Mount Vernon Colliery Co. 1933 S.C. (H.L.) 1 at pp. 11-12 where the English meaning of 'necessaries' is discussed for the purposes of the Workmen's Compensation Act 1925.

[4] Harper v. Hamilton (1687) Mor. 8927; Inglis v. Sharp's Executors (1631) Mor. 8941; Fontaine v. Foster (1808) Hume 409.

[5] Peters v. Fleming (1840) 6 M.& W. 42 per Baron Parke at pp.46-7. It has been said that "articles of mere luxury are always excluded though luxurious items of utility are in some cases allowed": Chapple v. Cooper (1844) 13 M. & W. 252 per Baron Alderson at p.258.

[6] Drummond v. Broughton (1627) Mor. 8939.

[7] Brown v. Nicolson (1629) Mor. 8940.

[8] Clyde Cycle Co. v. Hargreaves (1898) 78 L.T. 296.

[9] Chapple v. Cooper, supra.

[10] Scoffier v. Read (1783) Mor. 8936.

the goods sold are suitable to the minor's position in life, the seller is not bound to enquire whether he is already furnished with such goods.[1] What is required is simply proof that the goods supplied are ex facie for the use of the minor,[2] that it is reasonable for him to obtain them on credit and that the quantity and quality are reasonable.

2.15 Section 2 of the Sale of Goods Act 1893 created a statutory obligation to pay for necessaries in the following terms:

> "...where necessaries are sold and delivered to an infant or minor, ... he must pay a reasonable price therefor.
>
> Necessaries in this section means goods suitable to the condition in life of such infant or minor ... and to his actual requirements at the time of the sale and delivery."

The current provision is contained in section 3 of the Sale of Goods Act 1979. It is in virtually identical terms except that it omits reference to "an infant". What is a reasonable price is a question of fact dependent on the circumstances[3] of each case. Liability under this provision is quasi-contractual and is not for the agreed price, but, in effect, for the value of the goods.[4] A

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[1] Fontaine v. Foster (1808) Hume 409.

[2] Scoffier v. Read, supra.

[3] s.8(3).

[4] Nash v. Inman [1908] 2 K.B. 1 at p.8. The relationship between this provision and the minor's common law liability under contracts for necessaries is not entirely clear. See Gloag, p.83, footnote 5.

minor will not be liable under the Act for breach of an agreement to accept necessaries as his obligation arises only on delivery of the goods.

2.16 The rules of the common law, including those on agency, continue to apply to contracts for the sale of goods except in so far as they are inconsistent with the express provisions of the 1979 Act.[1] Hence, where a minor acting as agent for his parent buys necessaries for the parent's household, the parent, rather than the minor, is liable.[2]

2.17 It has been doubted whether the statutory provision imposes any liability on the minor which would not have been imposed by the general law.[3] The application to Scotland of the 1893 provision has also been criticised as being unnecessary and misleading.[4] There are two situations where a minor could be held liable at common law where he would not be liable under the statutory provision as construed in England. The first is where

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[1] s.62(2).

[2] Scoffier v. Read (1783) Mor. 8936.

[3] Gloag, pp.83-84; Brown, Sale of Goods Act 1893 (1895) pp.14-15.

[4] Brown, op. cit; p.16.

a minor pays for necessaries by a bond or bill of exchange. The Scottish courts will hold the minor liable provided the money has been usefully employed for the minor's benefit,[1] whereas the English courts will not.[2] The second situation concerns the statutory definition of necessaries as goods suitable to the actual requirements of the minor at the time of sale and delivery. Unlike the common law rule,[3] this requires the seller to establish that the minor was not already supplied with similar goods.[4]

2.18 Due to the terminology used in the two statutory provisions, there has been some doubt as to whether or not they applied also to pupil children. The 1893 Act referred to "infants", the English term for persons under 18, and "minors", which was regarded by some commentators[5] as excluding pupils, by others[6] as including them. The 1979 Act refers to "minors" which in English law means

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[1] Scoffier v. Read (1783) Mor. 8936; Wilkie v. Dunlop (1834) 12 S. 506.

[2] In re Soltykoff [1891] 1.Q.B. 413.

[3] See para. 2.14 above.

[4] Nash v. Inman [1908] 2 K.B.1.

[5] Brown, Sale of Goods Act 1893 (1895) at pp.12-16, does not appear to recognise the possibility that the provision might apply to pupils. See also Gow, The Mercantile and Industrial Law of Scotland (1964) p.97.

[6] Gloag, p.78; Gloag and Henderson, Introduction to the Law of Scotland (8th edn. 1980) p.62. Walker, The Law of Contracts and related obligations in Scotland (1979) suggests, at para. 5.17, that minor may include pupil.

the same as "infants".[1] Although the matter is not entirely free from doubt, it is probable that minor is used in this context in its more general meaning of persons under the age of 18.

2.19 It should be noted that the statutory obligation to pay for necessaries relates only to the supply of necessary goods. A minor's or pupil's liability for the provision of necessary services is still regulated by the common law.

(4) Trading contracts

2.20 By trading contracts we mean contracts entered into by a minor in the course of a profession, trade or business in which he is engaged.[2] Such contracts are binding on the minor and cannot be reduced on the ground of minority and lesion.[3] The fact that a minor is engaged

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[1] Family Law Reform Act 1969, s.12.

[2] Erskine, Institute I.7.38; Galbraith v. Lesly (1676) Mor. 9027; Campbell v. Hill (1826) 5 S.54. This does not include speculating on the Stock Exchange: Dennistoun v. Mudie (1850) 12 D. 613.

[3] Erskine, loc. cit.: "A minor who betakes himself to any business or profession, as trade, manufacture, law, etc. cannot be restored against deeds granted by him in relation to that employment".

in trade does not make all his contracts binding against him. The contract must be one entered into in relation to his business, and not merely incidental to it, such as a contract to accept compensation and discharge his common law claim for damages.[1] Bills or other obligations granted by minors for the goods in which they trade are presumed to have been granted in relation to the business and the goods so acquired to have been profitably disposed of.[2] Similarly, where money is advanced to a minor in trade, it is presumed to have been borrowed in the course of his business and the minor will be bound to repay that debt unless he can show the money was not expended for the purposes of his business or otherwise for his benefit.[3]

2.21 It has been questioned whether this exception extends to contracts entered into by a minor in the course of employment as well as to contracts undertaken in the course of the minor's own business.[4] The institutional writers are unclear on this point. Erskine[5] speaks of contracts entered into in relation to a "business or profession, as trade, manufacture, law,

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[1] McFeetridge v. Stewarts & Lloyds Ltd. 1913 S.C. 773 at p.791; O'Donnell v. Brownieside Coal Co. 1934 S.C. 534.

[2] Craig v. Grant (1732) Mor. 9035.

[3] Craig v. Grant, supra; McDonald v. Anon (1789) Mor. 9038.

[4] This is distinct from the question whether the contract of employment is itself binding on the minor: see para. 2.23 below.

[5] Institute I.7.38. Stair, I.6.44 refers to "trading merchants and others exercising trade requiring peculiar skill, capacity and understanding".

etc." Bell[1] refers to cases where "the minor was in trade, the transaction being mercantile; or in the exercise of an employment by which he gained his livelihood, the act being in the common course of that employment". Some authority for this proposition is to be found in Heddel v. Duncan[2] where it was held to be a general rule of law

> "that a minor, whenever he undertakes an employment by which he gains a part of his livelihood, becomes responsible, as well to his employer as to the public, for all his acts done in that situation".

2.22 More recently, the question has arisen in the context of a minor's claim under the Workmen's Compensation Acts which was alleged by the employers to be binding on the minor, thus extinguishing his claim to damages at common law. The decision in O'Donnell v. Brownieside Coal Co.[3] turned on the fact that even if the minor, who was an industrial employee, could be regarded as engaged in a trade or business, or, by analogy with the exception for trading contracts, had capacity to enter contracts in relation to his employment, his agreement to accept statutory compensation in respect of injuries sustained at work was not an agreement in the course of his business. It was therefore invalid without the consent of his

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[1] Commentaries I.131.

[2] 5 June 1810 F.C.

[3] 1934 S.C. 534.

curator. In McFeetridge v. Stewarts & Lloyds Ltd.[1] it was held, in similar circumstances, that because the minor was forisfamiliated, his agreement to accept compensation was not void, but merely voidable on the ground of minority and lesion. In both cases, the Court, although expressing various opinions both in the Outer House and on appeal,[2] found it unnecessary to decide whether contracts entered into by a minor in the course of his employment could be regarded as binding.

(5) Contracts of apprenticeship and employment

2.23 A minor has capacity to enter into either a contract of apprenticeship[3] or a contract of employment[4] without the consent of his curator. Such contracts are liable to reduction on proof of lesion.[5] If a minor is engaged in trade and in the course of his business takes on employees, these contracts will be valid as trade contracts.[6] The same principle applies to contracts for

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[1] 1913 S.C. 773.

[2] See Lord Ordinary (Moncrieff) and L.J-C. Aitchison in O'Donnell at pp.540 and 543-4 respectively and Lord Ordinary (Ormidale), Lords Dundas and Salvesen in McFeetridge at pp. 776, 787-8 and 790-1 respectively.

[3] Harvie v. McIntyre (1829) 7 S. 561; Stevenson v. Adair (1870) 10 M. 919.

[4] Heddel v. Duncan 5 June 1810 F.C.; Campbell v. Baird (1827) 5 S. 335; Argo v. Smart (1853) 1 Irv. 250; McFeetridge v. Stewarts & Lloyds Ltd., supra.

[5] Stevenson v. Adair, supra, opinions per L.P. Inglis at p.920 and Lord Ardmillan at p.922.

[6] See para. 2.20 above.

services which the minor enters into in the course of his trade.

B. Exceptions depending on the circumstances in which the minor has acted

(1) Forisfamiliation

2.24 Broadly speaking, what is meant by forisfamiliation is that a minor has, with parental consent, set out on an independent course of life. The doctrine permits a minor to contract validly on his own behalf, subject to reduction of his transactions on the ground of minority and lesion.[1] He is thus in the position of a minor without curators.[2] Forisfamiliation is linked to the concept of patria potestas, or parental authority which a father[3] holds at common law over his children. Parental authority ceases and the minor is freed from his parents' curatory on his becoming forisfamiliated, that is, by commencing business for himself, setting up an independent home or by marriage.[4] Thus a minor whose father resided abroad

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[1] Dundas v. Allan (1711) Mor. 9034.

[2] See paras. 2.7-2.8 above.

[3] Parental authority is now shared equally by the father and the mother: Guardianship Act 1973, s.10(1).

[4] Stair, I.5.13; Erskine, Institute I.6.53.

and who came to work in Scotland was held[1] to have capacity to enter into an agreement for statutory compensation, primarily on the ground of his forisfamiliation, although it was also observed that a contract entered into without the curator's consent could not be void if the curator resided abroad as he could not exercise any protective control over the minor nor could persons dealing with the minor be aware of the curator's existence.[2] The doctrine does not, however, apply to a minor residing independently who continues to receive parental support.[3]

2.25 Most authorities state that a minor may become forisfamiliated only with parental consent, either express or implied.[4] This statement seems inappropriate so far as forisfamiliaton by marriage is concerned. Indeed, the law has, in the past, treated male and female minors differently as regards the effect of their marriage. At common law, a minor wife passed from the curatory of her father to the curatory of her husband.[5] This rule was supplemented by a provision in the Married Women's Property (Scotland) Act 1920[6] that if the husband

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[1] McFeetridge v. Stewarts & Lloyds Ltd. 1913 S.C. 773.

[2] per L.J-C. Macdonald at p.786.

[3] Erskine, Institute I.6.53 and 55.

[4] Stair, I.5.6; Bankton, I.6.10; Erskine, Institute I.6.53; Fraser, p.88.

[5] Harvey v. Harvey (1860) 22 D. 1198 per L.J-C. Inglis at p.1208.

[6] s.2.

was himself a minor, she remained under her existing curatory. There was no corresponding provision for a minor husband and some doubt existed as to whether marriage of a male minor always resulted in forisfamiliation.[1] The discriminatory effect of the law and some of its uncertainty have now been removed by the Law Reform (Husband and Wife) (Scotland) Act 1984 which provides[2] that marriage automatically free a minor from his or her existing curatory, and that neither spouse is subject to the curatory of the other.

