



The Law Commission

Working Paper No. 81

Minors' Contracts

LONDON
HER MAJESTY'S STATIONERY OFFICE
£4.50 net

The Law Commission was set up by section 1 of the Law Commissioners Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are —

The Honourable Mr Justice Ralph Gibson, *Chairman*

Mr Stephen Cretney

Mr Brian J. Davenport, Q.C.

Mr Stephen Edell

Dr Peter North

The Secretary of the Law Commission is Mr R. H. Streeten and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London, WC1N 2BQ.

This Working Paper, completed for publication on 29 March 1982, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 1 January 1983.

All correspondence should be addressed to —

Mr I. H. Maxwell,
Law Commission,
Conquest House,
37-38 John Street,
London WC1N 2BQ
(Tel: 01-242 0861, Ext. 226)

The Law Commission

Working Paper No. 81

**Law of Contract
Minors' Contracts**

**LONDON
HER MAJESTY'S STATIONERY OFFICE**

© *Crown copyright 1982*
First published 1982

ISBN 0 11 730161 2

THE LAW COMMISSION
WORKING PAPER NO. 81

LAW OF CONTRACT
MINORS' CONTRACTS

CONTENTS

<u>PART</u>	<u>Paragraph</u>	<u>Page</u>
I	<u>INTRODUCTION</u>	1.1 - 1.14 1-7
II	<u>THE PRESENT LAW AND ITS DEFECTS</u>	2.1 - 2.29 8-31
	Introduction	2.1 - 2.2 8
	Binding contracts	2.3 - 2.9 8-14
	(i) Contracts for necessities	2.3 - 2.7 8-11
	(ii) Contracts of service and apprenticeship and analogous contracts	2.8 - 2.9 12-14
	Contracts which are binding unless repudiated	2.10- 2.12 14-15
	The Basic Rule: Contracts are not binding on a minor	2.13- 2.18 16-20
	(i) In general	2.13- 2.14 16
	(ii) The Infants Relief Act 1874	2.15- 2.18 17-20
	Consequences of a contract made with a minor	2.19- 2.20 20-22
	Liability in tort	2.21- 2.23 22-24
	Liability in equity for fraud	2.24- 2.25 24-26
	Defects of the present law	2.26- 2.29 26-31
III	<u>POLICY CONSIDERATIONS AND FIELD OF CHOICE FOR REFORM OF THE LAW</u>	3.1 - 3.16 32-38
	Introduction	3.1 32
	Policy considerations	3.2 - 3.6 32-34
	Field of choice for reform of the law	3.7 - 3.16 34-38

	<u>Paragraph</u>	<u>Page</u>
IV	<u>THE LATEY COMMITTEE PROPOSALS</u>	4.1 - 4.15 39-49
	Introduction	4.1 39
	The proposals	4.2 - 4.5 39-43
	Consideration of the Lately proposals	4.6 - 4.14 43-48
	Provisional conclusion	4.15 48-49
V	<u>A METHOD BASED ON UNENFORCEABILITY</u>	5.1 - 5.8 50-55
	Introduction	5.1 50
	The general approach of the present law	5.2 - 5.4 50-52
	Our general approach	5.5 - 5.8 52-55
VI	<u>OUR RECOMMENDATIONS AS TO THE BASIC RULE WHICH SHOULD GOVERN MINORS' CONTRACTS</u>	6.1 - 6.24 56-71
	Introduction	6.1 56
	The general rule	6.2 - 6.4 56-58
	The remedies available to an adult when the minor is in breach of a contract governed by the general rule	6.5 - 6.13 58-65
	An exception to the general rule	6.14- 6.21 65-70
	The remedy of specific performance	6.22- 6.24 70-71
VII	<u>CONTRACTS TO WHICH THE GENERAL RULE SHOULD NOT APPLY</u>	7.1 - 7.40 72-99
	Contracts for necessities or a similar category	7.1 - 7.19 72-85
	Introduction	7.1, - 7.3 72-74
	Possibilities for reform	7.4 - 7.24 74-89
	(i) Leaving the existing law of necessities as it is	7.5 - 7.8 74-77
	(ii) Amending the existing law	7.9 - 7.14 77-81
	(iii) Substituting another category of binding contracts	7.15- 7.19 81-85
	(iv) Abolishing necessities without substitution of any alternative concept	7.20- 7.24 86-89

	<u>Paragraph</u>	<u>Page</u>
Provisional conclusion	7.25	89-90
Contracts of Employment	7.26- 7.32	90-94
(i) Introduction	7.26	90
(ii) Policy considerations: contracts of employment	7.27- 7.28	91
(iii) Policy considerations: analogous contracts	7.29- 7.30	92-93
(iv) Ancillary rules for contracts of employment and contracts for personal services	7.31- 7.32	93-94
Loans of money	7.33- 7.38	94-98
Loans for the purchase of necessities	7.39	98-99
Contracts which are binding until repudiated	7.40	99
 VIII		
<u>RE-OPENING OF EXECUTED CONTRACTS</u>	8.1 - 8.15	100-111
Introduction	8.1 - 8.2	100-101
The case for reform	8.3 - 8.6	101-104
Proposals for reform	8.7 - 8.14	104-111
Conclusion	8.15	111
 IX		
<u>RATIFICATION</u>	9.1 - 9.9	112-117
The present law	9.1 - 9.3	112-114
Defects in the present law	9.4 - 9.5	114-115
Proposals for reform	9.6 - 9.9	115-117
 X		
<u>VALIDATION</u>	10.1 -10.20	118-127
Introduction	10.1 -10.2	118-119
Judicial conferment of contractual capacity	10.3	119-120
Validation of particular contracts	10.4 -10.15	120-125
(i) Introduction	10.4 -10.6	120-121
(ii) Validation of small transactions	10.7 -10.11	122-124
(iii) Validation of large transactions	10.12-10.15	124-125
Developments in other common law jurisdictions	10.16	126

	<u>Paragraph</u>	<u>Page</u>
Acquisition of contractual capacity on marriage	10.17- 10.20	126-127
XI <u>MISCELLANEOUS MATTERS</u>	11.1 - 11.13	128-135
The liability of fraudulent minors	11.1 - 11.2	128-129
The liability of minors in tort	11.3 - 11.4	129-130
Contracts between two minors	11.5 - 11.9	130-131
Guarantees and indemnities	11.10- 11.13	132-135
XII <u>AN ALTERNATIVE PROPOSAL</u>	12.1 - 12.26	136-155
Introduction	12.1 - 12.4	136-138
Why reduce the age to 16?	12.5 - 12.6	138-140
Implementing our policy considerations	12.7 - 12.9	140-143
Specific transactions examined in the light of the alternative proposal	12.10- 12.16	143-148
(i) Cash transactions	12.11	143-144
(ii) Credit transactions	12.12- 12.14	144-146
(iii) Contracts of employment and contracts for personal service	12.15	146-147
(iv) Trading contracts	12.16	147-148
The practical effect of the alternative proposal	12.17- 12.18	148-150
Under 16s	12.19- 12.25	150-154
Conclusion	12.26	154-155
XIII <u>SUMMARY OF RECOMMENDATIONS</u>	13.1 - 13.37	156-165
APPENDIX		166-179

THE LAW COMMISSION

LAW OF CONTRACT¹

WORKING PAPER NO. 81

MINORS' CONTRACTS

PART I : INTRODUCTION

1.1 The subject of this Working Paper is the law relating to contracts made by infants, or minors, that is to say by persons under the age of 18. In this Working Paper we shall use the expression "minors". The existing law is complicated and in part uncertain. It is mainly common law, based on decisions made by judges and it reflects historical considerations, some of which no longer have the force they once had. The major statute affecting it, the Infants Relief Act 1874, is generally thought to be unsatisfactory.² It is probable that most minors, and those who contract with them, are guided in their dealings far less by what the law is than by current commercial realities. We have looked at the existing law against this background.

1.2 Item I of the Law Commission's First Programme recommended an examination of the law of contract and quasi-contract, with a view to codification. In 1973 the Law Commission came to the conclusion that the publication of such a code, however fully annotated, would not be the best way of directing public attention to

1 Item I of the First Programme.

2 See paras. 2.15 to 2.17, below.

particular aspects of the law of contract which might be in need of reform.³ Work on the production of a contract code was therefore suspended. This Working Paper is one of several published since then dealing with particular aspects of the law of contract.

1.3 An important change in the law, namely the reduction in the age of majority from 21 to 18, was made by the Family Law Reform Act 1969.⁴ This Act followed the Report of the Committee on the Age of Majority, set up by Lord Chancellor Gardiner in July 1965 under the chairmanship of Mr. Justice Latey. The Committee published its Report in July 1967.⁵ The Latey Committee was required:

to consider whether any changes are desirable in the law relating to contracts made by persons under 21 and to their power to hold and dispose of property, and in the law relating to marriage by such persons and to the power to make them wards of court.

The Latey Committee made several proposals for the reform of the law, the most important of which was that the age of majority should be reduced from 21 to 18. The factors which led the Committee to this recommendation are, in our view, significant for the question of the reform of the law of minors' contracts. In particular, the implementation of the Latey Committee's central

3 Eighth Annual Report, (1972-3) Law Com. No. 58 (1973) paras. 3-5.

4 Family Law Reform Act 1969, s. 1(1).

5 Report of the Committee on the Age of Majority, (1967) Cmnd. 3342. We refer to the Committee as "the Latey Committee" and to their Report as "the Latey Report".

proposal, which among other things entailed the conferring of full contractual capacity on young people of 18, has prompted us to consider whether it might not now be appropriate to confer such capacity on those aged 16 and 17.⁶

1.4 In considering what changes should be made to the present law of minors' contracts we have paid careful attention to the suggestions made by the Latey Committee for reform of the law of minors' contracts. In the event our provisional conclusions are different from theirs. Nevertheless, their Report and the materials on which it was based⁷ have provided an invaluable starting point for our considerations.

1.5 We have also discussed some of our ideas, in their formative stage, with the contract law reform sub-committee of the Society of Public Teachers of Law. We are grateful to the members of the sub-committee, who saw an earlier draft of this Working Paper based on rather different principles. Their comments, and the various points they raised, were of great help to us.

Preliminary research

1.6 If minors are to be protected, it can be done only at the potential expense of those adults who will be dealing with them. The inevitable hardship to some adults is acceptable provided the law is sensible and reasonably well known; but the law should serve the real, rather than the assumed, needs of minors. In formulating proposals for reform of the law it is

6 See para. 1.12 and Part XII, below.

7 We are grateful to Mr. Justice Latey for enabling us to look at the evidence submitted to the Committee.

desirable to have information about the nature and extent of contracts in which minors commonly engage. We have tried to discover something of this prior to publishing this Working Paper.

1.7 Those in contact with young people will be aware of the kind of thing on which they most frequently spend their money. In practice most transactions which minors enter into are not large ones and they are usually for cash. We were particularly concerned to inquire into the extent to which minors purchase goods and services on credit, a matter on which there appears to be little evidence. We thought that this was important because it was here that the need to protect minors was greatest. Accordingly, in 1977 we commissioned the Office of Population Censuses and Surveys to include in their Programme for 1978/79 a survey into the earnings and the expenditure patterns of minors. In November 1978 a report was produced concerning the spending habits of 16- and 17-year olds, based on data collected in the course of the regular operation of the Family Expenditure Survey. The numbers involved in the survey were small. Not surprisingly, it appears that credit transactions, and all transactions involving more than £20, were very much the exception.⁸

1.8 We have also ourselves made inquiries of the credit industry in an attempt to discover to what extent minors generally are given credit and on what grounds the decision to grant or withhold it is made. The result of our inquiries leads us to believe that credit is very infrequently given by commercial houses to people under the age of 18; but the reason for this is less the legal consideration that minors are not normally liable on their

8 Copies of this report may be obtained from the Social Survey Division of the Office of Population Censuses and Surveys, St. Catherine's House, 10 Kingsway, London WC2B 6JP.

contracts, other than for necessities,⁹ than the commercial judgment that because of their comparatively low earning power and uncertain prospects minors are not on the whole credit-worthy.

1.9 In publishing our working papers, and inviting comment on what we provisionally propose, we also hope to receive factual information on which our ultimate recommendations may be based. In this instance we would particularly welcome information on the availability of credit facilities to minors, the more so if that information should run counter to the assertions we have made in this Working Paper.

The law elsewhere

1.10 In formulating our proposals we have considered the law in other Common Law jurisdictions, and also in Scotland. In some jurisdictions, notably New Zealand and New South Wales, there have recently been changes in the law of minors' contracts, and in some others there have been proposals for change. Such changes and proposals have in many cases been made against a different background from that which obtains here. We have set out in an Appendix some of the more prominent points of the jurisdictions we have surveyed.

1.11 The position of children in Scots law derives from Roman Law principles, and thus is based on a different approach from that taken by English law. The Scots law of minors' contracts is also under review by the Scottish Law Commission.¹⁰ However, it was thought useful to the reader to include a summary of Scots law, and this will also be found in the Appendix.

9. As to which see paras. 2.3 to 2.7, below.

10 Scottish Law Commission, 16th Annual Report 1980-81 (Scot. Law Com. No. 70) para. 3.28.

Scheme of the Working Paper

1.12 The present law of minors' contracts is complicated: it is made up of particular rules applicable to specific situations or categories of contract. Our concern is to simplify it. To that end the first task is to identify the principles to which a law of minors' contracts should give effect, and then to see how those principles should best be applied. In this Working Paper we put forward two main proposals. One proposal departs radically from the form of the present law, and aims at achieving as great a simplification in it as is consistent with providing adequate protection for minors. This proposal is to reduce the age of full contractual capacity to 16, and to confer on those aged less than 16 total immunity from liability for breach of contract. Minors between 16 and 18 would be fully liable for breach of contract as if they were adults: minors under 16 would not be liable at all. The proposal is considered in detail in Part XII at the end of this Working Paper. It raises issues which go beyond detailed law reform, and are primarily social, not legal. We have therefore made no formal recommendations concerning the proposal, but would welcome our readers' views.