2.26 It is clear that a forisfamiliated minor may choose his own residence[3] and hence his own domicile.[4] What is less certain is whether a minor who remains unemancipated has the same capacity. It is thought that, subject to some qualifications, parents retain the power to control the place of residence of a minor child in such circumstances.[5] As for domicile, it would appear that, in principle, a minor has capacity to form the intention

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[1] Bankton, I.6.8; Anderson v. Anderson (1832) 11 S.10.

[2] s.3.

[3] Harvey v. Harvey, supra; Craig v. Greig and Macdonald (1863) 1 M. 1172 at pp.1179, 1180 and 1185.

[4] Case of Robert A.P. Wallace December 3, 1827, reported in Robertson, Personal Succession, p.201.

[5] Harvey v. Harvey, supra. at p.1208; Craig v. Greig and Macdonald, supra at p.1179.

necessary to acquire an independent domicile, but that so long as he remains unemancipated, there are practical obstacles to his putting that intention into effect.[1]

(2) Fraudulent misrepresentation of age

2.27 A minor will be bound in a contract of any type if he has fraudulently induced the other party to contract with him.[2] This is best illustrated by the minor's representing himself as being of full age. If this misrepresentation has induced the contract and is reasonably believed, the minor is bound by the contract and barred from seeking reduction on the ground of minority and lesion.[3] A mere assertion of age in the deed by which the contract is constituted may not be enough if the minor has been induced by the other party to make that declaration.[4]

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[1] See Anton, Private International Law (1967) p.172; Clive, "The Domicile of Minors" 1966 J.R.1.

[2] Stair, I.6.44; Erskine, Institute, I.7.36; Bankton, I.7.91; Fraser, p.527.

[3] Kennedy v. Weir (1665) Mor. 11658; Wemyss v. His Creditors (1637) Mor. 9025

[4] Kennedy v. Weir, supra.

2.28 Fraud may be constituted either by the minor positively representing himself as being of full age[1] or, if his appearance is such that a third party would not believe otherwise, by the minor failing to acquaint him with his actual age.[2] It is a question of circumstance in each case whether a minor is bound to warn the other party that he is in minority.[3] Conversely, if his appearance clearly indicates his minority, the representation that he is of full age will not necessarily protect the other party from a plea of minority and lesion as, in effect, there has been no fraud.[4] The other party must show that he exercised due diligence to ascertain the minor's true status.[5]

2.29 A minor may also be barred from reducing his contract if he fraudulently stated that his curator had consented.[6]

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[1] Wemyss v. His Creditors, supra.

[2] Wilkie v. Dunlop (1834) 12 S. 506.

[3] McDougall v. Marshall (1705) Mor. 8995 and 421.

[4] Bankton, I.7.80.

[5] Kennedy v. Weir, supra.

[6] Harvie v. McIntyre (1829) 7 S. 561.

Challenge of transaction on ground of minority and lesion

2.30 Challenge on the ground of minority and lesion is available, subject to exceptions noted below,[1] in relation to any valid transaction by or on behalf of a pupil or minor. It is therefore available where the transaction is made:

(a) by a tutor on behalf of his pupil;

(b) (probably) by a pupil if he takes the benefit of the transaction;

(c) by a minor without curators;

(d) by a minor with his curator's consent.

The fact that a minor, with or without a curator, has sought authorisation from the court for a particular transaction, for example, for the sale of heritage, is not a bar to reduction on proof of lesion.[2] Moreover the plea of minority and lesion still applies where one minor validly contracts with another.[3]

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[1] Where the transaction is not valid anyway (e.g. because made by a minor having a curator but without the curator's consent) there is no need to have recourse to a challenge on the ground of minority and lesion. See paras. 2.5 and 2.10 above.

[2] Gloag, p.81; Wallace v. Wallace 8 March 1817 F.C.; Gillam's Curator 1908 15 S.L.T. 1043.

[3] Erskine, Institute 1.7.40; Bankton, I.7.92; Fraser, p.539.

2.31 Method of challenge. Originally the only method of challenge was by action of reduction in the Court of Session.[1] This was on the basis that challenge for minori and lesion would be aimed at deeds in writing[2] and at that time the only competent method of challenging the validity of a written obligation was by action of reduction, which was, and still is, within the privative jurisdiction of the Court of Session.[3] If the plea was relevant to sheriff court proceedings, the proper course was for the sheriff to sist the proceedings to enable the action of reduction to be brought in the Court of Session. However, it is now competent for challenge to be made ope exceptionis, that is incidentally, as a defence in other proceedings in both the sheriff court[4] and the Court of Session.[5]

2.32 Time of challenge. Reduction and restitution must be claimed before expiry of the four year period after majority known as the quadriennium utile.[6] Provided the action is served within that period, it may proceed to

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[1] Erskine, Institute, I.7.34; Ramsay v. Maxwell (1672) Mor. 9042; Stewart v. Snodgrass (1860) 23 D. 187.

[2] Erskine, Institute, I.7.35; Bell, Principles s.2098.

[3] Donald v. Donald, 1913 S.C. 274; Dobie, Sheriff Court Practice (1952) p.22.

[4] Sheriff Court Rules, rule 68: see Sheriff Courts (Scotland) Act 1907, Schedule 1, substituted by S.I. 1983/747.

[5] Rules of Court, R.174. The Court may insist on an action of reduction if it is considered more convenient.

[6] Erskine, Institute I.7.35; Bell, Principles s.2098.

decree thereafter. Some authorities state that the challenge must be made after majority, whether the transaction was entered into in pupillarity or minority.[1] Others state that the challenge may also be made during minority[2] and the matter is not entirely free from doubt. There appear to be only two reported cases in which reduction was sought before majority. In McFeetridge v. Stewarts & Lloyds Ltd.,[3] a forisfamiliated minor was allowed to seek reduction of an award under the Workmen's Compensation Act 1906. In Patrick v. William Baird & Co.,[4] a tutrix sought during her son's pupillarity to reduce a workmen's compensation award made to the son. The question of the competence of the action was raised but not decided.

2.33 Title to sue. The plea of minority and lesion is available not only to the pupil or minor but also to his successors, including his executors, creditors in bankruptcy or assignees.[5] It is unclear whether a tutor can reduce a deed entered into by him on his pupil's behalf.[6]

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[1] Bell, Principles s.2098; Fraser, pp.499 and 533; cf. Hill v. City of Glasgow Bank (1879) 7 R. 68 per L.P. Inglis. at p.75.

[2] Gloag, p.89.

[3] 1913 S.C. 773.

[4] 1926 S.N. 101; 1927 S.N. 32.

[5] Gloag, p.91. There are rules for computing the quadriennium utile in the event of the pupil or minor's death: see Fraser, p.501.

[6] Patrick v. William Baird & Co., supra.

2.34 Standard of lesion and onus of proof. To justify reduction, the pupil or minor must have suffered "enorm lesion" or considerable prejudice which proceeds from "the weakness of judgement or levity of disposition incident to youth, or from the imprudence or negligence" of his tutor or curator.[1] In the words of Lord President Dunedin, "the consideration which the minor got must be immoderately disproportionate to what might have been got."[2] Lesion is judged as at the date of the transaction, not the date of the action[3] and regard must be had to the whole circumstances of the transaction, not only to the financial consideration involved.[4] The loss or injury must result from the contract, not from an accident.[5] Lesion may be constituted, for example, by granting leases,[6] settling a claim for an inadequate sum[7] or by borrowing money and burdening one's estate with a liability to repay.[8] It is thought that a lesser degree

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[1]Erskine, Institute I.7.36; Gloag, pp.84-5.

[2]Robertson v. Henderson & Sons Ltd. (1905) 7 F. 776 at p.785.

[3]Cooper v. Cooper's Trustees (1885) 12 R. 473.

[4]Robertson v. Henderson & Sons Ltd., supra at p.785.

[5]Edgar v. Edgar (1614) Mor. 8986 (accidental destruction of goods purchased at fair price).

[6]Gibson v. Scoon 6 June 1809 F.C.

[7]Faulds v. British Steel Corporation 1977 S.L.T. (Notes)18

[8]Harkness v. Graham (1833) 11 S. 760; Blantyre v. Walkinshaw (1667) Mor. 8991.

of lesion will suffice if the minor has acted alone than if he has acted with his curator.[1] It is also said that less injury is necessary where the transaction relates to land or where ready money is given to a minor.[2]

2.35 The onus of proof is on the pursuer, but lesion will be presumed in certain circumstances, depending on the nature of the transaction. It is conclusively presumed in the case of a donation, cautionary obligation or gratuitous discharge.[3] The presumption may be rebutted in a sale of property by, or in payment of a debt to, a minor only by proof that the sum paid to the minor has been profitably applied, or still forms part of his estate.[4] It is not sufficient to show merely that the terms of the contract were reasonably fair.[5] The same principle applies to loans of money although lesion will not be presumed in the case of a loan to a minor in

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[1]Bell, Commentaries, I.131; Fraser, p.503; Cooper v. Cooper's Trustees, supra; Faulds v. British Steel Corporation, supra. This must refer to a minor who has no curator or a minor entering into a transaction for which his curator's consent is not required. In other circumstances, transactions entered into by a minor alone will be null.

[2]Bell, Commentaries, I.131.

[3]Stair, I.6.44; Erskine, Institute, I.7.37.

[4]Harkness v. Graham (1833) 11 S. 760; Ferguson v. Yuill (1835) 13 S. 886.

[5]Gloag, p.85.

trade.[1] Hence a sale or loan may be reduced if the minor has squandered the money received.[2] This explains the rule that a person who makes a capital payment to a minor may insist on security for the beneficial investment of the money.[3] If he does not do so, he cannot recover the money lent or resist a demand for return of the property purchased unless he can prove that expenditure of the loan or price has been to the minor's benefit (in rem versum). It will be to his benefit, if used for his maintenance or education,[4] in payment of debts for which he was liable,[5] in payment of fees on his entry into a profession[6] or if expended beneficially on his property.[7]

2.36 Where reduction is excluded. A plea of minority and lesion will be unsuccessful in respect of transactions entered into in the course of the minor's trade, business or profession or those in which the minor has fraudulently induced the other party to

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[1] See para. 2.20 above.

[2] Thomson v. Stevenson (1666) Mor. 8982. It is not clear whether the same rule applies also to loans of property.

[3] Ferguson v. Yuill, supra.

[4] Stark v. Tennant (1843) 5 D. 542.

[5] Harkness v. Graham, supra.

[6] Corser v. Deans (1672) Mor. 8944, 9026.

[7] Scott's Trustee v. Scott (1887) 14 R. 1043.

contract with him.[1] A transaction will not be reduced in so far as it is shown to be beneficial to the minor or pupil.[2] Certain acts - the making of a will by a minor, or his marriage - are incapable of reduction.

2.37 Reduction is also excluded if the contract has been ratified or homologated by the minor after his majority.[3] Ratification[4] may be express or by any free and deliberate act inferring approval of the contract.[5] In order to be effective, however, the party must be aware at the time that he has a right to reduce the contract[6] and

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[1] See paras. 2.20 and 2.27 above.

[2] See paras. 2.2 and 2.10 above.

[3] Stair, I.6.44; Bankton, I.7.90; Fraser, p.531. This applies to contracts entered into by a tutor on behalf of a pupil as well as to contracts entered into by a minor.

[4] Although the term "ratification" is commonly used in relation to minors' contracts, it is more accurate to speak of "homologation", as the law here is simply one application of the general rule concerning homologation of voidable contracts. "Ratification" is a generic term which is sometimes used interchangeably with both "homologation" and "adoption". We discuss adoption of void contracts at para. 2.42 below.

[5] Forrest v. Campbell (1853) 16 D. 16; Montrose v. Livingston (1697) Mor. 9046. McGibbon v. McGibbon (1852) 14 D. 605.

[6] Dempster v. Potts (1837) 15 S. 364. Knowledge of the material facts during minority may not be sufficient to infer knowledge after majority: McGibbon v. McGibbon, supra per L.J-C. Hope at p.611.

his ratification must not have been induced by fraud.[1] What amounts to ratification depends on the circumstances of each case: for example, the payment or receipt of rent or interest after majority will generally be sufficient.[2] Once homologated, the contract is regarded as binding as from the date on which it was originally entered into.[3]

2.38 There is a statutory exception to the rule that a person can ratify after majority a transaction which he has entered into in his pupillarity or minority. Under section 5 of the Betting and Loans (Infants) Act 1892, where money has been lent to a minor or pupil,[4] the lender cannot found upon a purported ratification after majority. The section is aimed at attempts to evade the Infants Relief Act 1874[5] and is ambiguous and uncertain in its application to Scotland. It is an open question whether the section

> "applies only to loans which are actually void as contracts, such as loans to a pupil or to a minor without the consent of his curator, or whether its

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[1] Leiper v. Cochran (1822) 1 S. 552.

[2] Erskine, Institute I.7.39; Johnston v. Hope (1630) Mor. 9041; Henry v. Scott (1892) 19 R. 545. But see Cockburn v. Halyburton (1672) Mor. 9009.

[3] Bell, Commentaries I.140.

[4] s.7.

[5] Held not to apply to Scotland: Whitehead v. Phillips 1903 10 S.L.T. 577.

terms are sufficiently general to cover the case of a loan to a minor which, though not void, is voidable on proof of lesion."[1]

2.39 Minor's obligation of restitution. The decree of reduction places the minor in the position he would have been in had he never entered the contract.[2] Restitution is, however, mutual and the minor (or pupil) must repay or restore anything he has obtained under the contract.[3] If he reduces a contract for the purchase of goods, he must restore the goods if still in his possession.[4] Similarly, if he reduces a sale of his property, he must repay the price if it has been invested and is still part of his estate.[5] If, however, the price has been squandered, the purchaser from the minor must still restore the property, even although he has no right to repayment.[6]

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[1] Gloag, p.90. Section 5 reads:
"If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement ... shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever."

[2] Fraser, p.540; Houston v. Maxwell (1631) Mor. 8986.

[3] Erskine, Institute, I.7.41; Bankton, I.7.94.

[4] Stocks v. Wilson [1913] 2 K.B. 235; but see Brown v. Nicolson (1629) Mor. 8940 where the minor was held to be liable for the price, even though he had offered restitution.

[5] Erskine, Institute, I.7.41.

[6] Houston v. Maxwell (1631) Mor. 8986.

Challenge of transaction on ground of nullity

2.40 Challenge on the ground of nullity is appropriate where the transaction is void on account of a defect in the consent - for example, where the transaction is:

(a) made by a pupil unless he takes the benefit of it;[1]

(b) made by a minor with a curator but without his consent;[2] or

(c) a gratuitous conveyance of heritable property by a minor.[3]

2.41 Where a transaction is void, it may be ignored without reduction.[4] Where necessary, however, challenge may be made by action of reduction in the Court of Session or it may be made ope exceptionis in either the Court of Session or the sheriff court.[5] It may be made by any person who can show a patrimonial interest to sue. There is no need to prove lesion. Where a transaction is set

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[1] See para. 2.2 above.

[2] See para. 2.10 above. This does not apply to the limited range of transactions for which the curator's consent is not required: see paras. 2.12-2.23 above.

[3] See para. 2.8 above.

[4] Mackay, The Practice of the Court of Session (1879) vol. 2, p.127.

[5] See also para. 2.31 above in relation to challenge on the ground of minority and lesion. It is thought that an action of declarator of nullity would, strictly speaking, be more appropriate for void transactions, although an action of reduction has the effect of a declaratory actio in this instance: Maxwell, The Practice of the Court of Session (1980) p.381. See also Smith, A Short Commentary on the Law of Scotland (1962) p.790.

aside on the ground of nullity, the same principles of restitution apply as in the case of reduction on the ground of minority and lesion.[1]

2.42 A transaction which is void, rather than voidable, cannot be homologated.[2] It may, however, be adopted either expressly or impliedly, on the attainment of majority.[3] To be effective, the adoption must be made in the knowledge that the original obligation is not binding.[4] By recognising its validity in this way, the party renders himself liable on a new contract as from the date of adoption.[5]

Effect of reduction on third party rights

2.43 Under the general law of contract, a distinction is made firstly between void and voidable contracts. In the case of a contract set aside on the ground of nullity, no right can be passed on to a third party, not even if he

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[1] Gloag, pp.531-2.

[2] Gloag, p.544.

[3] Adoption will not be inferred very easily for the party's actings. Failure to repudiate liability in face of a demand for payment of a bill does not, of itself, amount to adoption: Mackenzie v. British Linen Co. (1880) 7 R. 836. Adoption of a void obligation to repay a loan of money may not be possible by virtue of section 5 of the Betting and Loans (Infants) Act 1892; see para. 2.38 above.

[4] Actual, rather than constructive, knowledge is probably required: Muir's Executors v. Craig's Trustees 1913 S.C. 349.

[5] Bell, Commentaries I.140. It is thought however, that adoption could be given retrospective effect if that is the clear inference from the circumstances of the adoption: Bell, Principles s.27; Rankine on Personal Bar (1921) p.214.

acted in good faith, with no notice of the invalidity.[1] The minor or pupil may always recover property which has been transferred to a third party in these circumstances. In the case of a voidable contract, a further distinction is made according to whether or not the third party has acquired a real or a personal right at the time the challenge to the original, voidable contract is made. If a real right of property has been transferred to a third party, which is achieved by recording his title to heritage or in the case of moveables, usually by delivery, his right to that property is secure, provided that he acquired the property in good faith and for value and without notice of the defect in the title.[2] Where a third party has only a personal right to the property in question (for example, under an agreement to purchase), that right is extinguished by reduction of the original contract.[3]

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[1] Morrisson v. Robertson 1908 S.C. 332. But see Smith, op. cit. at pp.792-3 where it is suggested that the consequences of reduction of a void and a voidable contract are the same - ie. a third party receiving property for value and in good faith is protected.

[2] Erskine, Institute I.7.40; Lindsay v. Ewing (1770) Mor. 8997; MacLeod v. Kerr 1965 S.C. 253. This rule is statutory in the case of the sale of goods: Sale of Goods Act 1979, s.23.

[3] Stair, IV.40.21; Neilson v. Ireland (1755) 3 Ross L.C. 128.

Unjust enrichment: general principles of restitution and recompense

2.44 Scots law on unjust enrichment[1] is derived from Roman law principles. It may be described generally as an equitable doctrine whereby an obligation is imposed, by law and not by contract, on one party to make payment or performance to another in order to prevent his being unjustly and unjustifiably benefited at the other's expense.[2]

2.45 The obligation of restitution exists where one party comes into possession of goods without having title to retain possession, for example, where goods have been stolen.[3] It arises frequently on reduction of a contract. The obligation is to restore the property to the true owner and is enforceable by an action for specific restitution or, at least in certain circumstances, for damages for the value of the property if restitution is impossible, the property having been consumed, destroyed

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[1]The law on quasi-contractual obligations is discussed more fully in Smith, A Short Commentary on the Law of Scotland (1962) chap. 27.

[2]Stair, I.3.4; I.7 and I.8; Erskine, Institute III. 1.10; Bankton, I.4.25; Bell, Principles, ss. 531-2.

[3]Erskine, Institute III. 1.10; Bell, Principles ss. 526-7; Gorebridge Co-operative Society Ltd v. Turnbull 1952 S.L.T. (Sh. Ct.) 91.

or incorporated into a new substance.[1] As we have seen,[2] this obligation is relaxed in favour of a minor if he has destroyed or squandered the property which he has received under the contract.

2.46 The principle of recompense is that if a person suffers loss and thereby benefits another without any legally recognised justification or cause, or any intention to benefit him gratuitously, he may claim recompense from the latter to the extent of the benefit.[3] What is required is both loss to the claimant and gain to the other party.[4] A claim for recompense is appropriate where money or goods have been supplied under a contract which the party benefiting can reduce on grounds of incapacity.[5] It is the basis on which a claim may be made against a pupil for the supply of necessaries.[6] It also applies where a person has carried out improvements to heritable property in the mistaken belief that it is

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[1] International Banking Corp. v. Ferguson, Shaw & Sons 1910 S.C. 182.

[2] at para. 2.39 above.

[3] Stair, I.8.6; Erskine, Institute III. 1.10; Stewart v. Steuart (1878) 6 R. 145.

[4] Stewart v. Steuart, supra., per L.P. Inglis at p.149; Edinburgh and District Tramways Co. Ltd. v. Courtenay 1909 S.C. 99.

[5] Magistrates of Stonehaven v. Kincardineshire County Council 1939 S.C. 760.

[6] See para. 2.4 above. In the case of a minor the liability for necessaries may be contractual. See para 2.14 above.

his own.[1] In any of these circumstances, recompense is quantified on the basis of quantum lucratus, that is, the amount by which the party who benefited has been enriched.[2]

Consent to medical treatment

2.47 The capacity of young people to consent to medical treatment[3] raises issues which are, in some respects, different from those discussed above. Whereas much of the law on the legal capacity of minors is concerned with the question whether they can make themselves liable, the law on consent by minors to medical treatment is concerned with the question whether they can absolve other people from liability. Normally, invading another person's bodily integrity constitutes an assault, which may give rise to a criminal prosecution or a claim for damages or both. It is not an assault, however, for a doctor or surgeon to examine or treat

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[1] Newton v. Newton 1925 S.C. 715. This principle does not apply to improvements made by non-owners. A tenant or liferenter is presumed to improve the property for his own benefit and therefore cannot recover from the owner: Wallace v. Braid (1900) 2 F. 754.

[2] Scott's Trustee v. Scott (1887) 14 R. 1043.

[3] "Medical treatment" is here used in a wide sense so as to include, for example, surgery and dental treatment.

a patient if that patient, or his parent or guardian, has given a legally effective consent to the examination or treatment in question.[1] Before considering the present Scots law on the capacity of pupils or minors to give legally effective consent for this purpose it may be helpful if we set out what we understand to be present medical practice.

2.48 Present medical practice. In January 1979, the Scottish Home and Health Department issued a circular, for inclusion in hospital admission booklets,[2] which clearly takes the view that the age of consent to medical treatment in Scotland is 16. It indicates that where it is proposed to operate on a person under 16, the consent of his or her parents or guardians will be requested. This guidance was amended in September 1979 to include a statement to the effect that consent of parents or guardians may also be sought as a matter of accepted practice in cases of patients aged between 16

[1] See Gordon, Criminal Law (2nd edn. 1978) paras. 29-40 and 29-43. Walker, Delict (2nd edn. 1981) p.493. We are not concerned here with the doctor's duty to disclose information about a proposed treatment or with actions for damages for negligence based on breach of that duty. See Sidaway v. Bethlem Royal Hospital Governors /1984/ 1 All E.R. 1018, and /1985/ 2 W.L.R. 480. Nor are we concerned with the highly controversial question whether certain forms of advice to, or treatment of, a young person infringe the rights of his or her parent. See Gillick v. West Norfolk and Wisbech Area Health Authority /1985/ 1 All E.R. 533.

[2] Circular SHHD (DS(79)2).

and 18. This amendment was based on evidence submitted to the Department stating that hospital doctors "regularly, though not invariably" seek parental consent in these circumstances. Also, the Medical and Dental Defence Union for Scotland, in its Annual Report of 1970, advised its members that the age of consent to medical treatment in Scotland is 16. This was stated to be based on a long-established rule of the common law. That is still the view taken by the Union.

2.49 Thus, as a general rule, the medical profession requires the consent of the parent or guardian of a child under 16. In an emergency situation, in which the parent or guardian is unobtainable, doctors will in all probability proceed without consent. We understand that the advice given to Health Authorities by the Scottish Health Service Central Legal Office is that, in an emergency, the doctor may proceed to treat the child if he has obtained the agreement of a colleague that immediate treatment is necessary to save life or prevent unnecessary suffering. The BMA Handbook of Medical Ethics[1] states that:

> "Emergencies should not wait for consent and there can be little doubt that a court, having regard to parents' duty to provide medical care for their child, will uphold the doctor's action in providing such care as might reasonably anticipate the parent's consent. Where there is difficulty in contacting the parents, the doctor must assess the urgency of the need for treatment before embarking on any procedure."

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[1] 1984, para. 2.17

2.50 However, although it seems that as a general rule a doctor is loth to proceed without parental consent where the child is aged under 16, and an emergency situation does not prevail, it is interesting to note the advice contained in a circular issued by the Scottish Home and Health Department in 1975.[1] This is to the effect that hospital authorities are regarded as justified in giving a child life-saving transfusions or operations, notwithstanding refusal of parental consent, where the consultant, having decided on the basis of his clinical judgement to provide a blood transfusion or perform an operation in such circumstances, obtains

(a) the written supporting opinion of a colleague that the patient's life is in danger if the treatment is withheld, and

(b) an acknowledgement from the parents, preferably in writing or before a witness, that the danger has been explained to them and that their consent is still withheld.