1.13 While we can see merit in this proposal if it should be thought generally acceptable, we have devoted the greater part of this Working Paper to the other proposal, namely the reform of the existing law within the ambit, more or less, of its present assumptions. The space we have devoted to this reflects the complexity of the present law. In this discussion we have made many provisional recommendations. We make them on the basis that the more radical proposal in Part XII is thought impracticable or undesirable.

1.14 The scheme of this Working Paper is therefore as follows. In Part II we set out the existing law, and what we believe to be its defects. In Part III we consider what a law of minors' contracts should attempt to achieve, and state the policies on which the law should be based. We then consider the ways in which such policies might reasonably be implemented: that is the field of choice. In Parts IV and V we examine in detail two of these possible ways: in Part IV, that suggested by the Latey Committee; and in Part V that adopted by the existing law. Our provisional view is that a law based on a reform of the existing law is preferable to one based on the Latey proposals. In Part VI we make our recommendations as to the basic rule which should apply; and in Part VII we discuss the exceptions to the basic rule which in our view need to be made in specific circumstances. In Parts VIII, IX and X we deal respectively with re-opening of executed contracts, ratification and validation - matters which, though important, are peripheral to the main consideration. In Part XI we conclude our scheme of reform by a consideration of four miscellaneous consequential matters: fraud; the overlap between contract and tort; the case of two minors contracting with one another; and guarantees and indemnities. Finally, in Part XII, we return to the field of choice and consider the alternative, and more radical, proposal for the reduction of the age of full contractual capacity to 16 and the immunity from liability of minors below that age. The Working Paper ends with a summary of our recommendations. The Appendix sets out some points of comparison with other legal systems.

PART II : THE PRESENT LAW AND ITS DEFECTS

Introduction

2.1 The law of minors' contracts is largely judge-made and is a collection of particular rules relating to various kinds of transaction. Nevertheless certain principles are clear. The basic assumption is that because a minor is young and inexperienced he requires protection, not only from unscrupulous adults but also from himself. This protection is secured by the general rule that a minor's contracts are not enforceable against him, though they are enforceable by him.¹¹

2.2 The general rule applies to the great majority of contracts which a minor may make, but not to all of them. Some contracts are binding on a minor and may be enforced against him. Others are binding until repudiated by the minor, which he may do at any time before, or within a reasonable time after, he attains his majority. We begin by looking at these two exceptional categories of contract and then we consider the application of the general rule. The defects in the present law will become apparent in the course of this discussion. At the end of this Part we summarise them and examine how important they are in practice.

A. Binding contracts

(i) Contracts for necessities

2.3 A minor is bound by contracts for necessities because the law regards such contracts as for his benefit and (if he is married) for the benefit of his family. Necessaries include both goods and services. As to goods,

¹¹ It is still an open question as to what extent contracts are enforceable by a minor. See para. 2.16 and footnote 51, below.

the common law was codified by section 2 of the Sale of Goods Act 1893 (now section 3 of the Sale of Goods Act 1979) which provides that where necessaries are sold and delivered to a minor he must pay a reasonable price for them. This need not be the contract price. Necessaries are defined in the section as goods suitable to the minor's condition in life and to his actual requirements at the time of sale and delivery. The section does not apply to services, but these may be necessaries under the common law, which would define them similarly. Necessaries are not, therefore, synonymous with the necessities, or essentials, of life.¹²

2.4 Whether or not goods or services are necessaries is determined in two stages. First, the court must decide, as a matter of law, whether the goods or services in question are capable of being necessaries, that is to say whether there are any grounds on which they might be said to be needed to maintain the minor in his status or condition. In Ryder v. Wombwell,¹³ for example, it was held that a pair of jewelled solitaires and an antique goblet could not possibly be regarded as necessaries, even for a minor with a large unearned income. Secondly, if the court decides that the goods or services are, as a matter of law, capable of being necessaries, the plaintiff has then to prove that, as a matter of fact, they were necessaries in the particular circumstances of the minor. Where goods are concerned, this entails consideration of whether he was already adequately supplied with goods of that kind at the time of their sale and delivery.¹⁴

12 See Peters v. Fleming (1840) 6 M. & W. 42, 151 E.R. 314.

13 (1868) L.R. 4 Ex. 32.

14 Nash v. Inman [1908] 2 K.B. 1. See Winfield, "Necessaries under the Sale of Goods Act, 1893" (1942) 58 L.Q.R. 82.

However, if the minor does already have an adequate supply of the goods in question it is irrelevant that the supplier does not know this.¹⁵ The question must also be considered in the context of the minor's age and his means as well as that of his social position. Goods and services which have been held to be necessities include: food, clothing, medicine,¹⁶ lodging,¹⁷ a funeral for a member of a minor's family,¹⁸ education,¹⁹ and legal services.²⁰

2.5 A contract for necessities will not be enforced against the minor if it contains harsh or onerous terms.²¹ The contract must be one that is beneficial to the minor.

2.6 Section 3 of the Sale of Goods Act 1979 provides that a minor should have to pay only a reasonable price

-
- 15 Barnes & Co. v. Toye (1884) 13 Q.B.D. 410; Johnstone v. Marks (1887) 19 Q.B.D. 509.
- 16 Co. Litt. 172a; Com. Dig. Enfant (B.5); 1 Bl. Com. 466; Dale v. Copping (1610) 1 Bulst. 39, 80 E.R. 743; Huggins v. Wiseman (1690) Carth. 110, 90 E.R. 669.
- 17 Crisp v. Churchill (1794), cited in 1 Bos. & Pul. at p. 340, 126 E.R. 939.
- 18 Chapple v. Cooper (1844) 13 M. & W. 252, 153 E.R. 105.
- 19 De Francesco v. Barnum (1890) 45 Ch. D. 430, 439; Walter v. Everard [1891] 2 Q.B. 369.
- 20 Helps v. Clayton (1864) 17 C.B. (N.S.) 553, 144 E.R. 222.
- 21 Fawcett v. Smethurst (1914) 84 L.J.K.B. 473.

(which may not be the contract price) for necessary goods. Furthermore, the effect of the section is to include within the definition of necessities only goods which have actually been delivered to the minor. Goods which have not been delivered are, by definition, not necessities. This has led to the view that the minor's liability to pay for necessities is not contractual at all, but is one imposed on the minor by a rule of law.²² The point is important in deciding whether a minor is liable on an executory contract (that is, one which has not yet been performed) since if his obligation to pay flows from the fact of his having been supplied, rather than from his agreement to pay, he cannot be so liable. The question remains open, although in one case where the necessities consisted largely of education or instruction, a minor was found liable for repudiating the contract while it remained in part unperformed.²³

2.7 It is perhaps worth pointing out that the concept of necessities is important only where goods or services have been supplied on credit, and payment for them has not been made. Where goods have been delivered or services supplied and payment is made for them, the minor has performed his obligations under the contract and questions of enforcing those obligations will not arise. The minor cannot reject goods and demand return of money paid for them simply on the ground that they are not necessities.

22 See Re J. [1909] 1 Ch. 574, 577; Nash v. Inman [1908] 2 K.B. 1, 8, but see ibid. pp. 11, 12.

23 Roberts v. Gray [1913] 1 K.B. 520. Some commentators have, however, explained that case on the footing that it concerned a beneficial contract of service, which is another category of contract binding upon the minor, and have argued that executory contracts for necessities are unenforceable: Cheshire & Fifoot, Law of Contract 10th ed., (1981), p. 383.

(ii) Contracts of service and apprenticeship and analogous contracts

2.8 The law regards it as desirable that a minor should be able to find employment and hence earn his living, or that he should be able to equip and fit himself to do so by means of an apprenticeship. Accordingly, a minor is bound by a contract of service or apprenticeship provided that it is for his benefit.²⁴ Such a contract may contain some terms to the minor's disadvantage but it will still bind him if such terms are usual for that type of contract and the contract is otherwise fair,²⁵ or if, taken as a whole, the contract is beneficial even with such terms. On the other hand, a term may be so much to the minor's detriment as to render it unfair that he should be bound by the contract containing it.²⁶ The court cannot sever a contract by subjecting the minor only to those terms which are beneficial while striking out those which are not.²⁷ Therefore, as with a contract for necessities, a contract of service will not be enforced against a minor if, taken as a whole, it is not for his benefit. Contracts of apprenticeship were formerly governed by special rules²⁸ but they are now subject to the same rules as any other employment contract.

24 De Francesco v. Barnum (1890) 45 Ch. D. 430; Clements v. L. & N.W. Railway Co. [1894] 2 Q.B. 482.

25 Leslie v. Fitzpatrick (1877) 3 Q.B.D. 229; Bromley v. Smith [1909] 2 K.B. 235.

26 De Francesco v. Barnum (1890) 45 Ch. D. 430.

27 Slade v. Metrodent Ltd. [1953] 2 Q.B. 112, unless the offending term is a covenant in restraint of trade which is wider than necessary for the protection of the employer's business: Bromley v. Smith [1909] 2 K.B. 235.

28 See e.g. Employers and Workmen Act 1875, s. 6, repealed by Statute Law (Repeals) Act 1973, Sched. 1.

2.9 These rules may also apply to some other contracts by which a minor makes his living by the performance of some professional or semi-professional service, but which cannot be called employment contracts because the employer/employee relationship is lacking. Thus in one case²⁹ a minor, who was a professional boxer, was bound by the terms and conditions promulgated by the British Boxing Board of Control which applied to all professional fights; and in another³⁰ a minor was bound by a contract under which he had agreed to lend his name to a book ghosted for him, for which he had supplied the necessary information. It is not possible to state precisely what contracts might fall into this category. Not all contracts by which a minor earns his living will qualify. It may be that the minor will be bound by such contracts if they entail the performance of a service dependent on the exercise of some special skill or knowledge acquired by him; the opportunity provided by the contract of exploiting that skill or knowledge being regarded as beneficial to the minor. The law on this point is uncertain. It is, however, well settled that an ordinary trading contract is not binding on a minor no matter how beneficial it may be to him.³¹ The reason for this appears to be that ordinary trading does not primarily involve the exploitation by the minor of skill or knowledge, but rather the buying and selling of goods and services, and such

29 Doyle v. White City Stadium Ltd. [1935] 1 K.B. 110.

30 Chaplin v. Leslie Frewin (Publishers) Ltd. [1966] 1 Ch. 71. The court was divided as to whether the contract was for the benefit of the minor.

31 Cowern v. Nield [1912] 2 K.B. 419; Mercantile Union Guarantee Corporation Ltd. v. Ball [1937] 2 K.B. 498.

contracts are unenforceable against minors unless the goods or services are necessities and are supplied to him. There is no rule that a beneficial contract, simply as such, is binding on a minor.³²

B. Contracts which are binding unless repudiated

2.10 There are four types of contract under this heading which, while binding both parties, can be repudiated by the minor either during minority or within a reasonable time after majority. The four categories are: contracts under which the minor agrees to buy or sell land, or to take or grant a lease of land;³³ marriage settlements made by a minor;³⁴ contracts under which the minor incurs liability for calls on shares in a company³⁵ (either by subscribing for the shares or by buying partly-paid shares from a previous holder); and partnerships.³⁶ A minor partner does not become liable to partnership creditors,³⁷ but if he repudiates the partnership agreement while still a minor, or within a reasonable time after attaining full age, he will not be entitled to any share in partnership profits or capital until all partnership debts and liabilities to third parties have been met.³⁸

32 Cowern v. Nield, above.

33 Valentini v. Canali (1889) 24 Q.B.D. 166; Davies v. Benyon-Harris (1931) 47 T.L.R. 424.

34 Edwards v. Carter [1893] A.C. 360.

35 North Western Rly. v. M'Michael (1850) 5 Ex. 114, 155 E.R. 49.

36 Lovell & Christmas v. Beauchamp [1894] A.C. 607.

37 Ibid.

38 Ibid.

2.11 The effect of repudiation is to allow the minor to escape liability for future obligations although it is not settled whether he is also exonerated from obligations which have already accrued at the date of repudiation.³⁹ Having repudiated the contract the minor cannot recover money paid or property transferred by him in accordance with its terms unless there has been a total failure of consideration: that is, he must show that he has received no part of what he bargained for.⁴⁰ If, however, he can show a total failure of consideration he will not be debarred from recovery by the fact that the failure was brought about by his own act of repudiation.⁴¹

2.12 The feature common to the four categories seems to be that contracts which fall within them involve the acquisition of an interest in property of a permanent nature, or with continuing obligations attached to it. There is not, however, any general principle that any contract conferring an interest in such property is binding until repudiated. It would also seem that the policy underlying the category cannot be that such contracts are of benefit to the minor, because it has been decided that unless he repudiates within the time allowed the minor is bound by such contracts whether they are beneficial to him or not.⁴² Under modern conditions it is difficult to justify these four exceptions to the general rule, and in paragraph 7.40 below, we provisionally recommend that this category of contract be abolished.

39 See The Newry and Enniskillen Rly. v. Coombe (1849) 3 Ex. 565, 154 E.R. 970 and North Western Rly. v. M'Michael (1850) 5 Ex. 114, 155 E.R. 49 (retrospective); compare Ketsey's Case (1613) Cro. Jac. 320, 79 E.R. 274 and The Cork and Bandon Rly. v. Cazenove (1847) 10 Q.B. 935, 116 E.R. 355 (not retrospective).