2.51 Present law. Medical practice does not make law. If 16 is the age of consent to medical treatment in Scots law then this must rest on the common law or on statute. It cannot rest on the common law because the

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[1] NHS Circular 1975 (GEN) 81.

age of 16 had no special significance at common law.[1] It does not rest on statute because there is no statutory provision on this subject in Scotland.[2] There appears, in short, to be no legal foundation for the widespread view that 16 is the age of consent to medical treatment in Scotland. The question is governed by the common law and at common law the only relevant age for matters relating to the person of a child is the age of minority - 12 for a girl and 14 for a boy. It would appear, therefore, that the present law is that a girl of 12 or a boy of 14 can give a legally effective consent to medical treatment. Logically, it would follow that the consent of a parent or curator to treatment for a minor child above the age of 12 or 14 would be ineffective but, while this is no doubt the legal position in relation to a curator other than a parent,[3] it is possibly not the legal position in the case of the parent of a legitimate child. At common law the father was regarded as having

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[1] In relation to marriage, for example, the age of consent at common law was 12 for girls and 14 for boys. It took a statutory provision (The Age of Marriage Act 1929) to raise the age to 16. The position is similar in relation to the age of consent to sexual intercourse (12 for girls at common law; raised to 16 by the Criminal Law Amendment Act 1885, s.5).

[2] s.8 of the Family Law Reform Act 1969 (consent by persons over 16 to surgical, medical and dental treatment) does not apply to Scotland.

[3] Such a curator has no power over the minor's person: Graham v. Graham (1780) Mor. 8934.

parental rights and authority in relation to children above the age of pupillarity but under the age of majority[1] (now 18) and by statute the mother now has the same rights and authority as the father.[2] So it may be that, in the case of a young person between the ages of 12 or 14 and 18, the consent of either the young person or his father or mother would suffice. The law is by no means clear, however, and there must be grave doubts about whether it would be legally safe (to say nothing of ethics) to carry out treatment on a minor above the age of 12 or 14 against his or her will, even if parental consent has been given.

2.52. In the case of a legitimate pupil child (under the age of 12 or 14) consent to medical treatment may be given by either the father or the mother or by the child's tutor. In the case of an illegimate pupil child without a tutor it may be the case in strict law that there is nobody who can give a legally effective consent. We have, however, recommended in our Report on Illegitimacy[3] that the mother should have full parental rights - which would include the right to consent to medical treatment.

2.53 We have deliberately used the term "medical treatment" in this discussion of the present law. Extremely difficult legal and ethical questions arise once

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[1] Harvey v. Harvey (1860) 22 D. 1198.
[2] Guardianship Act 1973, s.10(1).
[3] Scot. Law Com. No. 82 (1984) para. 4.3.

one gets beyond therapeutic treatment and into the areas of non-therapeutic treatment and research. So far as the age of consent is concerned, however, there is nothing in Scots law to suggest that the age is any different for the purposes of, say, organ donation or medical research than for ordinary medical treatment. In relation to children under the age of minority, there must be a point at which the nature of the act in question is such that the consent of a parent or guardian would not provide a defence to a charge of assault (or worse) or to a civil claim by the child for damages for assault. The present law, however, provides no clear guidance as to where that point occurs.[1] One possibility is that it occurs when the proposed act, treatment or operation is not in the child's best interests, but that test in itself is vague and difficult to apply[2] and may be unduly restrictive in

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[1] See Skegg, "Consent to Medical Procedures on Minors" 1973 M.L.R. 370. See also Cusine, "To sterilise or not to sterilise" 18 Med. Sci. and Law (1978) 120 at p.318 (consent of parent or guardian to non-therapeutic treatment ineffectual).

[2] Even in the case of ordinary medical treatment there will often be doubt about what is in the child's best interests. The difficulties increase in the case of cosmetic medical or dental treatment and become acute in such areas as organ transplantation and sterilisation. Could it, for example, be in a child's "psychological best interests" to have skin, or a kidney, removed for the benefit of a twin brother? See Herron and Marion, "Homografting in the Treatment of Severe Burns, Using an Identical Twin as a Skin Donor" (1967) 75 Pac. Med. and Surg. 4; Savage, "Organ Transplantation with an Incompetent Donor" (1969) 58 Ky. K.J. 129; Edmund and Davies, "A Legal Look at Transplants" (1969) 62 Proc. Ray. Soc. Med. 633. Could it be in the best interests of a mentally retarded child to be sterilised or fitted with an intra-uterine contraceptive device? Cf. Re D (A Minor) /1976/ 1 All E.R. 326; Hansard (H.C.) 25 June 1975, vol. 894, col. 629; 1980 B.M.J. 1025.

relation to medical research (into, for example, children's disease) which may involve negligible risks to the individual child but be of great public benefit.[1]

2.54 Finally, it is by no means certain that a child below the ages of 12 or 14 could not give consent, at least to certain types of medical treatment, which would provide an effective defence to a prosecution for assault or a civil claim for damages for assault.[2] Much would depend on the age and understanding of the child and on the nature of the treatment. The consent of an older pupil child to a simple treatment may well be legally effective. It is difficult to believe, for example, that a 13 year old boy with a cut knee could successfully claim that it was an assault for a doctor to insert stitches with his consent.

Capacity of minors and pupils in litigation

2.55 Relevance of the age of minority. The distinction between minors and pupils is relevant to litigation in three main ways. First, in judicial proceedings in which the pupil or minor is concerned as a litigant, the same differences between their capacities arise in relation to the proceedings as arise in relation to other legal acts: the general rule is that a tutor will act for a pupil

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[1] See 1964 B.M.J. 178; 1978 Arch. Dis. Chldhd. 443; 1980 B.M.J. 229; 1980 Arch. Dis. Chldhd. 55.

[2] See the discussion in Skegg, op. cit. There appears to be no express authority on this question in Scots law.

and a curator will consent to a minor's acts.[1] Where a pupil is litigant, the tutor is in complete control of his case with power to compromise or continue the proceedings. In the appropriate legal phrase, he is dominus litis. By contrast, where a minor is litigant he is dominus litis not his curator, who merely consents to the proceedings. Second, where a pupil is a litigant but is not represented by his tutor or where a minor is a litigant but is not assisted by a curator, the court will normally appoint a curator ad litem to represent the pupil or assist the minor. As in the case of a legal guardian, a pupil's curator ad litem is dominus litis[2]: a minor's curator ad litem merely consents.[3] In certain cases where a pupil or minor has an interest though he is not a party to the proceedings (e.g. custody petitions) the court may, in the exercise of a wide discretion, appoint a curator ad litem to represent his interests. Third, there are enactments and rules of law which give rights or powers to minors, but not pupils. Examples are adoption proceedings and petitions to vary trust purposes.

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[1] Drummond's Trustees v. Peel's Trustees 1929 S.C. 484 per L.P. Clyde at p.493 (pupils); Cunningham v. Smith (1880) 7 R. 424 per L.P. Inglis at p.425 (minors).

[2] Dewar v. Dewar's Trustees (1906) 14 S.L.T. 238.

[3] Stephenson v. Lorimer (1844) 6 D. 377.

2.56 Before discussing the legal and practical consequences of the rules on capacity in litigation, it is convenient to consider first the circumstances in which a curator ad litem may be appointed.

2.57 Appointment of a curator ad litem. As an officer appointed by the court, the function of the curator ad litem is to satisfy the court that the case is properly conducted on the part of the pupil or minor and to ensure that the pupil or minor's interests are fully protected.[1] He has, of course, no role regarding legal control of the person of the child.[2]

2.58 There are no hard and fast rules concerning appointment of a curator ad litem. It may be at the instance of any interested party or by the court ex proprio motu.[3] The power to appoint a curator ad litem is completely discretionary:

> "The question is always whether the circumstances of the particular case are such as to make it just and expedient in the interests of the pupil to

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[1] Maclaren, Court of Session Practice (1916) (cited as "Maclaren") p.185.

[2] Imre v. Mitchell 1958 S.C. 439 per Lord Carmont at pp.470-1 (curator ad litem cannot therefore consent to the taking of a blood sample from a pupil.)

[3] Drummond's Trustees v. Peel's Trustees 1929 S.C. 481 per Lord Moncrieff at pp.518-9.

exercise the power of the court to make an appointment."[1]

The most obvious example is where the pupil has no tutor.[2] Appointment of a curator ad litem may also be appropriate, notwithstanding the existence of a tutor, where the action is against the tutor;[3] where the action is against a third party but the tutor has an adverse interest;[4] where the tutor refuses to sue;[5] where the tutor is incapacitated mentally or otherwise;[6] or where the tutor has disappeared and cannot be contacted.[7] Appointment is not, however, mandatory in any of these categories;[8] nor indeed do these categories represent an exhaustive list of the circumstances in which appointment of a

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[1] Kirk v. Scottish Gas Board 1968 S.C. 328 per Lord Guthrie at p.331.

[2] Ward v. Walker 1920 S.C. 80. A curator ad litem will not, however, be appointed to a pupil pursuer in anticipation of litigation since there is no action pending for which his appointment is required: Drummond's Trustees v. Peel's Trustees, supra, at p.493; Young, Petitioners (1828) 7 S.220.

[3] MacNeil v. MacNeil (1798) Mor. 16384.

[4] Ross v. Tennant's Trustees (1877) 5 R. 182.

[5] Kirk v. Scottish Gas Board, supra; McConochie v. Binnie (1847) 9 D. 791.

[6] Rankine and another, Petitioners (1821) 1S. 118 at p.122.

[7] Steen v. Macnicol (28 February 1967, unreported) referred to in Kirk v. Scottish Gas Board, supra.

[8] Drummond's Trustees v. Peel's Trustees, supra per Lord Hunter at p.505. For example, the court may refuse to interfere with a tutor's decision not to raise an action: Kirk v. Scottish Gas Board, supra, per Lord Guthrie at p.331.

curator ad litem may be desirable.[1] Moreover, there does not appear to be any definite authority as to when a curator ad litem should not be appointed.[2] Rather, it may be said that the power of appointment is exercisable in any circumstances in which the court considers it appropriate to act to protect the child's interests.

2.59 The same general principles apply to appointment of a curator ad litem to a minor. Again, the most obvious case is where the minor has no curator, but even here his appointment is not mandatory:

> "....while it is the general rule of the courts that a minor should have a curator ad litem, that is not, in my opinion, an absolute rule. For instance, if a minor nearing majority has been acting as a trader on his own behalf without a curator, I should doubt whether it would be necessary to appoint a curator ad litem to him in any litigation arising out of the business in which

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[1] Drummonds Trustees v. Peel's Trustees, supra per L.J-C. Alness at p.503:

> "There is no principle and no binding authority against the proposition that the court may competently appoint a curator ad litem to a pupil defender where his interests require it."

[2] Although there are dicta in Drummond's Trustees v. Peel's Trustees, supra at p.510 to the effect that a curator ad litem will not be appointed where a legal guardian, who is not under disability, is willing and able to act, Lord Sands goes on to qualify this statement by defining "disability", to include adverse interest, illness, and absence from the country beyond ready communication. It merely confirms the general principle that a guardian may be superseded by appointment of a curator ad litem only when it is just and expedient to do so. Cf. Carrigan v. Cleland (1907) 15 S.L.T. 543 where appointment of a curator ad litem was not considered appropriate where the tutor was resident in America at a known address and there was no evidence that he was unwilling or unable to act.

he was engaged."[1]

2.60 Pupil as pursuer. On the basis that he is incapable of performing legal acts, a pupil is said to have no persona standi in judicio.[2] Where the pupil has a tutor, the action is brought in the name of the tutor suing in that capacity.[3] Where he has no tutor, the proceedings are brought in the pupil's name and the court may appoint a curator ad litem to carry on with the action on the pupil's behalf.[4] Where a defender objects to the pupil's instance on the grounds that the tutor has not participated and the court does not appoint a curator ad litem, the action cannot proceed.[5] If he does not object, the defender is thereafter personally barred from challenging the decree on this ground.[6]

2.61 Pupil as defender. Where the pupil has a tutor both the pupil and his tutor should be called as defenders, the tutor's name and capacity being specified.[7] There are strict rules designed to

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[1] Cunningham v. Smith (1880) 7 R. 424 per Lord Shand at p.426.

[2] Maclaren, p.166.

[3] Maclaren, p.167; Davis's Tutor v. Glasgow Victoria Hospital 1950 S.C. 382.

[4] Ward v. Walker 1920 S.C. 80.

[5] Carrigan v. Cleland, supra.

[6] Drummond's Trustees v. Peel's Trustees, supra per L.P. Clyde at p.493.

[7] Bell, Principles s.2082; Whitehall v. Whitehall 1958 S.C. 252 per Lord Mackintosh at p.259.

ensure that known tutors are called in the summons and cited to appear.[1] Where the pupil is thought to have no tutors, a conclusion or crave must nevertheless be made "against his tutors and curators, if he any has" and they must be cited edictally.[2] Where a pupil has no tutors, a curator ad litem may be appointed either before or after appearance is entered.[3] His appointment does not, however, compel defence of the action. It is for the curator ad litem to decide whether the action should be defended on the pupil's behalf, with the risk of a decree in foro against the pupil reducible only on the grounds of minority and lesion, or whether he should allow decree in absence to be taken against the pupil.[4] Reduction of a decree in foro on grounds of minority and lesion is competent only where the granting of the decree has followed from some omission on the part of the tutor or curator ad litem, e.g. failure to state a full and proper defence.[5] It is not competent simply on account of the fact that decree has been granted against the pupil.[6]

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[1] Maclaren, p.170.

[2] Maclaren, p.171.

[3] Drummond's Trustees v. Peel's Trustees, supra.

[4] Since Sinclair v. Stark (1828) 6 S. 336, decree taken in such circumstances is not null but has effect as a decree in absence.

[5] Fraser, p.512. Even where the plea is competent reduction will not always be allowed if, owing to the lapse of time since decree was granted, evidence of the pursuer's claim has been lost: Oakley v. Telfer (1705) Mor. 9019.

[6] Fraser, p.512.

2.62 Minor as pursuer. A minor may bring an action alone[1]: but if he has curators they ought in principle to concur in the proceedings.[2] The defender may insist on participation of the minor's curators and, if they refuse to enter the process, or if the minor does not have any, he is entitled to seek appointment of a curator ad litem.[3] If the defender does not object on this ground and decree goes against him, he cannot contend thereafter that the decree is null.[4] On the other hand, if decree goes against a minor who has acted without the consent of a curator and without a curator ad litem being appointed, the minor may seek to have the proceedings set aside on the ground of minority and lesion.[5]

2.63 Minor as defender. The minor himself should be cited and called as defender. It is a rule of practice that the minor's curator should also be called, by name if it is known, or otherwise by the formula "and his tutors and curators if he any has"[6]. If he has no

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[1] Jack v. North British Railway Co. (1886) 14 R. 263.

[2] Maclaren, p.172: Sinclair v. Stark (1830) 6 S. 336 per Lord Balgray at p.338.

[3] Maclaren, p.173.

[4] Sinclair v. Stark, supra, at p.338.

[5] Cunningham v. Smith (1880) 7 R. 424 at p.425; McLaren, p.172.

[6] Maclaren, pp.173 and 175.

curator or the curator does not appear, a curator ad litem may be appointed.[1] The decree will be in absence if the minor does not appear and his curator is not called as defender; if his curator is called but does not appear; or if the curator ad litem, if appointed, does not agree to proceed with the defence.[2] If the action is defended unsuccessfully with the consent of the minor's curator or curator ad litem, decree will be in foro and may be reduced only on the ground of minority and lesion.[3] Reduction on proof of lesion is also competent where a minor without curators has defended the action without a curator ad litem having been appointed.[4]

Particular types of proceedings

2.64 (1) Adoption proceedings. While both minors and pupils can be adopted,[5] an adoption order can only be made in respect of a minor if he or she gives formal consent to the adoption.[6] A pupil

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[1]Maclaren, pp.174 and 175. It is thought that, following Drummond's Trustees v. Peel's Trustees, supra, a curator ad litem may be appointed to a minor before or after he enters appearance.

[2]Maclaren, p.174.

[3]Maclaren, p.174. Reduction will not, however, be allowed where full and proper defences have been stated: see para. 2.61 above and Fraser, p.512.

[4]Cunningham v. Smith (1880) 7 R. 424 at p.425; Maclaren, pp.175-6.

[5]Adoption (Scotland) Act 1978, s.12(1) as read with the definition of "child" in s.65(1).

[6]Adoption (Scotland) Act 1978, s.12(8). The minor's consent must be given in full knowledge of his parentage: A, Petr. 1936 S.C. 255. His consent is also required where he is to be freed for adoption: 1978 Act, s.18(8).

has no right to withhold formal consent but in deciding whether to make an adoption order, the court must give due consideration to the wishes of the pupil (or indeed of the minor) having regard to his age and understanding.[1] The court may dispense with the minor's consent if he is incapable of giving it.[2] Neither pupils nor minors may apply to adopt a child either alone or, in the case of a minor, with his or her spouse.[3] The spouse of a married minor may, however, bring adoption proceedings alone where the minor cannot be found or the spouses are permanently separated.[4] Where a minor is the natural parent of the child to whom the application relates, he or she has power to give or withhold consent to the adoption.[5] The court[6] is empowered by statute to appoint a curator ad litem to safeguard the prospective adopted child's interests.[7] His duties are prescribed by rules of court in considerable detail.[8] Representation of minors as natural parents is, however, governed by common law principles. Where a minor is involved in adoption proceedings as the natural mother, it seems

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[1] 1978 Act, s.6.

[2] 1978 Act, s.12(8).

[3] 1978 Act, ss.14 and 15 provide a minimum age qualification of 21 for adoptive parents. This replaces the former rule based partly on relationship: see Adoption Act 1958, s.2.

[4] 1978 Act, s.15.

[5] 1978 Act, s.16(1).

[6] The Court of Session or the sheriff court: 1978 Act, s.56(2).

[7] 1978 Act, s.58.

[8] Rules of Court, R.221; Act of Sederunt (Adoption of Children) 1959, Rule 6.

that a curator ad litem is rarely appointed if the minor has a legal curator and possibly even in other cases.[1]

2.65 Our concern with the position of minors and pupils in adoption proceedings is limited in that an adoption order is not reducible for lesion.[2] Our proposals might nevertheless affect adoption proceedings in two ways. First, if the age of minority were raised, some children entitled to veto an adoption order by withholding consent would lose that right. Second, changes in the principles governing the representation of minors by their legal curators, or by curators ad litem, would apply in adoption proceedings.

2.66 (2) Petitions to vary trust purposes. In petitions to the Inner House of the Court of Session for approval of an arrangement for variation of trust purposes, the court has inter alia power to approve the arrangement on behalf of beneficiaries who are incapable of assenting by reason of nonage.[3] This clearly refers to pupils.

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[1] A.B. and C.B. v. X's Curator 1963 S.C. 124 per L.P. Clyde at p.137.

[2] Cf. J and J v. C's Tutor 1948 S.C. 636, approved by the House of Lords in A v. B and C 1971 S.C. (H.L.) 129 at p.141.

[3] Trusts (Scotland) Act 1961, s.1(1)(a).

Contrary to the general rule, however, minors are deemed incapable of assenting to the arrangement,[1] and an arrangement approved by the court is not reducible on grounds of minority and lesion.[2] On the other hand, before approving an arrangement on behalf of a minor, the court must "take such account as it thinks appropriate of his attitude to the arrangement".[3] The court will always appoint curators ad litem to pupil or minor beneficiaries whose interests are liable to be affected by variation of the trust even if they have not entered appearance.[4]

2.67 (3) Petitions for the appointment of tutors, curators and judicial factors. Petitions for the appointment of tutors to pupils may be presented under the Guardianship of Children (Scotland) Acts 1886 to 1973. Thus any person may apply to the Court of Session or the sheriff court to be appointed tutor where there is no parent, guardian or other person having parental rights over the child.[5]

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[1] 1961 Act, s.1(2).

[2] 1961 Act, s.1(3). The court may not approve an arrangement on behalf of a beneficiary under 18 unless it is of the opinion that the carrying out thereof would not be prejudicial to him: s.1(1).

[3] 1961 Act, s.1(2).

[4] Tulloch's Trustees, Petitioners 1962 S.C.245.

[5] Guardianship of Infants Act 1925, s.4(2A).

Both courts may also appoint a tutor to act jointly with an existing tutor,[1] while the Court of Session alone has power to remove a tutor and appoint another in his place. The Court of Session also retains power at common law to appoint a tutor to a pupil who has none.[3] In all these cases the welfare of the child will be the first and paramount consideration[4] and the court has its usual discretion to appoint a curator ad litem to safeguard the child's interests.[5] Where a minor is without curators, he may apply himself to the Court of Session or the sheriff court for appointment of one.[6] No-one else may impose a curator on him against his will.[7] In our Report on Illegitimacy we have recommended a rationalisation and generalisation of these rules: any person claiming an interest should be able to apply to the Court of Session or the sheriff court for an order relating to tutory or curatory.[8]

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[1] 1925 Act, ss.4(1) and (2) and 5(4).

[2] Guardianship of Infants Act 1886, s.6.

[3] 1886 Act, s.13.

[4] 1925 Act, s.1.

[5] See Wilson (1857) 19 D.286.

[6] Administration of Justice (Scotland) Act 1933, s.12; Maclean, Petitioner 1956 S.L.T. (Sh. Ct.) 90.

[7] Erskine, Institute I.7.11.

[8] Scot. Law Com. No. 81 (1984) paras. 9.11-9.13 and recommendation 42.

2.68 Where someone is required to administer the estate of a pupil, the court[1] may appoint a judicial factor known as a factor loco tutoris. An appointment may be made where the child has no tutor, or where circumstances require that the tutor be superseded in the exercise of his powers over the child's estate, e.g. where a conflict of interest has arisen between pupil and tutor[2] or where the tutor refuses to act or is incapable or unfit to do so.[3] A petition may be presented by anyone who has an interest in the pupil or his estate, including a curator ad litem.[4]

2.69 A judicial factor, in this case known as a curator bonis, may also be appointed to a minor. Where a factor loco tutoris has been managing the estate of a pupil, he becomes curator bonis on the child's attaining minority and continues the administration of the estate until the minor reaches the age of 18 or himself chooses curators.[5] In other cases a petition may be presented to the Court of Session or sheriff court as above. It is competent to

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[1] The Court of Session or the sheriff court: Rules of Court, R.189; Judicial Factors (Scotland) Act 1880, s.4 as amended by Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s.14.

[2] Cochrane (1891) 18 R.456; Allan (1895) 3 S.L.T. 87.

[3] Barwick v. Barwick (1855) 17 D. 308; Macintyre (1850) 13 D. 951; Moncrieff (1891) 18 R. 1029. See further N.M.L. Walker, Judicial Factors (1974) pp.10-14.

[4] Thomson v. Thomson 14 July 1841 F.C.; Walker, op.cit., p.13.

[5] Judicial Factors (Scotland) Act 1889, s.11.

apply in one petition for the appointment of the same person as factor loco tutoris to pupils and curator bonis to minors.[1] A minor can apply for the appointment of a curator bonis to himself.[2] The curator bonis acts without the consent of the minor and supersedes him entirely in the management of his estate. Therefore where the petitic is not at the instance of the minor himself, the court requires written evidence of his consent or concurrence.[3] If the minor has a curator, he must be a party either as a petitioner with the minor or as a respondent since his position as administrator is affected.[4] In other cases the minor may petition alone without calling any respondents, though in practice the court will either conjoin his next of kin as petitioners or call them as respondents.[5] Where a curator bonis has been appointed on petition during minority, the minor has no absolute right to have the curatory recalled and the court will recall only if satisfied that it is in his interest to do so.[6] It is thought that transactions by a factor loco tutoris or curator bonis may be reducible on grounds of

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[1] Sutherland (1851) 13 D. 951; McWhirter (1852) 14 D. 761.

[2] Ross (1846) 8 D. 1219.

[3] Hutchison (1881) 18 S.L.R. 725; Hutcheon (1909) 1 S.L.T. 71; Walker, op. cit., pp.17-18.

[4] Walker, op. cit., p.18.

[5] Walker, op. cit., p.18.