40 Steinberg v. Scala (Leeds) Ltd. [1923] 2 Ch. 452.

41 See para. 2.19, below.

42 North Western Rly. v. M'Michael, above.

C. The Basic Rule: Contracts are not binding on a minor

(i) In general

2.13 Contracts not falling within the categories discussed above are unenforceable against a minor. This is so notwithstanding that the minor has actually received and enjoyed the (non-necessary) goods or services for which he has failed, or refuses, to pay, and even that he may have secured this benefit by misrepresenting himself to be of full age. If guilty of misrepresentation, he may be liable in equity to restore what he has received⁴³ but, provided that he has not been fraudulent, he may retain any fruits of the contract while at the same time refusing to pay or otherwise account for them. This is a logical consequence of principles intended to protect minors generally, but it can cause the law to appear to condone the conduct of unscrupulous minors. It is not known to what extent advantage is taken of this part of the law by minors.

2.14 The second part of the general rule is that contracts made with a minor are binding on the adult party. The minor may enforce them. He may not, however, do so by means of a decree of specific performance. This is because there is a want of "mutuality": the remedy of specific performance is not available against a minor and, therefore, a court of equity will not make it available in his favour.⁴⁴ His remedy against the defaulting adult will therefore in most cases lie only in damages.

43 See paras. 2.24 and 2.25, below.

44 Flight v. Bolland (1828) 4 Russ. 298, 38 E.R. 817.

(ii) The Infants Relief Act 1874

2.15 Most contracts which a minor is likely to make will fall within the provisions of the Infants Relief Act 1874. This short statute of only two substantive sections has caused problems incommensurate with its length. Section 1 of the Act provides as follows:

"All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."

The Act thus does not apply to contracts for necessities, or for services supplied to a minor, or to contracts under which the minor himself supplies goods or services.⁴⁵ Nor does it apply to employment contracts and analogous contracts of service.⁴⁶

2.16 The main question is: what is meant by the words "absolutely void"? This is not an easy question to answer, because the only thing of which one can be reasonably certain is that the words do not mean what they say. Ordinarily, a void contract has no legal effect at all; property does not pass under it and any money paid under it

45 Notwithstanding that contracts for non-necessary services supplied to a minor, or for goods or services supplied by him, are not within the Act; they are nevertheless unenforceable at common law.

46 I.e. those contracts discussed in para. 2.9, above.

can be recovered. It has been held, however, that where non-necessary goods are delivered to a minor, the property in them passes on the delivery notwithstanding the Act.⁴⁷ It could not sensibly be contended that in the vast number of transactions made daily in which minors purchase - and pay for - non-necessary goods property in those goods does not pass to the minor. Next, it seems that money paid by a minor under an "absolutely void" contract to which the Act applies cannot be recovered unless there has been a total failure of consideration - in which case it could be recovered apart from the Act under general rules of law.⁴⁸ On the other hand, it has been held that a guarantee of an "absolutely void" loan to a minor is itself void,⁴⁹ and that a minor cannot be made bankrupt in respect of debts arising out of the supply of non-necessary goods on credit, since such contracts are declared "absolutely void" by the Act.⁵⁰ Undoubtedly contracts caught by the Act are unenforceable against a minor, but so they were before the Act. Indeed, it appears from the authorities that this section of the Act has made little difference to the pre-existing common law position regarding the enforcement of contracts against a minor. It is a moot point as to

47 Stocks v. Wilson [1913] 2 K.B. 235; and see Watts v. Seymour [1967] 2 Q.B. 647, 654.

48 See para. 2.19, below. For a contrary argument, see Treitel, The Law of Contract, 5th ed., (1979) pp. 426-7.

49 Coutts & Co. v. Browne-Lecky [1947] K.B. 104. But an indemnity given in respect of such a loan is enforceable since it constitutes an independent primary obligation and not a secondary one - ibid., Yeoman Credit Ltd. v. Latter [1961] 2 All E.R. 294. See paras. 11.10 to 11.13, below.

50 Re Jones (1881) 18 Ch. D. 109.

whether the Act has changed the common law position that contracts are enforceable by the minor. The conventional view is that it has not, and they are.⁵¹

2.17 The Act makes specific reference to "money lent or to be lent". Loans to minors have always been regarded by the law with particular concern: such loans were irrecoverable before the Act, and the Act has made little difference. The Betting and Loans (Infants) Act 1892 invalidates any agreement by a person of full age to repay a loan made to him while a minor, and also invalidates any negotiable instrument (e.g. a cheque) given in connection with such agreement.⁵² The Consumer Credit Act 1974 makes it a criminal offence to circularise minors inviting them to apply for loans or to obtain goods on credit,⁵³ or to accept a pawn or pledge in respect of a loan to a minor.⁵⁴ The law allows one concession. If a loan is made to a minor for the purpose of purchasing necessaries, and the money, or part of it, is actually used for this purpose, so much of the money as was so used can be recovered by the lender.⁵⁵ Equity places the lender in

51 See G.H. Treitel, "The Infants Relief Act 1874" (1957) 73 L.Q.R. 200-202 and P.S. Atiyah, "The Infants Relief Act 1874 - A Reply" (1958) 74 L.Q.R. 99-101.

52 Sect. 5.

53 Sect. 50.

54 Sect. 114(2). This section is not yet in force.

55 Marlow v. Pitfield (1719) 1 P. Wms. 558, 24 E.R. 516.

the shoes of the supplier who would have been entitled to sue in respect of the necessities supplied if the minor had failed to pay for them.⁵⁶ The Infants Relief Act seems to have made no difference to this rule and money lent to a minor to purchase necessities, and used for that purpose, may still be recovered by the lender.⁵⁷

2.18 Section 2 of the Infants Relief Act relates to ratification of contracts after the minor comes of age. The common law permitted ratification, but section 2 of the Act forbids it. This section has been more effective in changing the law than has section 1. A minor cannot now, after he comes of age, bind himself to perform a previously void or unenforceable contract. He can, however, after he comes of age, enter into a new contract to do the same thing. The present law on ratification (including section 2 of the 1874 Act) is discussed in detail in Part IX of this Working Paper.

Consequences of a contract made with a minor

2.19 Whether a contract is "absolutely void" under the Infants Relief Act or merely unenforceable against the minor at common law, the consequences are the same. Though he is not bound by the contract, it seems that the minor cannot recover money or other property which he may have

56 It follows that if the money was not used to purchase necessities, even though the loan was made for that purpose, the lender cannot recover: Earle v. Peale (1712) 1 Salk. 386, 91 E.R. 336. This case also establishes that one who purchases necessities on a minor's behalf can sue the minor in respect of the purchase.

57 See Nottingham Permanent Benefit Building Society v. Thurston [1903] A.C. 6, where the purchase was not necessities but land, but the principle would be equally applicable to necessities.

paid or transferred under it before deciding not to go on with it.⁵⁸ There is an exception to this rule where the minor has paid money or transferred property and has received in return for it no part of what he bargained for. In such a case there has been a total failure of consideration and the minor is entitled to recover what he has paid or transferred. This is a general rule of law, and the same would apply to an adult. There is, however, one difference. A minor may recover on a total failure of consideration even though that failure is due to his own act in repudiating the contract.⁵⁹ An adult must show that the failure of consideration was not due to his own breach of contract.⁶⁰ It should be noted that the failure of consideration must be total if the minor is to be permitted to recover; if he has received any part of what he contracted for there has been no such failure, even if what he has received has been of no benefit to him.⁶¹

2.20 Once the contract has been fully performed on both sides no question of enforcing it can arise. There is no general rule of law providing for an executed contract to

58 Wilson v. Kearse (1800) Peake Add. Cas. 196, 170 E.R. 243; Corpe v. Overton (1833) 10 Bing. 252, 259, 131 E.R. 901, 904; Ex p. Taylor (1856) 8 De G.M. & G. 254, 44 E.R. 388; Chaplin v. Leslie Frewin (Publishers) Ltd. [1966] Ch. 71; but see the dissenting judgment of Lord Denning M.R. in this last case. It is arguable that the position has been changed by the Infants Relief Act 1874: see Treitel, Law of Contract 5th ed., (1979) pp. 426-7.

59 Corpe v. Overton (1833) 10 Bing. 252, 258, 131 E.R. 901, 903.

60 The adult (unlike the minor) is bound by his contract. If he repudiates without cause he cannot base a claim on his wrongful act.

61 Steinberg v. Scala (Leeds) Ltd. [1923] 2 Ch. 452; Pearce v. Brain [1929] 2 K.B. 310.

be reopened to enable a minor to avoid hardship which has resulted from it. The protection which the law confers on a minor, by rendering his contracts unenforceable against him, is, therefore, of no further use to him after performance. On the other hand, equity may grant relief in certain cases where one party to a contract has taken an unconscionable advantage of the other. In Evans v. Llewellyn,⁶² for example, the plaintiff (who was not a minor) had been persuaded to part with an inheritance for a mere fraction of its value. There had been no fraud, and the plaintiff had even been cautioned by a solicitor against the transaction. But he was a poor man of no education and was given no time to reflect or consult upon the advisability of the sale. The court set the sale aside as it had been "improvidently obtained". A minor taken advantage of by an adult, even in the absence of fraud, might on this principle obtain relief.⁶³ A minor may, of course, plead fraud, misrepresentation, duress, undue influence, or any other ground open to an adult on which equity might avoid a contract. In all these cases a minor is subject to no special rules and has no privileges, but a court might be more ready to find in favour of a minor than of a mature and more experienced adult.

Liability in Tort

2.21 This Working Paper is concerned with minors' contracts. The dividing line between contract and tort, however, is not always clear. For example, if A contracts with B to perform some task, and does it so badly that B suffers damage, A will be liable to B for breach of contract: he may also be liable in tort if his action amounts independently of the contract to an actionable wrong.

62 (1787) 1 Cox C.C. 333, 29 E.R. 1191. See also Lloyds Bank v. Bundy [1975] Q.B. 326.

63 See para. 8.14, below, where we provisionally recommend the statutory endorsement of this principle.

A minor's liability in tort therefore falls to be considered in so far as it impinges on his liability for wrongful performance of a contract. In addition a minor may obtain a contractual advantage by misrepresenting himself to be of full age, or indeed by any other misrepresentation. If the misrepresentation is fraudulent the minor may be liable to the other contracting party for the tort of deceit, and this too must be examined.

2.22 A minor is generally liable in tort in the same way as an adult save where he is too young to be placed under any legal duty of care or to form any necessary intention. However, he may not be liable where the tort is connected with a contract upon which no action lies against him. The reason for this rule is that it prevents the adult from enforcing the contract indirectly by suing the minor in tort.⁶⁴ But the minor may be liable in tort if he does something which, although perhaps connected with the subject matter of the contract, either is expressly forbidden by its terms or is totally outside the contemplation of the parties.⁶⁵ A minor can be sued for the return of money which he has stolen,⁶⁶ and for the return of items which he has borrowed and has without authority lent to another.⁶⁷

64 Fawcett v. Smethurst (1914) 84 L.J.K.B. 473.

65 Contrast Jennings v. Rundall (1799) 8 Term Rep. 335, 101 E.R. 1419, with Burnard v. Haggis (1863) 14 C.B.(N.S.) 45, 143 E.R. 360.

66 Bristow v. Eastman (1794) 1 Esp. 172, 170 E.R. 317; In re Seager (1889) 60 L.T. 665.

67 Ballett v. Mingay [1943] K.B. 281.

2.23 A fraudulent misrepresentation by a minor that he is of full age which induces an adult to supply him with goods on credit or to lend him money does not prevent the minor from relying on the Infants Relief Act as a defence to an action in deceit by the adult claiming the value of the goods or the amount of the loan.⁶⁸ It has been held that to allow such an action would be tantamount to permitting indirect enforcement of the contract. However, in such cases we shall see below that equity may grant some relief against the fraudulent minor. Fraud, other than misrepresentation as to age, may entitle the adult party, not indeed to enforce the contract, but to recover money which he has paid under it.⁶⁹

Liability in equity for fraud

2.24 Where a minor, by a fraudulent misrepresentation, whether as to age or any other matter, has induced another to enter into a contract as a result of which the minor has acquired property which remains in his possession at the time of trial, equity will compel the minor to return it,⁷⁰ on the principle that he may not retain benefits he has unjustly obtained or be permitted to profit from his own wrong. This liability arises independently of contract and is not affected by the Infants Relief Act. Equity will also release an adult from an obligation entered into

68 Levene v. Brougham (1909) 25 T.L.R. 265; R. Leslie Ltd. v. Sheill [1914] 3 K.B. 607.

69 Cowern v. Nield [1912] 2 K.B. 419, 424.

70 Clarke v. Cobley (1789) 2 Cox 173, 30 E.R. 80; Lempriere v. Lange (1879) 12 Ch. D. 675.

in reliance upon a minor's false representation of full age.⁷¹ The position is, however, less clear if the minor has parted with the property for value but still has the proceeds of sale in his possession. It has been argued⁷² that a minor would be liable to hand over to the adult the proceeds of sale which remain in his possession⁷³ but the law is uncertain on this point. It is generally accepted that if he has both disposed of the property and dissipated the proceeds of sale a personal judgment will not be enforced against his present or future resources.⁷⁴ Where the minor has obtained a loan of money by falsely representing himself to be of age, equity will not intervene to compel him to repay the loan since to do so would be to enforce the contract.⁷⁵