[6] Balfour Melville (1903) 5 F. 347; Walker, op. cit., pp.19-20.

minority and lesion.[1]

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[1]Although there is no reported case, a factor loco tutoris or curator bonis would probably be regarded as being in the same position as a tutor acting on behalf of a pupil in relation to his estate: Walker, op. cit., p.22. See also the obiter opinion of L.P. Hope in Hammond (1831) 10 S. 167.

PART III - EVALUATION OF THE PRESENT LAW

Aims of the law

3.1 In assessing the merits and demerits of the present law, we must first identify what we consider to be the general aims of the law limiting the capacity of children The primary aim must be to protect young people from the consequences of their inexperience and immaturity without restricting unnecessarily their freedom of action. This special protection is needed to prevent young people from entering into onerous and binding obligations which, through their lack of experience, they may be unable to fulfil - or may be able to fulfil only to their disadvantage - and whose implications they may not fully apprecia They should be protected from any hardship which they might suffer simply on account of their youth.

3.2 One consequence of this protection is that an adult who contracts with a person under 18 runs the risk of suffering loss through not being able to enforce the other's obligation. If the law were to give too much protection to young people, it would deter adults generally from entering into any course of dealing with them. A young person would encounter difficulty in entering into any sort of transaction, even if it were to his advantage. A balance must therefore be struck betwee the primary objective of protection and the second objective, namely, that the law should not operate unfair by causing unnecessary inconvenience and prejudice to adults who reasonably enter into legal transactions with

persons under 18 and who do not take advantage of their immaturity.

3.3 A third and subsidiary objective is that the law should be clear, coherent, and should accord with modern social and economic conditions.

3.4 Other policy considerations have been figured in the past, but have now become obsolete. It was, for example, suggested in the early 19th century that the law should prohibit transactions with pupils and minors, except where strictly necessary. Indeed, the law was originally regarded not simply as a means of protecting the interests of young people themselves, but as a means of safeguarding their estate, particularly their heritable estate, for the benefit of their successors.[1] Such consideration do not have much relevance today. It seems to us that the objectives mentioned in paragraphs 3.1 to 3.3 above provide the most appropriate criteria for evaluating the present law.

3.5 Protection of young people. At first sight, Scots law does, on the whole, give reasonable protection to young people in their dealings.[2] If a transaction is to the child's serious prejudice, it will be reducible for minority and lesion. If the child's tutor or

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[1] See para. 2.13 above.

[2] Whether 18 years is still the appropriate age up to which protection should be given will be considered at paras. 5.6-5.23 below.

curator does not participate in the required legal manner, the transaction may be ignored. In either case, the court will grant restitution.

3.6 This statement is however, subject to a number of qualifications, some of which suggest that the law does not go far enough to protect all young people equally, others that it is overprotective in certain circumstances.

3.7 Firstly, it is difficult to see why a minor without curators should be regarded as having full capacity. In this respect the law concedes too great a capacity to children as young as 12 or 14. Emancipation on the death of a minor's parents seems a curious form of "protection". This is the situation where the minor is most obviously in need of advice to protect him from entering into unwise bargains. The same applies to a minor who has been forisfamiliated. Why should a boy of 16 who has left home be in less need of protection than a boy of 17 who has opted to continue living with his parents? The forisfamiliated minor does not have the advice or guidance available to other minors and is open to exploitation by the unscrupulous adult. In any of these circumstances the minor still has the power to reduce his contracts for lesion, but whether this limited protection is sufficient is unclear. If it is sufficient, why is it not adequate for all minors?

3.8 It also seems anomalous that a minor having curators, but acting without their consent, can be held bound in trading contracts while he needs their consent to enter

into more everyday transactions, other than those coming within the definition of necessaries. Arguably, the exception for trading contracts was originally meant to benefit minors by making it possible for them to go into business but this was only relevant so long as children could leave school at 11 and remained minors until 21. Today the exception extends minors' capacity unnecessarily, while the general rule can prevent them making even the smallest cash purchase alone.

3.9 A minor is further protected by the rules of restitution which come into operation on reduction of his contract. He recovers what he has paid or delivered in pursuance of the contract and restores property or money received from the other contracting party in so far as he is still enriched by it at the time of the action. Though, in principle, restitution restores both parties to the position they were in prior to the contract, this rule is relaxed in the minor's favour: he does not have to give back money which he has spent and he does not have to compensate for property no longer in his possession. He returns only what he still retains. While this rule gives ample protection to the minor in all circumstances, it can operate unfairly as against the other contracting party who is bound to make restitution even if the minor is unable to do so.

3.10 Fairness to adults. We have already noted that one result of the protection afforded to a young person is that an adult must be prepared to accept a degree of prejudice in order to deal with him. The question is whether or not the prejudice he suffers is more than is

necessary.

3.11 In order to secure his position, an adult must first satisfy himself as to the young person's status: whether he is a pupil, minor or adult. If the young person induces a contract by misrepresenting his age, the adult has nothing to fear. In some cases, it will be obvious whether the child is a pupil or minor. Whether it is reasonable to expect an adult to appreciate the legal differences between the two is another matter. In many cases, however, the contract may be concluded at a distance, for example, through a mail order catalogue. In those circumstances, the adult has no means of knowing the age of the person with whom he is dealing. Although the contract may well require the party to sign a declaration that he is over 18, a mere assertion of age in a standard form document may not always be sufficient to be regarded as a fraudulent misrepresentation of age and may not always afford protection to the adult party.

3.12 The adult must also ascertain whether or not the child has a guardian and, if so, he must ensure that the guardian participates in the transaction in the correct manner.[1] If the guardian does not participate, the pupil or minor can treat the transaction as null. In transactions involving payment of money to a young person, the adult must not only insist on the guardian's participation in granting the receipt or discharge, but he must also obtain evidence of, or security for, the proper investment of the money for the benefit of the child. Finally, the adult must not take advantage of the child even if the guardian does participate, otherwise he risks having the transaction set aside for minority and lesion.

3.13 It is clear that safeguards are available to enable adults to protect themselves from unnecessary prejudice when dealing with children. But are these safeguards fair

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[1] Under the present law, the child's legitimacy or illegitimacy is also important to the adult. An illegitimate child has no tutor or curator unless one is appointed by the court. Thus, the consent of a parent of an illegitimate minor is irrelevant unless that parent has been judicially appointed as curator. In most circumstances, this does not put the adult at any additional disadvantage. In an extreme case, however, if someone other than a parent has been appointed guardian, the adult may mistakenly believe that participation of a parent in the transaction is still sufficient. In our Report on Illegitimacy (Scot. Law Com. No. 82) (1984) paras. 2.3 and 2.9, we have recommended that the mother of an illegitimate child should automatically be the child's tutor and curator and that the father should be entitled to apply to the court for appointment as such.

and reasonable? As a general rule, it is probably reasonable to require an adult to satisfy himself as to the status of the person with whom he is dealing, but in the context of "long-distance" contracts, this has become impracticable. The participation of a guardian is certainly reasonable for what may be regarded as the more important transactions, such as hire purchase agreements, partnership contracts, the purchase and sale of heritable property and the like. On the other hand, it is an unrealistic requirement for the type of contracts which young people most commonly enter into, namely cash transactions for small purchases, bus fares, entertainment etc.

3.14 As regards the principle of restitution, it seems reasonable that if a child obtains reduction of his contract, he should restore goods or money still in his possession and that, in general, where he has squandered the benefit received under a contract, his obligation of restitution should not put his general assets at risk. This seems quite appropriate where the adult contracting party has taken advantage of the child's immaturity, and the contract is clearly to the child's prejudice. However, this principle can apply in certain types of transactions which are not actually prejudicial. Because of the strong presumption of lesion which arises in transactions involving payment of money to a child, by way of a loan or as the price of goods bought, the child may still escape his obligation of restitution even if the actual terms of the contract were perfectly fair, if the money received no longer forms part of his estate, perhaps for

reasons totally unconnected with the transaction. This particular application of the law on minority and lesion seems unduly biased against the responsible adult.

3.15 Clarity, coherence and adaptability to modern conditions. We have already touched on various matters, in our consideration of the first two objectives, where the law can be criticised as being difficult to apply, anomalous or out of touch with modern social and economic conditions. It is, however, useful to summarise the defects of the present law under this separate heading as well, in order to make out fully the case for reform.

3.16 It is readily apparent from Part II of this Consultative Memorandum that the law is complicated. The validity of a legal transaction depends on a bewildering variety of factors: the age of the child; the existence or not of a guardian; whether the child is forisfamiliated; the participation of a guardian, if any; where the guardian does not participate, the degree of benefit, if any, to the child from the transaction; and whether it is the child or the adult who seeks to enforce. The law is therefore complex, both in its basic principles and in its application to particular cases.

3.17 The law is also unclear in some respects, the most important of which is the legal effect of a transaction entered into by a pupil acting alone or by a minor having curators without their consent. There is, firstly, uncertainty whether such contracts are void, i.e. totally

without legal effect, or merely "unilaterally void", i.e. enforceable by, but not against, the pupil or minor. Secondly, assuming that such contracts are not totally without legal effect, there is uncertainty whether they are governed by the same or different principles. Thirdly assuming a contract where the minor or pupil has received payment or performance and refuses to perform his part of the contract, there is uncertainty whether the other party's claim is:

(a) contractual, including, for example, an action of damages for breach of contract and an action to enforce performance by the minor or pupil, or

(b) based on unjust enrichment, and thus restricted to recovery of the amount by which the minor is enriched at the date of the action.

This uncertainty is unsatisfactory for the different bases of claim can give widely different results.

3.18 Another example of uncertainty in the law is the question whether the plea of minority and lesion is available before majority. There is also uncertainty in the extent to which minors and pupils are assimilated for the purpose of determining their liability for the supply of necessaries.

3.19 A further criticism of the present law is that it is unfair and anomalous. It is discriminatory in its treatment of the sexes, applying different ages of minority

for males and females. It is lacking on coherent principle in the varying degree of protection afforded to minors with or without curators. It is anomalous in its provision for the supply of necessary goods and services, the former being dealt with, at least partly, by statute, the latter being governed by slightly different common law rules. Further anomalies result from the difference between the age of full contractual capacity and the minimum age of marriage and from the limitation on inter vivos disposals of heritage.

3.20 As regards questions of capacity in litigation, the law reflects the general principles governing legal capacity in other matters and, to that extent, is complex. Moreover, participation of a curator or a curator ad litem in proceedings involving a 16 or 17 year old may, in some cases, be inappropriate and inconvenient.[1] The fact that, in certain circumstances, a decree may be reduced if, due to some omission on the part of the guardian or curator ad litem, it has caused substantial prejudice to the young person also seems incompatible with our general principles concerning challenge of judicial decisions. A decree is, in any event, an act of the court, not of the young person himself and, logically, should fall outwith the ambit of the special grounds of reduction applicable to transactions

[1] See the observations made by Lord Shand in Cunningham v. Smith (1880) 7 R. 424 at p.426: para. 2.59 above. Cf. Wilson v. Smith 1972 S.L.T. (Sh. Ct.) 21 (an action of affiliation and aliment raised by a girl, aged 22 by the time of decree, and her father as curator and administrator-in-law).

entered into by a minor.

3.21 The law can also be said to be out of touch with social and economic reality. This is particularly so in the significance which it ascribes to the ages of 12 and 14 which are of no relevance in any other context. We have already noted, in this connection, the wide divergenc between law and practice on the age of consent to medical treatment: the legally significant ages of 12 and 14 are widely ignored in practice and the age of 16 is regarded as the appropriate age of consent. In the commercial field, the advent in recent years of general consumer protection law[1] may suggest that young people are no longer in need of the same degree of special protection as was originally thought appropriate.

3.22 The principles of the law were framed at a time when protection of the wealthy minority was a primary consideration. They bear little relevance to the needs of the average young person today. The law ignores the fact that many young people become economically active before they reach the age of 18, either simply by having pocket money to spend, or by taking a full-time job and becoming financially independent of their parents, or by getting married and leaving home. While the law may protect young people undertaking long-term obligations,

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[1] See the Supply of Goods (Implied Terms) Act 1973 (much of which is now incorporated in the Sale of Goods Act 1979), the Fair Trading Act 1973, the Consumer Credit Act 1974, the Unfair Contract Terms Act 1977 and the Consumer Safety Act 1978.

this is achieved at the expense of restricting their ability to enter into everyday cash transactions. The concept of "necessaries" does not accord with the type of contract which young people are most likely to make. In practice, however, a shopkeeper does not refuse to transact with a young person because of his lack of legal capacity. If a child wants to purchase an item and offers the cash to pay for it, the shopkeeper will not make enquiries as to the child's age, whether or not he is forisfamiliated and so on, before deciding whether or not to accept his money. If a person under 18 seeks credit, his application will probably be considered more on commercial than on legal grounds, the most important consideration being whether or not he has the financial resources to meet his commitment. To this extent, we suspect that the law, and the protection which it offers, are largely irrelevant to the general public.