2.25 A minor may also be held to account for benefits he has obtained in breach of a fiduciary duty. He is not debarred, by reason of his minority, from being an agent, a partner, or a director or promoter of a company, and there appears to be no general rule of law exonerating a minor from the fiduciary duties incidental to those positions. He must, accordingly, account to the person to whom the fiduciary duty is owed for whatever has been entrusted to him by that person or received by him on that

71 Clarke v. Cobley, above.

72 See Treitel, The Law of Contract 5th ed., (1979) pp. 434-436.

73 See Stocks v. Wilson [1913] 2 K.B. 235.

74 R. Leslie Ltd. v. Sheill [1914] 3 K.B. 607.

75 Ibid. It might be different in the unlikely event that the loan was of cash and the minor still had possession of the actual coins or notes.

person's behalf, and must likewise account to him for any profits made in breach of his fiduciary duty.⁷⁶

Defects of the present law

2.26 Many of the cases in which the present law was established were decided in the time of Queen Victoria. The facts of those cases reflect the way of life at that time of minors who were rich enough to be worth suing, and the fact that the supply of goods on informal credit was far more common then than it is today. The rules of law which give protection to minors may have been devised and developed partly out of a desire on the part of a property owning class to protect property vested in a minor (which may in many cases have been family property) from the consequences of the folly and inexperience of the minor. There are few modern authorities, probably because the basic principles are well established and because it must be rare nowadays for the resources of a minor to justify litigation about his liability on a contract. Changes in the distribution of wealth have been very great over the last eighty years or so. There are no doubt today fewer minors who are entitled to large estates or capital sums, but there has been a very large increase in the number of minors who earn substantial wages and spend them on a wide range of necessities and pleasures. It is hard to believe that minors today do not from time to time experience difficulties, and that these difficulties are not much the same as those suffered by their predecessors of eighty years ago. Minors who have money or expectations or earnings must need protection from their own inexperience to much the same extent as they needed it in the time of Queen Victoria. We think, therefore, that the principles of the existing law

76 See Bristow v. Eastman (1794) 1 Esp. 172, 170 E.R. 317; and In re Seager (1889) 60 L.T. 665.

which protect minors are not to be disregarded as out of date merely because they received their present form in the last century.

2.27 Nevertheless there are defects in the present law. Many of them have been mentioned in the foregoing outline. They are important because we believe that the present law is correct in its general approach and, short of the adoption of the more radical proposal which we discuss in Part XII of this Working Paper, should continue to form the basis of the law of minors' contracts. Its defects therefore have to be considered so that proposals for reform may be set out.

2.28 The defects and uncertainties in the present law may be summarised as follows:-

- (i) The ambit of the category of "necessaries" is imprecise; and it is uncertain whether a minor is liable under an executory contract for the supply of necessaries.⁷⁷
- (ii) The rule that a minor is not liable for necessaries if he already has an adequate supply, even though this is not known to the supplier, is inconsistent with the stated basis of liability for necessaries,⁷⁸ and places the supplier in a difficult position in which he may not be able to derive any advantage from the doctrine.

77 See paras. 2.3 to 2.7, above.

78 See Ryder v. Wombwell (1868) L.R. 4 Ex. 32, at p. 38: para. 7.1, below.

- (iii) The borderline between beneficial contracts of service (and analogous contracts) and trading contracts is not clear.⁷⁹
- (iv) There would seem to be no satisfactory justification for the continued existence of the category of contracts which are binding on the minor unless he repudiates the contract.⁸⁰
- (v) Section 1 of the Infants Relief Act 1874 is unsatisfactory. The contracts dealt with seem to have been selected on no coherent principle. It is not clear, for instance, why supply of goods is treated differently from supply of services. The terminology of the section is obscure, and its effect uncertain.⁸¹
- (vi) There is some doubt as to whether a minor can recover money paid or property transferred under an "absolutely void" contract, or under a contract unenforceable at common law.⁸²

79 See paras. 2.9, above.

80 See paras. 2.10 to 2.12, above, and 7.40, below.

81 See paras. 2.15 and 2.16, above.

82 See para. 2.19 and footnote 58, above.

- (vii) The rule that a guarantor of a minor's "void" debt is not liable under the guarantee is not necessary for the protection of minors. In any event the rule can be avoided by drawing up the transaction as an indemnity.⁸³
- (viii) A minor is sometimes allowed to retain an unjust enrichment in circumstances where justice would seem to demand that he should return what he has received. This is because liability under the equitable doctrine of restitution, and in quasi-contract, is restricted to cases where the minor has induced the transaction by fraud, and in no other circumstances is he liable to return what he has received.⁸⁴
- (ix) It is not clear whether the liability in equity of a fraudulent minor is restricted to making restitution of any property retained, or extends to restitution of traceable proceeds, or whether it extends at all to money lent; and whether in quasi-contract such a minor can be compelled not only to restore but also to account.⁸⁵
- (x) It is not clear what precisely is meant by the rule that a contract which is not enforceable at common law, but not void under the Infants Relief Act, binds the other party but does not bind the minor.⁸⁶

83 See para. 2.16 and footnote 49, above; and see paras. 11.10 to 11.13, below, for a discussion of this matter.

84 See para. 2.24, above.

85 See para. 2.24, above.

86 See para. 2.16 and footnote 51, above.

2.29 As a result of the reduction of the age of majority (and hence of the age of contractual capacity) from 21 to 18, the defects which we identify are of far less practical importance than they might have been when the age of majority was 21. It is therefore unlikely that these defects and uncertainties cause difficulty in any significant number of cases. Moreover much of the protection extended to minors and therefore many of the rules governing minors' contracts are intended to protect the minor in circumstances where he has obtained credit.⁸⁷ It is here that the defects would be most likely to give rise to mischiefs in practice. Minors can nowadays obtain credit only in very exceptional circumstances unless at the same time an adult agrees to indemnify the creditor. As a matter of commercial reality this position seems unlikely to alter even if the law is changed in such a way as to make minors more generally liable (in contract or quasi-contract or under some more or less limited restitutionary remedy) when they enter into credit transactions. Another factor which in our view reduces the practical importance of the defects in the present law is the substantial growth in consumer protection legislation in recent years.⁸⁸ This is a still developing part of the

87 In this Working Paper where we refer to credit transactions or the obtaining of credit we are not referring to situations where credit is extended for a very short period by reason of the nature of the transaction as, for example, having a haircut or eating in a restaurant or hiring a taxi. For our purposes these types of transaction are analogous to cash transactions. Thus the minor's need for protection in cases of this type is in our view equal to his need for protection in respect of cash transactions and different from the need for protection in respect of transactions involving, for example, hire-purchase, bank overdrafts or credit accounts at shops.

88 See generally 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.

law which extends protection to both adults and minors. In view of these factors the theoretical problems which can arise under the present law may have become of less practical importance in recent years than in the past. It remains for consideration, however, whether any risk of injustice (no matter how remote) to minor or to adult should be tolerated if it is possible to prevent it by a practicable change in the law.

PART III : POLICY CONSIDERATIONS AND FIELD OF
CHOICE FOR REFORM OF THE LAW

Introduction

3.1 In this Part we examine the policy considerations which should form the basis of the law relating to minors' contracts. There are various methods of implementing those policy considerations, and we shall outline them in this Part. However, some of the possible approaches would be so clearly unsatisfactory that they do not merit detailed discussion. In Parts IV, V and XII we examine the three different approaches which in our view do deserve to be considered in detail.

Policy considerations

3.2 Why should contracts entered into by minors be treated differently from contracts between adults? Special treatment is not justified merely because a minor may suffer hardship if he is compelled to abide by his contractual obligations⁸⁹ - an adult may also find himself in this position. The reason for giving special protection to minors is that, because of their lack of experience, minors are less likely than adults to appreciate the consequences of their promises. If they suffer hardship it may be because their immaturity and inexperience of the world has led them too easily to enter into onerous obligations. In our view the first and most important policy consideration is that the law must protect minors against making promises and undertaking obligations which may be beyond

89 That is, if he is compelled either to perform his obligations or to pay damages for non-performance or for defective performance.

their ability to perform, or may have consequences - in damages or otherwise - which they cannot foresee.

3.3. But the greater the protection which is afforded to the minor, the greater will be the potential prejudice to an adult who contracts with a minor. If a minor is protected against liability for breach of contract, the adult who contracts with a minor must himself bear any loss which he may sustain if the minor breaks the contract. The only justification for permitting this potential prejudice to the adult is that the minor needs the special protection which he is given; and it follows that the law should keep this protection to a necessary minimum. Thus in our view the second policy consideration is that the law should go no further in protecting the minor than is necessary.

3.4 Another consequence of protecting the minor is that adults may be deterred from contracting with minors because they will realise that they might be prejudiced by doing so. In our view there are certain categories of contract which the minor needs to be able to enter into freely, and adults should not be deterred from making such contracts with minors. Deterrence can be avoided by making these contracts binding on minors. For example, since the school leaving age is 16 and most young people do in fact leave school at 16 or 17, it would be regrettable if the law were to have even a marginal effect in increasing their difficulties in finding work. Thus we consider that contracts of employment should generally be binding on minors. The third policy consideration, therefore, is that the law should not deter adults from entering into certain specific contracts with minors.

3.5 We can summarise these three policy considerations as follows:

- (a) the law should protect minors against their inexperience and immaturity;
- (b) the law should not cause unnecessary prejudice to adults who deal with minors;
- (c) the law should not deter adults from entering into certain types of contract with minors.

3.6 Our provisional conclusion is that these three policy considerations should form the basis of the law relating to minors' contracts. It is, unfortunately, one of the difficulties in devising a satisfactory law of minors' contracts that these considerations are, to an extent, mutually incompatible. Throughout this Working Paper our main concern will be to achieve a fair balance between them.

Field of choice for reform of the law

3.7 It seems to us that these three policy considerations do, by and large, underlie the present law. We have seen that under the present law the minor receives protection in that contracts are generally unenforceable against him, while at the same time the law seeks to avoid causing unnecessary prejudice to adults by imposing some liability on minors who are guilty of fraud and by refusing to allow minors to recover money paid or property transferred by them. Also, under the present law, some contracts are binding on minors in order that adults should not be deterred from entering into such contracts with them. We shall refer to this approach of the present law as "qualified unenforceability".

3.8 "Qualified unenforceability" is, however, not necessarily the only way of achieving a satisfactory balance between the three policy considerations. Accordingly, we shall have to consider what other methods could be devised and whether they could be made to balance those considerations more satisfactorily.

3.9 One possible method would be based on the total unenforceability of contracts, both by and against a minor. Under such an approach neither the minor nor the adult would be able to enforce the contract against the other, whatever the nature of the contract and regardless of whether the particular contract was wholly executory, partly executed or had been fully executed. It is necessary only to formulate this approach in order to recognise the injustices which would follow its adoption, and to see that it would give no proper weight to any of the policy considerations which we have identified. We therefore consider that this method does not merit further discussion.

3.10 Under another possible method contracts would be enforceable by the minor as though he were an adult but would not be enforceable at all, directly or indirectly, against him. This would seem to give too much weight to the first policy consideration, to allow insufficient weight to the second and totally to disregard the third. We do not think that contracts of employment, for example, can be dealt with by the same rule as applies to contracts such as those for the purchase of luxuries on credit. For these reasons we consider that this approach, too, is not worth discussing in detail.

3.11 At the other end of the range of possible methods is one based on unqualified contractual enforceability. This would be effectively to treat all minors as adults

and dispense with any law of minors' contracts. Again, this approach has only to be stated in order to be rejected immediately. To make a child of twelve fully liable for damages for breach of contract seems to us to do such violence to the first and primary policy consideration as to enable us to dismiss this approach without further discussion. It may be objected that a twelve-year-old child could be liable in tort, on account of some negligent act, for damages in excess of anything he would be likely to incur for any breach of contract. Why, then, if the law is prepared to countenance his liability in tort, is it so undesirable for a young minor to be liable in contract? Whether or not a young minor ought to be liable in tort is a question beyond the scope of this Working Paper. A tort, however, is a unilateral act, of which the consequences are an injury to an innocent victim, wholly or partly unavoidable by him. A contract on the other hand is a two-sided relationship. An adult is not bound to contract with a minor, and the law protects minors in part by discouraging adults from doing so. Adults are deemed to know that they deal with minors at their peril. The younger a minor is, the greater is his need for protection on account of his greater immaturity, and in our view there is no acceptable basis on which to make a young minor fully liable for breach of contract.

3.12 The present law is based on a primary unenforceability of contracts, which is qualified by allowing the adult some remedies and by making certain contracts binding on the minor. A further possible method would be the opposite of this - one based on contractual enforceability sufficiently qualified by way of exclusion and exception as to achieve a satisfactory balance between the three policy considerations. An approach along these lines has found favour in New South Wales.⁹⁰ But

90 See Appendix, para. (12), below.

contractual enforceability would be basically inconsistent with the primary policy consideration. It seems clear, therefore, that such an approach would involve many exclusions and exceptions, and that it would be necessary to give the court the power of dispensing with the normal incidents of contractual liability in a wide variety of situations. In our view either unacceptable uncertainty or unacceptable complexity (or both) would result.

3.13 The merit of "qualified unenforceability" is that most contracts are simply not binding on the minor and there can be no dispute about his liability. Uncertainty is confined to a relatively small area where contracts will be binding unless they are not for the minor's benefit. Under a scheme based on qualified enforceability the area of uncertainty is greatly enlarged. A minor wishing to resile from any contract will nearly always be able to find some arguments for making an exception to the basic rule and exempting him from liability. Uncertainty will persist until the issue is determined by a court. It seems to us that the inevitable effect of such an approach would be to increase litigation, or the threat of it. The danger should not be overstated because in many cases the minor is unlikely to be worth suing, but it is there.

3.14 Finally, a variant of the approach which underlies the present law is one based on general contractual unenforceability, but where the adult, though unable to enforce the contract directly, would have a remedy in quasi-contract against the minor in respect of benefits received by the latter under the contract. This would be coupled with power in the court to relieve the minor from his quasi-contractual liability in appropriate circumstances. This is the approach suggested by the Latey Committee which we shall look at in more detail in Part IV. In the event, however, we have come to the provisional conclusion that

these proposals, if implemented, would not achieve a satisfactory result.

3.15 As mentioned in the Introduction to this Working Paper,⁹¹ we have also considered a very different possibility, simpler and more radical than any of the other approaches, namely, to lower the age of contractual capacity to 16 but to have no contractual liability below that age. It can be argued that persons between the ages of 16 and 18 no longer require special protection in relation to their contracts, and that the relevant policy considerations might be satisfactorily provided for by this alternative proposal. The argument turns on the fact that young people of 16 exercise in practice a high degree of responsibility for their own lives, and on the possibility that current consumer protection legislation, and the practical difficulty which young people apparently experience in obtaining any kind of credit, render unnecessary special protection for minors above that age. These issues are fully discussed in Part XII, below.

3.16 The advantages of reducing the age of contractual capacity from 18 to 16, and making all contracts entered into by minors under the age of 16 unenforceable against them, are the simplicity of the scheme and the fact that it would seem to accord with the reality of life. However, we consider that the merit of this alternative depends largely on social judgments which we think we are in no position to make before consultation. We therefore do not put forward even a provisional recommendation in regard to it at this stage. We would, however, welcome as many comments as possible on this alternative, particularly from 16- and 17-year olds themselves and from those who have knowledge of their requirements and problems.

91 See para. 1.12, above.

PART IV : THE LATEY COMMITTEE PROPOSALS

Introduction

4.1 The Latey Committee made general proposals for the reform of the law of minors' contracts. For a number of reasons they did not put forward detailed proposals. Those reasons included the fact that the Law Commission, with its process of consultation, was in a better position to formulate detailed proposals. They were also aware that the Law Commission and the Scottish Law Commission were, at that time, proposing to produce a contract code common both to England and Wales and to Scotland, and they did not regard it as right for them to recommend changes in the contract law of Scotland. The Latey Committee did, however, comment adversely on the existing law, and they commended their general proposals for consideration by the Law Commission as the basis of a reformed law of minors' contracts. These proposals represent one possible method of carrying into effect the policy considerations which we think should underlie the law.

The Latey proposals

4.2 The Latey Committee thought that the present law enabled a minor to profit from his minority⁹² because he could resile from a contract with impunity and at the same time retain any benefit which he had received under it. They did not however think that a minor's contracts should be binding on him because they did not wish "to do anything that enlarges the possibility of [a minor] being sued for damages for breach of contract, particularly if

92 (1967) Cmnd. 3342, para. 289.

the contract were executory on both sides".⁹³ In order, therefore, to balance the need to protect minors against their immaturity and inexperience with the need not to cause injustice to the honest adult they thought that the law should operate "on what we may term restitutionary rather than contractual principles".⁹⁴ They proposed:

"(a) that where [a minor] receives money, property or services under a contract which he fails to perform he should be liable to account to the other party for the benefit he has received;

and

(b) that the court should be empowered to relieve the [minor] from this liability to account to such extent as it thinks fit."⁹⁵

4.3 The Latey proposals went beyond requiring that a minor restore any actual benefit retained, for which he has not paid, and extended to an obligation to account. The difference between restoring and accounting is important. If the minor were liable merely to restore benefits he would be bound to return any goods which remained in his possession, and a "tracing" order might be made against him to recover the identifiable proceeds of goods which had been sold,⁹⁶ but he would not be liable to pay for services, or for goods which he had consumed, or for proceeds of sale which he had dissipated. If the

93 (1967) Cmnd. 3342, para. 289.

94 Ibid., para. 290.

95 Ibid., para. 309.

96 For the law on "tracing" under the common law and in equity, see Goff and Jones, The Law of Restitution, 2nd ed., (1978) pp. 48-63.

minor were under a liability to account for benefits received he would be liable to pay for them out of his general assets, even where the benefits were services, and even where the benefits were goods but the minor had consumed them, or had sold them and dissipated the proceeds of sale. Moreover in many, if not in most, cases the value of the benefit would be taken as equal to the contract price.

4.4 Under the Latey Committee's proposals, therefore, although their chief proposal was that a minor's contract should be unenforceable against him, the minor would be at risk of a money judgment - effectively for the contract price - against his general assets in many cases in which the adult had performed his part of the bargain. Might this not amount in many cases to awarding damages against him for breach of contract? The Committee answered this question by saying that the minor's liability to account should be clearly stated as designed solely to prevent him from profiting from his minority at the expense of the other party, with a power in the court in appropriate cases to relieve the minor from his liability to such extent as it should think fit. The fact that an order to account might in a particular case amount to much the same as an order to pay damages should not of itself lead the court to relieve the minor.⁹⁷ The court should consider the minor's overall position. If, for example, the adult party had taken advantage of the minor's lack of maturity and experience the court should take this into account in fixing the extent, if any, of the minor's liability.⁹⁸

97 (1967) Cmnd. 3342, para. 309.

98 Ibid.

4.5 The Latey Committee made other, subsidiary, proposals relating to the contractual rights and obligations of minors. Where a minor had transferred money or property to an adult he should be entitled to repudiate the contract and recover the money or property.⁹⁹ But at the same time the minor should be liable to account to the adult for any benefit he had received under the contract up to the time of the repudiation.¹⁰⁰ (Under the present law he can recover what he has transferred under the contract only if there has been a total failure of consideration.¹⁰¹) The Committee proposed that executed contracts should not be re-openable except insofar as the general law already provides, but they thought this question might merit further consideration.¹⁰² Executory contracts should not be enforceable against a minor¹⁰³ and there was no need for any special rule regarding necessities because the Committee's main proposal would apply in such cases.¹⁰⁴ Contracts of service would also be governed by the main proposal and in this case also there was no need of any special rule.¹⁰⁵ But if a minor wished to enforce a contract of service, for example to recover wages due to him under an employment contract which he had himself broken, he would not be able to recover except to the extent to which he had properly performed his own obligations.¹⁰⁶ Contracts for loans

99 (1967) Cmnd. 3342, para. 310.

100 Ibid.

101 See para. 2.19, above.

102 Ibid., para. 3.12.

103 Ibid., paras. 313, 314.

104 Ibid., paras. 315 to 322.

105 Ibid., para. 323.

106 Ibid.

would likewise be governed by the main proposal: the Committee thought that existing rules went beyond what was necessary to protect the minor in this regard.¹⁰⁷ In the case of loans, however, the court would be expected to make a wider use of the relieving power.¹⁰⁸ Trading contracts could also be governed by the main proposal.¹⁰⁹ Finally, the Committee proposed that there was no need to protect former minors from ratifying contracts which they had made during their minority.¹¹⁰

Consideration of the Latey proposals

4.6 The Latey Committee considered that their main proposal, that a minor's contracts should be unenforceable against him but that he should be liable to account for benefits received, would obviate the need for special rules relating to particular categories of contract. All would be amenable to the same general principle. Here we note our first reservation over the Committee's proposals. We doubt whether the policy considerations, which we consider should form the basis of the law relating to minors' contracts,¹¹¹ can be balanced in the same way irrespective of the type of contract made by the minor. We do not think that the weight to be attached to the various policies should be the same in relation, for

107 (1967) Cmnd. 3342, paras. 329 to 336.

108 Ibid., para. 335.

109 Ibid., paras. 343 to 345. But the Committee would have made a different proposal if they had not also been recommending the reduction of the age of majority to 18. In such case they would have proposed that trading contracts should be fully binding on a minor as if he were an adult: para. 345.

110 Ibid., paras. 337 to 339.

111 See para. 3.5, above.

example, to credit transactions - particularly where the minor is purchasing expensive items - as in relation to an agreement to take accommodation; and the weight which should be attached to those policies in relation to each of these contracts is not the same as the weight to be attached to them in relation to contracts of employment. In our view the Latey proposals would not in general achieve the most satisfactory balance between the competing policies.

4.7 Our second reservation is that the minor's liability to account for benefits received may reduce too much the protection which it is intended to afford, and we think should be afforded, by making his contracts generally unenforceable against him. For example, services which have been rendered and not paid for would, presumably, in most cases be benefits for which the minor would have to account, and the contract price would normally serve as an indication of the value of the service. So, also, with goods supplied by an adult to a minor who has consumed but not paid for them: the price would normally serve as an indication of the value of the goods. If the minor has to pay the contract price (either at once or by instalments) then, apart from any reduction below that price in the sum ordered to be paid, the contract is in effect being enforced against the minor. The fact that in a particular case substantial enforcement of the contract is being brought about by means of the duty to account does not, by itself, amount to any valid criticism of the proposed rule, in that particular case, if the duty is there seen to work justly; but in such cases the only way in which any real protection is provided for the minor, against the consequences of his own folly or imprudence (if any) in making the contract, is by the operation of the proposed

relieving power. We do not consider that, merely because a minor has received a benefit under a contract, he no longer needs protection from the consequences of the contract and of his own imprudence.

4.8 The extent to which the policy of protecting minors from the consequences of their own imprudence would be given effect in cases where the minor has received a benefit from the contract would depend upon the principles applied by the courts in exercising the relieving power. The Latey Committee, for reasons explained above, did not put forward any detailed proposals, or any guidelines, to be followed by the courts. They said that, in exercising the relieving power, it was the minor's "overall position that should be considered";¹¹² and they added: "Clearly where the adult party has taken advantage of the minor's age or inexperience the court would be entitled to take this into account in fixing the extent, if any, of the minor's liability".¹¹³

4.9 We have no doubt that guidelines could be stated in new legislation which would enable the court to make orders in many individual cases substantially in accordance with the main policy considerations of protecting a minor from the consequences of his own inexperience and immaturity and of limiting so far as possible preventable loss to the adult party; and also in accordance with the Latey Committee's proposal of requiring a minor to account, so far as would be reasonable, for any benefit obtained by him under an unenforceable contract. Such guidelines would refer, no doubt, to the

112 (1967) Cmnd. 3342, para. 306.

113 Ibid.

conduct of the parties in making the contract; to any belief of the adult that the contract was a reasonably sensible and prudent contract for the minor to make; to the reasonableness of the grounds of any such belief; to the extent and value of any actual benefit obtained by the minor under the contract; to the amount of any benefit still retained and the circumstances in which the minor parted with any such benefit; and to the actual assets, means and earning capacity of the minor.

Consideration would have to be given to obliging the adult to make enquiries of the minor as to the prudence of the transaction for him and as to whether any such obligation would be commercially practical. The reasonableness of the adult's belief in the prudence of any transaction would have to be judged, it seems to us, by the court's objective, and not by the adult's subjective, standards. In many cases the court would have to decide between leaving the adult to suffer loss, and imposing liability upon a minor in respect of an imprudent contract. Perhaps the comparative financial position of the adult and potential hardship to him should be relevant: the adult might be little older, and no more experienced, than the minor.

4.10 It seems to us that courts would have difficult decisions to make in cases where the minor had no ready cash with which to make the payment, or readily saleable assets; or where the minor had earnings but also other demands upon those earnings. The court would, no doubt, be driven to apply principles similar to those adopted with reference to the making of compensation orders in criminal cases in which the actual ability to pay is of prime importance. If the minor had no money with which to pay, the court would presumably refuse to make any order and would dismiss the claim.

4.11 It is clear that a liability to account, with a relieving power in the court, could enable substantial justice to be done in a number of cases where, without such liability to account, an unmeritorious minor, with the ability to pay, would escape. The question is whether the ability to impose a moderated liability in such cases is worth the uncertainty and complexity which would be caused by such a law. Our provisional conclusion is that it is not.

4.12 The need for a relative degree of certainty in the law is, in our view, of very great importance. The law serves not only to solve disputes when they arise but also to regulate conduct so as to avoid them. In order to avoid disputes the law must be reasonably certain in its application. If contracts are unenforceable against minors, that is, in most cases, the end of it. While such a rule may in some cases lead to unjust enrichment it also avoids much fruitless litigation. Those who know the law can take precautions against its abuse by unscrupulous minors. Potential abuse of the laws and of its procedures is not limited to minors; many adults avoid paying their just debts by refusing to pay and leaving the creditors to the expense of trying to trace them and of getting and enforcing a judgment. The best protection, as is widely known, is not to give credit to the untrustworthy.

4.13 Under the Latey Committee's proposals of a general duty to account, coupled with a relieving power in the court, the outcome of any case would be uncertain and this uncertainty would exist on several levels: on the valuation of the benefit conferred; on the question of whether the minor should be relieved of his liability to account; and, if so, on the extent to which such

relief should go. These uncertainties would make out of court settlement less likely. The scheme might well cause some increase in litigation: and, in a large number of cases, there would be a need for legal aid on one or both sides.

4.14 In short we see in the Latey proposals two main difficulties. First, the absence of special rules for certain categories of contract means that the balance between the competing policies is not fully achieved and appropriate weight is not given to the relevant policies in regard to particular contracts. Second, the duty to account would not only result in the liability of minors, in respect of benefits received under contracts, being extended so as to make most executed contracts potentially enforceable against them, but that extended liability would be subject to discretionary relief with increased uncertainty of outcome and increased litigation. In most cases where the adult had performed his obligations under the contract the minor would be at least in apparent risk of a money judgment which could be enforced against his general assets or future earnings.