The case for reform

3.23 Apart from criticism of the specific areas in which the present law is defective, its inherent complexity provides a powerful argument in favour of reform.[1] While some protection is available to the adult who enters into a course of dealing with a child, the requirements with which he must comply in order to safeguard his position seem unduly onerous, and, in some cases, impracticable.

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[1] Its complexity is highlighted in the Comparative Table set out at Appendix A which summarises the main existing rules and the corresponding rules under our two options for reform.

The intricacy of the legal rules with which the adult must contend, if he is aware of them at all, may simply deter him from transacting. If the law gives rise to little difficulty in practice, that may result from its being relatively unknown to the people whom it affects.[1] If, on the other hand, it were to be simplified, knowledge of the relevant rules might become more widespread and the protection offered by them more effective.

3.24 The combination of these criticisms points, in our view, to the need for a major overhaul of the law, replacing the existing rules with a coherent set of principles which have been adapted to modern social conditions. Before considering the options for reform, it is appropriate to consider the law on legal capacity in some other countries. The next part of the Memorandum is therefore a brief comparative survey. In the meantime, we would welcome general comments on the merits or demerits of the present law. We therefore invite views on our provisional conclusion that the law of Scotland on the legal capacity of minors and pupils is in need of major reform.

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[1] In one of the more recently reported cases, Boyle v. Woodypoint Caravans 1970 S.L.T. (Sh. Ct.) 34, it was doubted whether the limitations on a minor's contractual capacity were widely understood.

PART IV - COMPARATIVE SURVEY

England and Wales

4.1 The age of majority in England and Wales was reduced from 21 to 18 by section 1 of the Family Law Reform Act 1969. A minor may be declared of full age by Act of Parliament before he reaches the age of 18 but his status of minority can be changed in no other way.[1] All minors are subject to the same rules on capacity, whatever their age.

4.2 In general, three types of contract entered into by an English minor are binding on him. These are:

(i) contracts for necessaries, in the sense of goods suitable to the minor's station in life and to his actual requirements;

(ii) contracts of employment provided that the contract, taken as a whole, is beneficial to the minor;

(iii) certain categories of contract involving the acquisition of a lasting interest in property or the incurring of a continuing obligation attached to property.

The first two types are always fully enforceable against

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[1] See Halsbury's Laws of England (4th edn. 1979) Vol. 24, para. 402.

the minor.[1] The third group is binding unless and until repudiated by him either during minority or shortly after attaining majority.[2] Apart from these exceptions, the basic rule of English common law is that a minor's contracts are enforceable by, but not against him.[3] Section 1 of the Infants Relief Act 1874 purports to render certain minors' contracts "absolutely void" but the courts have refused to give the section its literal meaning and in practice it has made little difference to the common law position.[4] Thus a minor may not be compelled either to return or to pay for non-necessary goods or services he has received, although if he has fraudulently induced the other party to enter into the contract he may be liable in equity to restore what he has acquired.[5] Section 2 of the Infants Relief Act makes it impossible for a minor, on attaining majority, effectively to ratify an otherwise unenforceable contract entered into by him during minority. Once a contract has been completed, there is no general rule allowing it to be re-opened to enable the minor to avoid hardship caused by it, but equity may in certain cases grant relief where one party

[1] See Law Commission Working Paper No. 81, Minor's Contracts paras. 2.3-2.9.

[2] Ibid., paras. 2.10-2.12.

[3] Ibid., paras. 2.13-2.14.

[4] Ibid., paras. 2.15-2.17.

[5] Ibid., para. 2.24.

to a contract has taken an unconscionable advantage of the other.[1]

4.3 The Law Commission for England and Wales has recently examined this area of the law.[2] It concluded that reform should be confined to the relatively few aspects of the present law which are likely to lead to difficulties or injustices in practice. On this basis it recommended that the Infants Relief Act 1874 be repealed; that minors' contracts should be capable of effective ratification on majority; that guarantees of minors' contracts should be validated[3]; and that in some circumstances the supplier of goods to a minor should, in the event of non-payment, be entitled to recover them or the proceeds of their sale by the minor.[4] The Commission was not in favour of introducing any statutory procedure for the judicial validation of minors' contracts, either by a general conferment of capacity on a particular minor or by validation of a particular contract.[5] It also rejected an alternative proposal which was canvassed in the Commission's

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[1] Ibid., para. 2.20

[2] Law Com. No. 134, Report on Minor's Contracts (1984).

[3] Such guarantees are void under the present law: Working Paper No. 81, para. 2.16.

[4] See Law Com. No. 134, Part IV and para. 6.3.

[5] Ibid., paras. 5.7-5.9.

original Working Paper.[1] This would have replaced the basic principle of "qualified unenforceability" with a simple rule whereby minors under 16 would be totally immune from liability for breach of contract, while those of 16 or over would be fully liable on all contracts. The Commission saw the main advantage of this in the great simplification of the law which it would achieve. However a difference of opinion ensued on consultation and in such circumstances the Commission felt there was insufficient support to justify adoption of the proposal.

4.4 As regards consent to medical treatment, it is provided by the Family Law Reform Act 1969[2] that a minor over the age of 16 may effectively consent to treatment even if his parent or guardian objects. This is without prejudice to any other consent effective at common law,[3] and there is some authority for the view that a minor below the age of 16 may consent, at least to treatment designed for his own benefit, if he is capable of understanding the issues involved and the nature of the treatment proposed.[4]

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[1] See Working Paper No 81, Part XII; Law Com. No. 134, Part II.

[2] s.8(1).

[3] s.8(3).

[4] See Bromley, Family Law (6th edn. 1981) p.317; Hoggett, Parents and Children (2nd edn. 1981) pp.12-13; Skegg, "Consent to Medical Procedures on Minors" 1973 36 M.L.R. 370. See also the case, reported in The Times, 14 May 1982, of a 15 year old school girl who was allowed to have an abortion against her parents' wishes. However, in Gillick v. West Norfolk & Wesbech Area Health Authority and Another, /1985/1 All E.R. 533, the Court of Appeal seemed to favour drawing a rigid line at the age of 16.

4.5 A minor may sue and be sued in all types of civil proceedings but he must be represented by his "next friend" where he is the plaintiff and by a guardian ad litem where he is the defendant.[1] A parent is entitled to act in these capacities unless he has an adverse interest.

United States of America

4.6 Recent reductions in the age of majority mean that young people acquire full capacity at 18 in most, though not all, of the American states.[2] Some states also provide for majority to be attained on marriage before 18. One basic common law rule governs the question of contractual capacity throughout the United States, subject to any exceptions provided for by individual state legislatures. The basic principle is that a minor may make and enforce contracts, but he has the right to disaffirm them when asserted against him at any time before reaching majority and for a reasonable time thereafter.[3] The right

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[1] Cretney, Principles of Family Law (4th edn. 1984) p.305; R.S.C. Ord. 80, r.2(1). This rule applies generally in common law countries.

[2] The exceptions are Alabama, Nebraska and Wyoming, where majority is attained at 19, and Mississippi, where it is attained at 21. Many other states retain the age of 21 for the purpose of sale of alcoholic beverages.

[3] Clark, Domestic Relations, (3rd edn. 1980) p.719; Corpus Juris Secundum, Vol. 43, s.166.

to disaffirm is not affected by such factors as whether the contract is fair or unfair, whether or not it is beneficial to the minor, and whether or not it has been approved by the child's parent. There is one general exception to this rule: a minor is liable for the reasonabl value of necessaries supplied to him unless his parent or guardian has already made provision for the articles furnished.[1] In addition, special statutes in most states permit minors to make binding contracts in relation to specified transactions.[2] Thus, many states provide for full capacity to borrow money for the purposes of higher education.[3] There are several different types of provision designed to make a minor liable on contracts connected with a business in which he is engaged,[4] and minors are often given capacity to consent to specific types of medical treatment.[5] One unusual provision applies in California, where a minor is bound by contracts under which he agrees to render "artistic or creative services" in the entertainment field or services as a participant or player in professional sports, provided that the contract has

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[1] 43 C.J.S. s.180.

[2] Clark, op. cit., p.719.

[3] See Uniform Minor Student Capacity to Borrow Act, Uniform Laws Annotated, Vol. 9A (1979).

[4] 43 C.J.S. s.182.

[5] See para. 4.8 below.

court approval.[1] A voidable contract made by a minor may be ratified by him on attaining majority, and the effect is as if the contract had been binding from the beginning.[2]

4.7 A doctrine unknown in England but widespread in the United States is that of emancipation. In general, it consists of the legal process by which a minor is released from the control and authority of his parents.[3] The traditional definition of emancipation, as developed by the courts, is that it is a renunciation by a parent of his legal duties towards the child. Whether or not a parent emancipates his child depends on the intention of the parent, not the child. The effect of emancipation is generally to release the child for some, but not all, of his disabilities. For example, it may enable him to acquire his own domicile and retain his own earnings but he may still be entitled to disaffirm contracts entered into before majority. In such cases, emancipation is concerned only with the ending of parental control over the child and not with his position vis-a-vis third parties. It is, however, a question of fact in each case whether emancipation has taken place and what its effect is on the child's legal capacity.[4]

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[1] See Martindale - Hubbell, Law Directory (1979) Vol VII, California Law Digest.

[2] 43 C.J.S. ss.168-171.

[3] Clark, op. cit., p.721.

[4] Marriage, enlistment in the armed forces and departure from the parental home to set up a residence elsewhere are generally sufficient for emancipation: Clark, op. cit.,p.722. Some statutes provide that emancipation by marriage has the effect of removing all disabilities imposed on the minor: 43 C.J.S. s.116.

In some states, there is a statutory procedure whereby a child may be emancipated. In Oregon, for example, a child over 16 is entitled to file a petition for emancipation which may be granted after the court has considered such circumstances as whether the parent consents, whether the child living away from home and is self-supporting and whether he is sufficiently mature to manage his own affairs Such emancipation will usually have the effect of removing all legal disabilities affecting the child.[2]

4.8 A number of states confer a general power to consent to medical treatment on minors who are emancipated. In addition, many allow minors to consent to specific types of medical treatment.[3] A Model Health Care Consent Act,[4] approved by the Commissioners on Uniform State Laws in 1982 but not yet adopted in any state, provides that without prejudice to any power to consent available under state law, a minor may consent to medical treatment if he is emancipated, or has attained the age of /14/ and regardless of the source of his income, is living apart from his parents or any person in loco parentis and is managing his own affairs; if he is or has been married; or if he is in military service.

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[1]Clark, op. cit., p.722.

[2]43 C.J.S. ss.117-119.

[3]Common examples are medical treatment relating to alcohol or drug abuse, psychiatric counselling, pregnancy, venereal disease, abortion, use of contraception: see Uniform Laws Annotated, Vol. 9, Cumulative Supplement 1984, p.336.

[4]Uniform Laws Annotated, Vol. 9, Cumulative Supplement 1984

Australia

4.9 The age of majority in all the Australian states is now 18. In general, the English common law applies throughout Australia, although only Victoria and Tasmania have adopted the provisions of the Infants Relief Act 1874.[1] In New South Wales, however, substantial reform was introduced by the Minors (Property and Contracts) Act 1970, which codifies the law relating to all aspects of the legal capacity of minors.[2] The general principle of the statute is that a civil act[3] is presumptively binding on a minor if it is for his benefit unless, at the time of the act, he lacked, by reason of youth, the necessary understanding of its consequences.[4] The phrase "presumptively binding" does not mean that there is only a prima facie inference of enforceability which may be rebutted: rather, the act is binding on the minor and has effect as if he were of full age when he participated in it.[5] Thus, although any defence based on infancy is made irrelevant, defences based on other vitiating factors, such as fraud, remain available. Where a minor's contract is not initially presumptively

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[1] See Finlay, Family Law in Australia (3rd edn. 1983), pp. 205-8.