Provisional conclusion

4.15 For these reasons we do not find that the Latey Committee's proposals offer the most satisfactory basis for the reform of the law. At first sight they are - as we found them - attractively simple and they seem to provide a basis for avoiding some of the possible injustices of the present law. When we considered the detailed rules necessary for their implementation the difficulties we have mentioned became apparent. It seems to us that implementation would result in unacceptable uncertainty. Our provisional conclusion is that the reform

of the law of minors' contracts should not be based on the Latey Committee's proposals. Comments on this conclusion would be welcome. If it is thought that the Latey Committee's proposals could form a suitable basis for the reform of the law, then we would appreciate detailed suggestions as to the sort of guidelines which might be established for the exercise of the relieving power.

PART V : A METHOD BASED ON UNENFORCEABILITY

Introduction

5.1 In this Part we examine the second of the three possible methods of implementing the policy considerations which we believe should underlie any law of minors' contracts. This method we have called "qualified unenforceability"¹¹⁴ and is the basis of the present law. We shall see that notwithstanding the fact that there are a number of defects in the present law and that uncertainty can arise in some situations¹¹⁵ the general approach of the present law by and large provides an effective and satisfactory way of balancing the essential policies.

The general approach of the present law

5.2 The first policy consideration is that the law must protect minors against their inexperience. Under the present law this protection is provided by the Infants Relief Act 1874 and by the common law relating to contracts which are unenforceable against the minor or which he has the power to avoid. The Infants Relief Act provides the minor with protection where he borrows money or where he purchases non-necessary goods. The orthodox view is that a minor cannot recover money which he has paid or property which he has transferred (unless there has been a total failure of consideration)¹¹⁶ and the protection provided by

114 See para. 3.7, above.

115 See para. 2.28, above.

116 See para. 2.19, above. However, the two cases usually cited in support of this view - Valentini v. Canali (1889) 24 Q.B.D. 166 and Pearce v. Brain [1929] 2 K.B. 310 - can be explained on another ground: see Treitel, The Law of Contract, 5th ed., (1979) at pp. 426-428.

the Infants Relief Act therefore applies mainly to situations where the minor has received credit of some kind. Where an adult contracts to render services to the minor or where the minor sells goods or services, the minor is protected not by the Act but by common law. The law enables the minor to escape from a promise to supply goods, or to refuse to perform services (and thus to avoid onerous obligations), or to resile from a contract under which the adult has promised to render services. But in this case also the minor cannot recover money paid or property transferred unless there has been a total failure of consideration. If a contract falls within the special category of contracts which are binding until repudiated, the minor is protected because he may repudiate the contract at any time, and he will be relieved from future liabilities, although it is not clear whether liabilities which have already accrued are extinguished by the repudiation.¹¹⁷ Again the minor can recover money or other property paid or transferred under a "voidable" contract only if there has been a total failure of consideration. The basic principle of the present law is therefore that a minor should be protected from liability arising from his contracts, particularly from contracts under which he has been granted credit.

5.3 The second policy underlying the law relating to minors' contracts is that the law should not cause unnecessary prejudice to adults who deal with minors. A minor (if guilty of fraud) can incur some liability in equity.¹¹⁸ The adult is also protected to some extent

117 See para. 2.11, above.

118 See para. 2.24, above.

by the rule that the minor cannot recover money paid or property transferred unless there has been a total failure of consideration.¹¹⁹

5.4 The third policy is that adults should not be deterred from entering into certain types of contracts with minors. Thus the fact that a minor is in certain circumstances bound by a contract for necessary goods and services has been explained on the ground that it is "not for the benefit of the tradesman who may trust the infant, but for the benefit of the infant himself."¹²⁰ In addition a minor is bound by a contract of service (or analogous contract) if it is on the whole for his benefit.¹²¹

Our general approach

5.5 We believe that the three policies underlying the present law should form the basis of any system of rules relating to minors' contracts. Our provisional conclusion is that the general approach of the present law provides an acceptable way of balancing these policies. It seems to us that the law must protect minors against their inexperience and therefore the general rule should be that contracts are unenforceable against the minor. The general rule can then be qualified in order to give effect to the remaining two policy considerations.

119 See para. 2.19, above.

120 Ryder v. Wombwell (1868) L.R. 4 Ex. 32, 38.

121 See paras. 2.8 and 2.9, above.

5.6 While we consider that minors should not generally be bound by their contracts, we think that different considerations apply once those contracts have been fully executed. When the minor has performed his obligations there is by and large less obvious need to protect him against his inexperience. Moreover unacceptable uncertainty would arise if executed transactions were generally capable of being re-opened. Our view is that where a contract has been executed, the minor should not be entitled to recover money paid or property transferred under the contract, save in accordance with those principles under which an adult would be entitled to relief.¹²²

5.7 While we are broadly in sympathy with the general approach of the present law, we have one major reservation; namely, the concern of the present law with the granting of credit to minors. As a matter of commercial reality credit is not in the ordinary course of events extended to minors, unless there is also an indemnity from an adult. It is therefore questionable whether there is much need in practice of the protection which is now given to minors in this area. It is of course true that there are other types of future commitments in which a minor's inexperience and immaturity may prejudice him.¹²³ The question is, however, whether even these transactions are not so rare as to be of little practical

122 For a discussion of these issues and our provisional recommendation in this regard, see Part VIII, below. We provisionally recommend the statutory endorsement of a minor's right to set aside an unfair contract on proving that advantage was taken of his immaturity.

123 For example, he might commit himself to supply goods in the future, or to perform services in the future: see para. 5.2, above.

concern or importance. Our reservation therefore is that the elaborate structure of the present law may not be really necessary to protect minors against the dangers which they face in practice. This reservation explains our interest in the proposal to reduce the age of full contractual capacity to 16. We would welcome comments on this point.

5.8 Apart, however, from the possibility of reducing the age of full contractual capacity to 16, our provisional conclusion is that the approach which best balances the policies which should underlie the law relating to minors' contracts is the approach of the present law: namely, qualified unenforceability. Since any reform of the law based on this hypothesis must in essence be simply a tidying-up operation, we have considered whether it would not be better just to leave the present law as it is. In practice the existing law does not seem to work hardship on either minors or adults: concluded contracts raise no problems, and credit is, for commercial rather than legal reasons, rarely extended to minors, at least not in sums which are likely to give rise to serious dispute. Any change in the law brings with it uncertainties, and the risk of litigation, while the new law settles down and the public becomes accustomed to it. Putting it bluntly: is reform worth the trouble? We think it is. The present law is untidy. It consists of particular rules, most of them judge-made, not always clearly related to one another. Its principles are not so much stated, as have to be deduced (sometimes with difficulty) from particular instances. Partly, perhaps, as a result of this, most people probably have little idea of what the law on minors' contracts is. We do not think this is desirable. If our more radical proposal is not thought appropriate, it is still, in our view, worth restating

the existing law in comprehensive, and comprehensible, terms, and taking the opportunity to remedy in the process some of its more significant defects. Because our provisional recommendations would leave the basic approach of the present law intact, any disruptive effects of reform are not likely to be unacceptable. Those who know the present law, and frame their conduct accordingly, will not need to revise their expectations. Nevertheless, we would welcome comment on this point. Readers may like to bear in mind, as they consider the remainder of this Working Paper, the option of doing nothing at all.

PART VI : OUR RECOMMENDATIONS AS TO THE BASIC RULE
WHICH SHOULD GOVERN MINORS' CONTRACTS

Introduction

6.1 In this Part we set out our recommendations regarding the basic rule which in our view should govern minors' contracts. Our starting point is that the Infants Relief Act 1874 is an unsatisfactory statute for two main reasons: first, the contracts dealt with are arbitrarily selected and do not reflect cogent policy considerations; second, the terminology of the Act is obscure, giving rise to confusion and uncertainty.¹²⁴ Our provisional conclusion is that the Act should be repealed. In its place we propose a general rule that contracts should be enforceable by the minor but not against him. However, we consider that certain categories of contracts should not be governed by the general rule and that special rules should apply to these categories. We shall deal first in detail with the general rule, then we shall consider what remedies (if any) should be available to an adult who has entered into a contract which is unenforceable against the minor. We shall then consider a situation where the application of the general rule would lead to unacceptable injustice to the adult and which consequently requires there to be an exception to the general rule. We shall deal in Part VII with the various categories of contract to which the general rule should not apply.

The general rule

6.2 The general rule has two limbs:

- (a) contracts should be enforceable by the minor; and

124 See paras. 2.15 to 2.17, above.

- (b) contracts should be unenforceable against the minor.

We do not intend this rule to affect the present position regarding the passing of property. Property should be capable of passing under a contract with a minor even though the contract is not enforceable against him.

6.3 Though a contract may be unenforceable by the adult against a minor, the adult should not be further penalised by being deprived of any defence available to him in an action against him by the minor to enforce the contract. Where an adult would have had a defence to an action had it been brought by another adult, on the ground of the other adult's failure to perform a condition precedent or a concurrent condition, or on the ground of defective performance, or on any other ground,¹²⁵ we consider that the adult should have a similar defence against a minor. Thus, if the contract provides that the minor must perform his obligations before performance by the adult is due, the minor should be entitled to enforce the contract only if he has done what he himself is bound to do under it. Similarly, where the contract provides for concurrent performance the minor should be entitled to enforce the contract only if he is willing and able to perform his own obligations. We deal later¹²⁶ with the situation where all or part of the minor's performance is postponed until after complete performance by the adult. An adult should also be entitled to raise defective performance by a minor in diminution of a claim for the price. But an adult should not be entitled by way of

125 See, for example, para. 6.12 and footnote 136, below.

126 At paras. 6.14 to 6.20, below.

counterclaim to recover more than the amount claimed by the minor: otherwise an adult who is sued by a minor might, by a procedural device, circumvent the protection which it is intended the minor should have.

6.4 In our view the remedies available to a minor when he enforces the contract should be the same as if he were an adult. The remedy of specific performance gives rise to particular problems and we shall discuss separately the availability of this remedy both to and against the minor.¹²⁷

The remedies available to an adult when the minor is in breach of a contract governed by the general rule

6.5 Though a contract may itself be unenforceable against a minor it does not follow that an adult should have no remedy at all against a defaulting minor. If the adult is totally without redress, whether in contract, in quasi-contract or in equity, great injustice would be caused to adults who deal fairly with minors. For example, if such were the case a 19 year old adult would have no remedy when a 17 year old minor has obtained from him, say, a motor-cycle, has retained possession of it and continues to use it, but refuses to pay the price for it. It seems to us that in such a situation justice requires that the minor be compelled to return the motor cycle.

6.6 This example is straightforward and the solution obvious. Difficulties arise where the minor has sold the goods or exchanged them for other goods¹²⁸ or where the

127 See paras. 6.22 to 6.24, below.

128 Or where he has exchanged the goods but there has also been an equalising cash payment either to the minor or by him.

minor has received services from the adult and has not paid for them. One way of preventing injustice to the adult would be to allow him to claim a reasonable price (as opposed to the contract price) for goods or services provided by him whether or not the benefit received by the minor is still returnable. In the case of non-returnable benefits this would be the only way of giving the adult a remedy, but, if applied as the general rule, would appear to go too far in withdrawing the protection intended to be given to minors by making contracts unenforceable against them.

6.7 In our view, the objection, in most cases, to the retained benefit for which the minor has not paid is not so much to the mere fact that the adult is out of pocket - that is inevitable in some circumstances if the minor is to be protected - but to the fact that the minor is permitted to retain a tangible benefit notwithstanding that he refuses to pay for it. If the minor has sold the goods but spent the money, or if he has "consumed" the goods, then he is no longer in possession of the benefit of the contract, and his failure to pay for what he has received appears somewhat less objectionable. Unless the adult's remedy is to extend to all cases of breach of contract by a minor, which we think would go too far in withdrawing the protection thought to be required from the law, or unless the adult's remedy is to be hedged about by complicated exceptions or provisions for relief, it seems that the line should be drawn so as to limit the adult's remedy to cases where the minor retains the actual benefit obtained by him under the contract.

6.8 If the adult's remedy were to be allowed to extend beyond recovery of specific articles obtained by the minor, but yet not to include a right to damages for

breach of contract, then that remedy could be based only upon the concept of tracing, or upon that concept modified by some provision for discretionary relief. We do not think this would be desirable. In our view, if the limit of the adult's remedy is set at recovery of specific articles, the rule is clear and simple; and such a rule is preferable to the complications of tracing, with or without discretionary relief. This applies equally where the minor has exchanged the contract goods for other goods, but refuses to pay for the original goods. It can be argued that the adult should at least be entitled to the goods which the minor has received in exchange. But we believe that cases of straightforward exchange are rare and that, if the adult were allowed a remedy in respect of goods which the minor has obtained as a result of part exchange, that remedy would once again become unacceptably complex.

6.9 It seems to us that the objective should be to achieve the best balance between the policy of not allowing the minor to retain an unjust enrichment, and the policy of causing the minor to be a defendant only in actions which are simple to pursue and result in remedies which are easy to execute. Having regard to the types of situation which are likely to occur most frequently in practice it is our provisional conclusion that the best balance will be achieved by restricting the adult to the return of goods in specie. The obvious objection to this course is that a calculating and unscrupulous minor can dispose of goods he has acquired under the contract, and hold on to the proceeds of sale, or goods received in exchange, while refusing to pay the contract price. This mischief could be mitigated by varying the rule, to provide that a minor may not, simply on the ground of his minority, refuse to pay for goods acquired under a contract unless either he returns the goods in specie or he proves that the goods are no longer in his possession and that he did not dispose of them

with the purpose of defrauding the supplier. In most cases the minor would thus have the choice of paying for the goods or returning them.

6.10 A rule to this effect would work perfectly well where the property in the goods had passed to the minor under a contract of sale. Since the adult supplier would no longer own the goods he would have no right to repossess them, notwithstanding that the minor was refusing to pay for them. Because the contract would be unenforceable against the minor, the adult could not bring an action for the contract price, but under the proposed rule he could sue for return of the goods. The court could be empowered to make an order for their return unless the minor agreed to pay the purchase price. At the same time the court could be given discretion to vary the terms of the contract. For example, the minor might be willing to pay a reasonable price but may allege that the contract price is too high. The court could have power to fix a reasonable sum.¹²⁹ Again, the minor might wish to retain the goods and pay for them but be unable to pay for them immediately, or over the period originally agreed. The court could have power to extend the time for payment. Where at the time of the action the minor no longer had the goods in his possession, obviously the court could make no order for their return. Under the proposed rule it would in that case order the minor to pay for them (with the same discretionary power to vary the original contract terms) unless the minor could show that he had not disposed of the goods in order to defeat the claims of the supplier. Thus where a minor had disposed of the goods in good faith, or the goods had

129 See Consumer Credit Act 1974, ss. 137-139 which would in any case enable the court to look at the terms of the bargain in these circumstances, if the sale were a credit sale.

been lost or destroyed, the minor would not be compelled to pay for them notwithstanding that he was unable to return them.

6.11 Under a hire purchase agreement¹³⁰ property in the goods supplied does not pass to the hirer until the last instalment of the purchase price is paid. If the hirer defaults on his contractual obligations, repossession of the goods by the lender is, therefore, simply a taking back of his own property. Under the Hire Purchase Act 1965 the lender cannot recover possession until he has served a notice of default on the hirer, which has not been complied with.¹³¹ At the expiration of the notice the lender is free to repossess the goods, by physical action if this can be done peaceably and conveniently, or otherwise by action in the county court. In our view service of a default notice is sufficient protection for a hirer who is a minor, and we see no reason further to restrict the lender's right to repossession in such cases. However, the 1965 Act itself contains further restrictions where one third or more of the purchase price of the goods has been paid.¹³² The hirer cannot then recover possession except by court action, and in such action the court is given a wide discretion similar to that proposed in paragraph 6.10 above in relation

130 Or a conditional sale agreement. References to hire purchase in this paragraph include references to a conditional sale.

131 Hire Purchase Act 1965, s. 25.

132 Ibid., ss. 33-34.

to contracts of sale.¹³³ In our view our proposed rule, that a minor who has obtained goods on credit must either pay for them or return them is, in relation to hire purchase transactions, except for one point, adequately provided for by the existing statutory machinery.¹³⁴ The exception is the suggested qualification to that rule, namely that the minor should not be compelled to pay if he can show that the goods are no longer in his possession and that he did not dispose of them in order to defeat the claims of the lender. We propose that where the hirer of goods is a minor the relevant provisions of the 1965 Act¹³⁵ should be amended in order to allow this qualification.

6.12 In our view rules to this effect would go far to remedying what appears to be a defect of the existing law of minors' contracts, that an unscrupulous minor can obtain non-necessary goods and then, more or less with impunity, refuse to pay for them. We appreciate that even this proposal would not meet every case of unjust enrichment

133 Hire Purchase Act 1965, ss. 35-40.

134 In due course these provisions of the Hire Purchase Act 1965 will be replaced by equivalent provisions of the Consumer Credit Act 1974. See also the 1974 Act, ss. 137-139 (re-opening of extortionate credit bargains) which are not limited to hire purchase agreements or to cases where recovery of possession is restricted under ss. 33-34 of the 1965 Act.

135 Or, as the case may be, of the Consumer Credit Act 1974.

on the part of the minor. Where an adult provides services for which the minor refuses to pay the adult will have no remedy. But in many cases when an adult provides services in advance of payment, he will have a lien, as for example where he repairs a minor's motorcycle.¹³⁶ In cases, such as taxi rides, where the service is usually provided before payment is made, our proposals mean that the minor would not be civilly liable if he failed to pay. But the minor would not be civilly liable under the existing law unless the taxi ride were regarded as "necessary". A minor who bilks a taxi driver would apparently be guilty of the offence of "making off without payment" under section 3 of the Theft Act 1978 if he could be proved to have acted dishonestly. In any event, even allowing an adult the full restitutionary remedy would not give him an effective remedy where he has provided services. Only a remedy in quasi-contract would suffice in such cases, and, for reasons which we have discussed above, such a remedy would be unsatisfactory in our view.

6.13 It is to be remembered in this context that we are here dealing only with civil remedies arising from contracts.

136 A possessory lien is a right of defence to an action by the owner of goods for their return. It is not itself a right of action. It may therefore be enforced though the debt which it secures is irrecoverable at law because, for example, it is statute barred: Spears v. Hartley (1800) 3 Esp. 81, 170 E.R. 545. It is arguable that there could be no valid possessory lien in respect of a debt arising out of a contract void under the Infants Relief Act 1874. Our provisional recommendations, however, involve the repeal of that Act, and under our proposed general rule a contract with a minor would be unenforceable against the minor, but not invalid. Accordingly, the holder of a possessory lien could assert it against the minor in an action by the minor to recover his goods. See para. 6.3, above.

If a minor is deliberately dishonest, and cheats an adult into parting with an article on credit, then whether or not he promptly sells or exchanges the article, the minor would be guilty of a criminal offence and could be prosecuted. It is also our proposal that, if a minor by deceit induces an adult to enter into a contract, the minor should be liable for any loss so caused to the adult.¹³⁷ We would welcome comments on the extent of an adult's remedy against a minor where the minor has received goods or services for which he is refusing to pay.

An exception to the general rule

6.14 Under our proposed general rule a minor could enforce a contract against the adult but the adult could not enforce the contract against the minor. This could lead to injustice where the contract postpones all or some of the minor's obligations until the adult has completely performed his side of the contract. The only circumstances in which this situation is likely to arise are where the minor has been given credit and the adult has failed to do in full what he has promised to do (perhaps because he has discovered the minority of the other party) and the minor wishes to enforce the contract. We are therefore dealing with an unusual situation. However, in such cases the minor would be entitled to judgment but the court would nevertheless be unable to compel him to perform his own obligations (or to pay damages for failing to do so) when the time for such performance arrived.

137 See para. 11.2, below.

6.15. This unsatisfactory (albeit rare) situation could be avoided in one of three main ways:

- (a) the minor could be entitled to enforce the contract only if he were willing to perform his own obligations concurrently with performance by the adult;¹³⁸ or
- (b) the adult could be made liable to perform his own obligations (or he could be liable in damages) only after the minor had performed his obligations; or
- (c) by enforcing the contract against the adult, the minor could render himself fully liable on the contract, and so enable his own obligations to be enforced against him.

6.16 If the first option were adopted the minor could enforce the contract against an adult only if he were prepared to perform his obligations concurrently with performance by the adult. However, it is probable that the reason for the postponement of performance by the minor until after performance by the adult is that the minor is unable to perform earlier. Thus it would be unrealistic to expect the minor to perform concurrently with the adult and his ability to enforce the contract against the adult would be illusory. If the second option were adopted, the adult would be liable for damages for breach of contract only after the minor had fully

138 Or if the minor had already performed his side of the contract notwithstanding the fact that his performance was not strictly due until after performance by the adult.

performed his side of the contract. Thus if the minor had acquired defective goods on credit, he could claim damages from the adult only after he had paid all the instalments - which perhaps might be as much as two years later. In our view this would be totally unsatisfactory.

6.17 The third option is that if the minor enforces the contract against the adult he should himself be liable on the contract. The reason for extending protection to minors at all is to protect them from the consequences of their inexperience and immaturity. However, while a minor might well enter into an unsuitable contract without sufficient thought, he is not likely to take legal proceedings in this way. In any event a minor can only start proceedings by his next friend¹³⁹ and this should act as a check on impulsiveness. If the minor decides not to enforce the contract, he himself will not be bound by it. If he does decide to take legal proceedings it is, in our view, not unreasonable in these circumstances that he should be fully bound by the contract. This solution appears to us to be reasonable, easy to understand and easy to work. But if the minor is to become fully liable on the contract when he "enforces" the contract against the adult, we must be clear about the point at which the minor may be said to have "enforced" the contract.

6.18 We think a minor should be exposed to full contractual liability only when he seeks to enforce the contract by legal proceedings, or by a counterclaim in legal proceedings. A mere demand by the minor, even in

139 R.S.C. Order 80 rule 2; County Court Rules 1936, Order 3 rule 2; Order 5 rule 11. (C.C.R. 1981, O. 10, r. 1; in force from 1.9.1982).

writing, that the adult should perform his obligations should not be sufficient to deprive the minor of his legal protection. Such a demand may be made on impulse and may reflect the immaturity or inexperience of the minor. On the other hand, legal proceedings are most unlikely to be undertaken without due consideration, and the requirement of a next friend to act on his behalf should operate as a further check on impetuous action.

6.19 The question arises as to what step in the legal proceedings should for this purpose constitute enforcement of the contract by the minor. In our view there are two main alternatives - the minor should become fully liable on the contract:

- (a) once he has instituted proceedings -
i.e. once the writ or summons has been issued; or
- (b) at the time of judgment.

In our view the institution of proceedings should suffice to make the minor fully liable on the contract. If the relevant time were the time of judgment it would discourage out of court settlements and it would complicate the question of counterclaims, set-offs and third-party notices.

6.20 Our provisional conclusion is that, in those rare cases where all or some of a minor's obligations are postponed until after complete performance by the adult, and the minor institutes proceedings against the adult before he (the minor) has performed his own obligations, he should thereby become liable himself on the contract. Comments would be welcome on this exception to the general rule, and on the question as to whether the minor should

be considered to have enforced the contract at the time when he institutes proceedings or only at the time of judgment.

6.21 It is also for consideration whether this principle should not be restricted to cases in which the minor's performance is postponed to the adult's but should be extended to every case in which a minor sues the adult party under a contract. In any case in which a minor seeks a decree of specific performance against the adult the nature of the remedy is such that he will in effect become bound himself - see the next following paragraphs. But where, for example, he sues for damages for defective goods, or for damages for non-delivery or late delivery, or damages for the defective performance of some service, should he thereby become legally bound to carry out his own part of the contract? In these cases, if the minor wins his action his own obligations will be subsumed in the award of damages in his favour; but not, of course, if he loses. On the other hand, if the minor claims, for example, that the goods are defective and the court holds that they are not, he will, under our provisional proposals,¹⁴⁰ be bound either to return them or to pay for them. The same would apply to an unsuccessful action for late delivery of goods; and in a case of non-delivery if the minor had not received the goods he could not be bound to pay for them. It would seem therefore that to extend this principle to all cases where a minor sues to enforce the contract would in practice be relevant only to contracts for services. We think that to make a distinction in this respect between contracts for services and contracts for the supply of goods would needlessly complicate the law and would not be justified

140 See paras. 6.9 to 6.11, above.

by the likely extent of the mischief. Our provisional conclusion is that the minor should not become automatically bound to his part of the contract in every case when he takes legal action against the adult. Comments are invited.

The remedy of specific performance

6.22 It will be recalled that, as the remedy of specific performance is not available against a minor, the minor cannot himself obtain a decree of specific performance against an adult.¹⁴¹ However, this requirement of mutuality was recently reformulated in Price v. Strange:¹⁴² the court "will not compel a defendant to perform his obligations specifically if it cannot at the same time ensure that the unperformed obligations of the plaintiff will be specifically performed, unless perhaps damages would be an adequate remedy for any default on the plaintiff's part". In our view, where the minor has already performed his obligations, or where the contract is binding on him, he should not be debarred from obtaining a decree of specific performance against the adult, but subject, of course, to the general rules relating to specific performance. If the contract provides for concurrent performance, the court should be able to grant the minor a decree of specific performance on condition that he perform his own obligations. This would not mean that the minor would thereby be compelled to perform his own obligations, but merely that if he wished to enforce the

141 Flight v. Bolland (1828) 4 Russ. 298, 38 E.R. 817. See para. 2.14, above.

142 [1978] Ch. 337, 367-8 per Buckley L.J.

decree of specific performance against the adult he would have to perform his side of the bargain. Where the minor's performance is postponed to that of the adult the court should be able to grant the minor a decree of specific performance on the terms that the minor shall perform his own obligations in the future.¹⁴³

6.23 This is not a proposal that a minor can as a general rule be sued for specific performance. A decree of specific performance should be available against a minor only if the minor has first sued the adult. Thus, if the contract provided that the minor should perform first and he simply refused to do so then the adult would have no remedy. If the contract provided for concurrent performance, a decree of specific performance would be available against a minor only if the minor sued the adult and, similarly, if the contract provided that the minor's performance was postponed to that of the adult then the adult would be entitled to a decree of specific performance against the minor only if the minor had first sued the adult.

6.24 We should make it clear that though we intend that the remedy of specific performance should now be available to a minor (as it has not been under the present law) we do not propose any change in the general principles which govern its availability. We merely wish to permit the application to minors' contracts of the general principles relating to specific performance under the present law. We do not intend to alter the criteria upon which a decree is made.