[2] The Act is explained and discussed in Harland, The Law of Minors in relation to Contracts and Property (1974).

[3] Defined to include all civil transactions, including the making of contracts and disposition of property: s.6.

[4] ss.18 and 19.

[5] s.6(3). See Harland, op. cit., p.32.

binding, it may be affirmed by the court on the application of any interested person or by the minor himself when he attains majority. The court can only affirm where this would be for the minor's benefit.[1] A minor may repudiate a contract which is not for his benefit at any time before he attains majority or within one year thereafter, and the court also has a restricted power to repudiate a contract during his minority.[2] Where repudiation has taken place the court has wide powers to adjust the rights of parties to the contract.[3] On application by a minor, the court may grant him general or limited capacity to enter into contracts or may approve particular contracts, if satisfied that this would be for his benefit.[4]

New Zealand

4.10 The age of majority in New Zealand is 20. Full contractual capacity is also attained on marriage.[5] The law relating to the contractual capacity of minors is now contained in the Minors' Contracts Act 1969, which divides

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[1] s.30.

[2] ss.32 and 34.

[3] s.37.

[4] ss.26 and 27.

[5] Minors' Contracts Act 1969 s.4(1). Young people can marry at 16, although parental consent is required for all those under 20.

minors' contracts into two groups. The first comprises all contracts made by minors over 18, contracts of service and certain contracts of insurance. These are treated as having full effect as though they had been made by an adult.[1] However, the court is given a wide discretion to declare such contracts unenforceable against the minor and to make such orders for compensation and/or restitution as it thinks just in cases where the consideration for the minor's promise is so inadequate as to be unconscionable, or where a term of the contract is harsh or oppressive to the minor.[2] The second group comprises contracts made by minors under 18. These are unenforceable against the minor but are of full effect in all other respects.[3] The court may provide relief for an adult who is bound by a contract under which the minor refuses to perform his obligation by ordering such compensation or restitution as it thinks just. The court may also declare the contract binding on the minor in whole or in part if it considers the contract to have been fair and reasonable when made.[4] In deciding whether a contract was fair and reasonable when made, the court is to have regard to the circumstances surrounding the

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[1] s.5(1).
[2] s.5(2).
[3] s.6(1).
[4] s.6(2).

making of the 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.[1] Any party to a proposed contract with a minor, including the minor himself or his guardian, may apply to the court for its approval of the contract, upon which the contract is fully binding on the minor.[2] Where a minor has induced the other party to enter a contract by falsely representing that he is of full age, the court can take this into account in the making of any order for compensation and restitution.[3]

Canada

4.11 Majority is attained at 19 in four of the ten Canadian provinces[4] and at 18 in the others. In all the provinces except Quebec the rules on contractual capacity are those of the common law with little statutory amendment: thus, in general, a minor is not liable on any contracts other than those for necessaries. Alberta also makes a minor liable on a contract for life insurance, while in Manitoba it is provided that where a

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[1] s.6(3).

[2] s.9.

[3] s.15(4).

[4] British Columbia, New Brunswick, Newfoundland and Nova Scotia.

minor over 16 does not live with his parents or guardian, or has none, he will be liable on a contract to perform work or services unless the Director of Public Welfare declares it void on evidence of injustice.[1]

4.12 Proposals for reform have been made but not implemented in Alberta and British Columbia.[2] Under the Alberta proposals, contracts in general remain unenforceable against minors, but if the adult can satisfy the court that he reasonably believed the contract terms to be fair, the onus will shift to the minor to show either that the contract was improvident in his interests or that by restitution and/or compensation the adult could be placed in as good a position as if the contract had not been made.[3] The Report also recommends that on attaining majority a minor should be able either to affirm or to repudiate a contract made during his minority. Repudiation should take place within one year of majority, but the other party should be able to require him to do so within 30 days.[4] If satisfied that a particular contract is to a minor's benefit, the court

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[1]See Martindale-Hubbell, Law Directory(1979) Vol. VII, Part III (Canadian Digests).

[2]See Alberta Institute of Law Research and Reform Report on Minors' Contracts (1975) and Law Reform Commission of British Columbia Report on Minors' Contracts (1976, L.R.C. 26).

[3]Pp.28-29, 32-33.

[4]Pp. 34-35.

should be able to approve it and thus make it fully enforceable against the minor. The court should also have power to grant a minor either general or limited contractual capacity.[1]

4.13 The British Columbia proposals retain the basic rule of unenforceability against the minor but recommend a power in the court to grant relief to either party by way of compensation and restitution or by discharging the parties from any further obligation under the contract.[2] They allow the minor either to affirm or to repudiate a contract on attaining majority: if he does not repudiate it within one year he becomes fully bound although the other party may require him to repudiate within 60 days.[3] They also provide for judicial grants of either general or limited contractual capacity. The court must be satisfied that this would be for the minor's benefit and that in the circumstances he is not in need of the protection which the law affords to minors.[4]

4.14 The rules in Quebec are somewhat different since

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[1] Pp. 37-40.
[2] Pp. 29-32.
[3] Pp. 34-35.
[4] Pp. 38-42.

they are based not on the common law but on the French civil law. A minor, i.e. a person under 18, may not act alone but must be represented by his tutor.[1] Any contract he makes alone is reducible on proof of lesion.[2] However a minor engaged in business or trade is bound by all contracts made for purposes of the business or trade.[3] A minor of 14 or more may sue alone to recover wages but all other actions are brought and defended in the name of the tutor.[4] A minor is emancipated by marriage, and emancipation may also take place on the advice of the family council and judgment of the court.[5] When a minor is emancipated, a curator is appointed to him. The minor must be assisted by his curator in all acts other than those of mere administration, which he may perform alone.[6] Where an emancipated minor acts outwith his legal capacity, the contract is reducible on proof of lesion.[7]

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[1]Quebec Civil Code, arts. 986 and 290.

[2]C.C. art. 1002. Contracts for the alienation and burdening of heritage made without judicial authority granted on the advice of a family council may be set aside without proof of lesion: C.C. art. 1009.

[3]C.C. arts.1005 and 323.

[4]C.C. art. 304.

[5]C.C. arts.314 and 315.

[6]C.C. arts.317-322.

[7]C.C. art. 1002.

France

4.15 The age of majority in France is 18.[1] Marriage belc this age emancipates a minor as a matter of law.[2] Emancipation may also be pronounced by the judge of guardianships on the request of a parent or, if the parents are dead, the family council, when the minor has reached 16.[3] An emancipated minor has full capacity for all acts of civil life except marrying and being adopted, for which he must observe the same rules as an unemancipated minor.[4] It is also specifically provided that an emancipated minor may not engage in trade.[5]

4.16 An unemancipated minor in general has no capacity to act alone and must be represented by his guardian in all civil acts.[6] The main exception to this rule is "acts of daily life", where law or usage authorises a minor to act for himself, a category which includes the purchase of essential goods and articles of daily use, contracts for necessary services, and even hiring (though not buying) a car.[7] A minor may perform such acts alone.[8] He may

[1] Code Civil, art. 388.

[2] C.C. art. 476. A girl may marry at 15 with parental consent but a boy may not marry until he reaches 18: C.C arts. 144 and 148.

[3] C.C. arts. 477 and 478.

[4] C.C. art. 481.

[5] C.C. art. 487.

[6] C.C. arts. 389.3 and 450.

[7] See Marty and Raynaud, Droit Civil (Les Personnes) (3rd edn. 1976) p.643.

[8] C.C. art. 389.3.

also take "mesures conservatoires", such as the registration of a deed or the interruption of prescription. These generally involve no danger to him and are necessary to safeguard his interests.[1] A minor acting along may open a bank account and join a trade union at 16 and obtain a shooting licence at 15.[2] He may also enter into a contract of employment or apprenticeship, but in this case parental authorisation is required.[3] If a minor practises a profession, transactions made in the course of that profession are valid and binding on him.[4]

4.17 Where a minor has contracted alone there are two possible remedies available to him (but not to the other contracting party). These are simple rescission on the ground of incapacity, and rescission for lesion. There has been some uncertainty as to the circumstances in which each remedy applies, but the prevailing view is that simple rescission is available for all contracts where the guardian should have represented the child, while rescission for lesion applies only to acts for which the minor does have some independent capacity, e.g.

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[1] Marty and Raynaud, op cit., p.641.
[2] Ibid., p.643.
[3] Ibid., p.642.
[4] C.C. art. 1308.

acts of daily life. Some disproportionate injury must be shown before he can reduce such contracts.[1] An action for rescission must be brought within five years of the minor's majority or emancipation: otherwise, the transaction will be looked upon as valid.[2] On attaining majority a young person may ratify any contract he made during minority and if he does so he becomes fully bound by it.[3]

West Germany

4.18 Contractual capacity in West Germany depends on what is called "Geschäftsfähigkeit", or the capacity to do business. This capacity is acquired at the age of majority, i.e. 18.[4] Capacity to do business is totally lacking in children under 7, and contracts of such children are therefore void ab initio.[5] Between the ages of 7 and 18 a minor is limited in competence.[6] In general he cannot act without the consent of his legal representative (that is, his parent or guardian), but if he does so act the transaction is not void ab initio. Rather, its validity is indeterminate until the legal representative has either accorded or refused consent.[7] Before approval

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[1] See Stoljar, International Encyclopedia of Comparative Law, Vol. IV, Chapter 7, pp.139-140.

[2] C.C. art. 1304.

[3] C.C. art. 1311.

[4] B.G.B. art. 2.

[5] B.G.B. art. 104.

[6] B.G.B. art. 106.

[7] B.G.B. art. 108.

is given to the contract, the other party is entitled to revoke, although if he had notice of the minority he may revoke only if the minor falsely declared to him that he had his representative's approval; even then he may not revoke if he knew the approval had not in fact been given.[1] If the minor has attained majority, his own approval takes the place of the representative's.[2]

4.19 There are several exceptions to the general rule. First, a minor can act without his representative's consent where the only result of the act is to give him a legal advantage.[3] The definition of advantage here is formal rather than economic: it is counted as a legal disadvantage to give up any legal right or incur any legal liability. This therefore excludes all acts of a commercial nature but includes such acts as the acceptance of a purely gratuitous benefit. The second exception is the so-called "pocket-money rule" under which a minor can make a valid contract if he performs his part with money given to him by his legal representative or by a third party with the representative's consent. The money must be given either for the purpose of that particular contract or for the minor's free

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[1] B.G.B. art. 109.
[2] B.G.B. art. 108.
[3] B.G.B. art. 107.

disposal.[1] Thirdly, where the legal representative has, with court approval, authorised the minor to carry on gainful occupation independently, the minor has unlimited capacity to enter into contracts within the scope of the business.[2] A similar rule applies in relation to contracts connected with a service or employment which the minor has entered with his representative's consent.[3]

Switzerland

4.20 The age of majority in Switzerland is 20.[4] Majority is also acquired on marriage,[5] and a minor who has attained the age of 18 can, with his own consent and that of his parents, be declared by the court to be of full age.[6]

4.21 Swiss law, like German law, draws a distinction between minors who have some capacity to act and those who do not. In this case the distinction depends on whether or not the minor has "discretion". A minor is held to have discretion if he is not incapacitated, through his tender age, from acting rationally.[7] The Swiss Civil Code does not fix the age of discretion or attempt to define it, but leaves the question to be decided by the judge in

[1] B.G.B. art. 110.
[2] B.G.B. art. 112.
[3] B.G.B. art. 113.
[4] Swiss Civil Code, art. 14.
[5] Ibid.
[6] C.C. art. 15.
[7] C.C. art. 16.

in each case. A minor without discretion is incapable of effecting any legal act, and any transaction he purports to make is void.[1] A minor who has discretion can bind himself only with the consent of his guardian.[2] This consent may be given either before or after the act and may be express or tacit. The minor may himself ratify the act as soon as he comes of age.[3] Without the guardian's consent the minor can validly accept purely gratuitous benefits and exercise strictly personal rights, such as making a will.[4] He is also free to dispose of his own wages, although he is expected to contribute to the cost of his maintenance if he lives with his parents.[5]

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[1] C.C. arts. 17 and 18.

[2] C.C. art. 19.

[3] See Dessemontet and Ansay (eds.) Introduction to Swiss Law (1981), p.53.

[4] C.C. art. 19.

[5] C.C. art. 323.