143 See para. 6.20, above.

PART VII : CONTRACTS TO WHICH THE GENERAL RULE
SHOULD NOT APPLY

A. Contracts for necessities, or a similar category

Introduction

7.1 As we have seen in Part II of this Working Paper, a minor must pay a reasonable price for "necessaries" which an adult has supplied to him. It has been said that this obligation is imposed "not for the benefit of the tradesman who may trust the [minor], but for the benefit of the [minor] himself."¹⁴⁴ The adult supplier should not be deterred from supplying the minor with his reasonable requirements by the fear that he will not be paid. The concept of necessities is relevant only to a case where the goods or services are supplied on credit. It is doubtful how far in practice this principle results in credit being given where it would not otherwise be given. Our investigations suggest that minors have much difficulty in obtaining credit for any purpose. The Latey Committee said:

"We have received no evidence whatsoever that the [minor's] liability for necessities consciously causes any supplier to give him credit.... We have not heard of a single case where the supplier's view that goods were necessities persuaded him to give credit."¹⁴⁵

7.2 The law relating to necessities has been criticised principally because the supplier must prove not only that the goods or services were capable of being necessities, but also that they actually were necessities in the particular circumstances of the minor in question.

144 Ryder v. Wombwell (1868) L.R. 4 Ex. 32, 38.

145 (1967) Cmnd. 3342, para. 318.

The particular circumstances of the minor include his condition in life (since his needs must be dependent upon his legitimate expectations) and his actual requirements at the relevant time (and this may depend upon whether he was adequately supplied with others of the article in question). These are matters which are generally not within the supplier's own knowledge and it will be difficult for him to obtain information about them at the time of contracting. Whether or not the adult can enforce the contract thus depends in many cases upon matters of which he can have no knowledge. Moreover, it seems that the goods must be "necessaries" both at the time of the contract and at the time of delivery. The supplier may be satisfied that the minor has a real need for the goods he is buying at the time the contract is made, but how can he be sure that the minor will not have acquired an adequate supply from some other source before the time comes for delivery?

7.3 If these are truly defects in the present law, is it worth attempting to remedy them? Is it, in fact, worth preserving any category of contract enforceable against a minor with a view to ensuring that he is not impeded in the satisfaction of his reasonable requirements? The Latey Committee thought it was not. They would have abolished necessaries and subjected all purchases of goods and services by a minor to their proposed general principle of law. We accept that it is difficult to demonstrate that the existence of necessaries encourages anybody to supply minors on credit. Nevertheless it may do so. We do not believe that an appropriate category of enforceable contracts can be harmful to the interests of minors; if it may do something to help them there would seem to be reason to keep it. In any event, the existence of necessaries

clearly may enable some adults to recover payment, or to settle satisfactorily some claims, where they would not otherwise be able to do so. The principle therefore could mitigate injustice to adult suppliers. It does not, however, follow that the existing, or an amended, category of necessities is the best means of achieving these objectives.

Possibilities for reform

7.4 There seem to us to be four possibilities in this field. They are:

- (i) to leave the existing law of necessities as it is;
- (ii) to amend the existing law in order to render it more effective in meeting its stated purpose;
- (iii) to abolish necessities but to substitute another category of contracts which would achieve the same purpose to better effect;
- (iv) to abolish necessities without instituting any alternative concept.

These possibilities must be examined in turn.

- (i) Leaving the existing law of necessities as it is

7.5 There is something to be said for this course. The law has been developed over several centuries. Lawyers are familiar with it, even if laymen are not, and can advise on the likelihood of the recovery of any debt. A new concept is bound to cause at least initial uncertainty while its effects are worked out and may

therefore provoke litigation. Although the reason for the doctrine of necessities is commonly expressed as being for the benefit of minors, in encouraging traders to supply goods and services on credit, it also operates for the benefit of suppliers. The effect of the doctrine is that a minor is bound to pay for things of which he can be judged to have a reasonable requirement; and since that requirement is measured against the minor's background and status the result is, more or less, that if he can afford to pay for the article in question he will be obliged to do so. The doctrine of necessities appears old fashioned because it discriminates between minors on the basis of social condition, but, inasmuch as it renders liable to pay for goods and services those minors who in general have the money to pay, therein lies its fairness, and also its flexibility. One concept meets an infinite variety of circumstances and produces, it can be said, a reasonably just result in each.

7.6 On the other hand these advantages may be more real in theory than in practice. A supplier relying on the doctrine of necessities must first estimate the social position, status and means of his minor customer; next calculate whether, in the light of this, the goods or services he is supplying are reasonably required to sustain the customer's position in life; and finally satisfy himself that the customer is not already sufficiently supplied with the goods or services in question. If he gets any of these things wrong he may lose his money. He can ask questions of the minor, but he relies on what he is told at his peril, since the minor is not bound to a contract simply because he procures it by fraud.

7.7 When these rules were first worked out the conditions in which business was done were different from those that apply today. Fewer minors had money to spend and there were fewer traders available to supply their needs. There were no large chains of retail stores. Social mobility was less. A shopkeeper probably had only one shop. He knew his regular customers, their status, background, what they could afford, and whether he could safely advance them credit. The credit would come from him personally, and not from a remote finance house or bank. In many cases the shopkeeper would know how well supplied his customer already was with goods of the kind he dealt in. Even when the shopkeeper did not already know his customer he may have been able to estimate the customer's status and wealth by his dress, attitude and manner of speech - indications which nowadays would be much less reliable. Against this background the doctrine of necessities makes sense, and the burdens which it places on the supplier are not unreasonable. Today's conditions are so changed from those of the Victorian and earlier ages that to oblige most suppliers to rely on the kind of calculation mentioned above, in deciding whether or not to supply, is now almost certainly unrealistic.

7.8 We therefore think that the doctrine of necessities should not continue unaltered. Whatever usefulness it may now have is, in our view, largely fortuitous. We doubt if many suppliers stop to consider whether or not the goods they are asked for are necessities for the minor in question, even supposing that they know about the existence of the doctrine, and we do not find it surprising that the Latey Committee thought that the doctrine had no effect. If, in the last resort, a court action to enforce the contract should succeed because the goods are held to have been

necessaries, this is more likely to be due to good fortune than good judgment on the shopkeeper's part. Such theoretical advantages as there are in the doctrine of necessaries cannot outweigh the practical difficulties, and we think it wrong that the law should rely upon a doctrine of doubtful utility.

(ii) Amending the existing law

7.9 Because there is much in the concept of necessaries that is theoretically useful it may be possible to amend it so as to get round the practical objections. One such amendment is simple. This is to abolish the requirement that goods must be necessaries both at the time of the contract and at the time of delivery. We see no justification for penalising one supplier because, after the contract is made between him and the minor, but before delivery of the goods, the minor obtains additional goods of the same kind from another supplier: or for allowing the minor to escape from one set of obligations by incurring another set (which other set will possibly not be binding on him either because, at the time of the second contract, the promise of delivery of the first lot of goods may have rendered the second lot of goods surplus to requirements, and therefore not necessaries). In our view the sensible time for considering whether or not goods are necessaries is the time of the contract, and only the time of the contract. Whatever happens afterwards, to which the supplier is not a party, should not affect that issue.

7.10 Even so the supplier would still have to assess the minor's condition in life, and his actual requirements of the goods or services in issue. This he could do only by asking questions. So far as the first matter is concerned we do not think it would be necessary

for the supplier to inquire in detail into the minor's background. An application for credit will in any case involve an investigation of the minor's means, whether he has a job, a bank account, is able to give references, and so on. Where the purchase is not an unusual one - for example, where it is a music centre or a motor cycle - we think the answers to these questions are likely to tell the supplier all he needs to know about the suitability of the purchase to the minor's condition in life. An unusual purchase, for example an expensive diamond ring, must obviously entail more searching questions. In practice we do not think that in most cases it would be difficult for a supplier to satisfy himself that the purchase was a reasonable one for the particular minor to make, and that he could afford to pay for it.

7.11 The need to ascertain the minor's actual requirements at the time of the contract will also entail an inquiry into the state of his existing supply of the goods or services in question. Here we think the supplier is in a much more difficult position. Obviously he must rely entirely on what the minor tells him, though under the present law the minor will not be bound to the contract if he provides false information. But even if the information provided is correct, the supplier may find it does not greatly help him. Necessaries are not confined to goods and services of which the minor has an immediate and essential need¹⁴⁶ and a thing may be a necessary although the minor possesses others of its kind. The minor's actual requirements must inevitably be his reasonable requirements. It seems to

146 See Peters v. Fleming (1840) 6 M. & W. 42, 151 E.R. 314.

us that here the supplier may be required to make a difficult assessment. For example, a minor seeking to buy a 250cc motorcycle tells the salesman he already possesses a moped: a minor seeking to buy a stereo system says that he already has a music centre but wants something better. In our view it is hard for the shopkeeper to have to pick his way among the nice distinctions which may arise in such cases. We think, therefore, that the existing state of the minor's supply of the goods or services in issue should be disregarded in determining his actual requirements at the time of the contract.

7.12 There are two possible objections to this course. First, its effect might in some cases be that a minor would be bound to pay for something of which he had no particular need. We are not much troubled by this. Necessaries are, under the present law, not confined to things of which the minor has an essential need: they extend to things of which he has a reasonable requirement. We think that in practice there would be few cases in which a minor would collect goods or services of a particular sort in numbers or amount so great that the enforceability of the contract would cause hardship to him. The second objection is that it would be somewhat artificial to exclude from the calculation of the minor's actual requirements the state of his existing supply. We are prepared to accept this artificiality in the interests of achieving a simple, workable concept which, for the reason just given, would, we think, in most cases provide a just result.

7.13 Finally, if the supplier is to be obliged to make inquiries of his customer he ought, in our view, to be able to rely on the answers given, provided these answers appear reasonable in the circumstances. Under the present law if the minor falsely leads the supplier to believe that goods and services are necessities he does not thereby become bound to the contract - nor is he liable to the supplier in tort. We propose elsewhere¹⁴⁷ that a minor should be liable in tort for deceit, though not in contract, when he has fraudulently induced an adult to contract with him. If the concept of necessities is to be retained we think the minor should be liable on the contract if he falsely persuades a supplier that goods or services provided for him are necessities. Accordingly the supplier should be entitled to rely on the truth of answers to questions relevant to ascertaining the minor's condition in life and his requirements of the items in question, provided only that it was reasonable for him to do so.

7.14 An amended doctrine of necessities might therefore be expressed as follows:-

Necessaries are goods and services suitable to the minor's condition in life, and to his reasonable requirements at the time of the contract. In assessing the minor's reasonable requirements the possibility that the minor may already possess a supply of the goods or services in question may be disregarded. A contract for the supply of necessities will be binding on a minor if the supplier has reasonable cause to be satisfied that what he is

147 See para. 11.2, below.

supplying are indeed necessities; and for this purpose the supplier is entitled to rely on the truth of information provided by the minor in answer to the supplier's inquiries, provided that it is reasonable for him to do so.

In our view the existing category of necessities amended in this way could operate generally for the benefit of both supplier and minor, and would be consistent with the conditions in which business is nowadays carried on.

(iii) Substituting another category of binding contracts

7.15 It remains possible that some different category of binding contracts may be more appropriate to today's needs. We are concerned in this inquiry only with goods obtained on credit. In fact, it seems that credit is very rarely advanced to minors today. Commercial credit, other than for very small amounts, is almost invariably provided by specialised agencies working to a prescribed formula, caring little about the borrower except for the likelihood of his being able to repay what he borrows. The history of necessities suggests that the doctrine was evolved in order that a minor should be bound to pay for his reasonable requirements if he could afford to do so. Nowadays he is unlikely to be given credit at all unless it is judged objectively by an impersonal organisation that he can afford to pay. To an extent, therefore, one part of the job of the doctrine of necessities is already done as soon as the minor is granted credit. There remains the question of the suitability of the goods or services to the minor's condition in life. But the very wide discrepancies in social conditions which existed even 50 years ago are much less obvious today. Although there are still great differences in the purchasing power of a child of wealthy

parents and one from a poor family it is not clear that the "reasonable requirements" of the one would nowadays be seen as significantly different from those of the other. Whereas the wealthy minor may, in justice, be held liable to a supplier in respect of a greater number of more expensive goods than the poor minor, it may be seen as unacceptable to base legal liability, even in this comparatively small area of credit transactions by minors, upon the capacity to pay. It may seem that the notion of "reasonable requirements" according to "condition in life" is an unsuitable basis for the rules relating to contractual capacity in a minor.

7.16 If there is a real need for a category of contracts binding on the minor in order to encourage the provision of credit we think there is much to be said for a single, more objective, criterion applicable to all minors alike, rather than one applicable to each individual according to his particular circumstances. In our view the choice is between a rule based on the average requirements of minors and one based on the minimum requirements of minors. No other possibility is capable of operating across the board without regard to individual factors. Though "average" might be more helpfully rendered as "ordinary" or "usual", it is a more uncertain concept than "minimum" on which there is likely to be a broader measure of agreement. Inevitably, any concept based on minimum requirements will be less extensive than the present doctrine of necessities. Given that credit is seldom advanced to minors anyway - for commercial rather than for legal reasons - we do not consider this to be an important disadvantage of an alternative concept, though we recognise that suppliers to wealthy minors, of what could be necessities for them,

would be adversely affected. In our view, any such alternative should be based on a common standard of minimum requirements.

7.17 We think the flavour of what we are suggesting is best conveyed by calling such contracts "contracts for necessities". Necessities would be goods or services of a kind which, if bought by minors, would normally be bought by them in order to meet basic needs. Food, drink, clothing and accommodation would clearly fall within this category; but not all such things would be necessities. Champagne, caviar, a fur coat or a three-bedroomed flat, would hardly pass the test of meeting basic needs. Health and education are basic requirements and things relating to their essential promotion would be necessities. The concept would not cover items of luxury or even luxurious items of utility,¹⁴⁸ but only those things which are essential to the maintenance of basic living standards. Whether or not the minor had an actual need of the goods or services in question would not be relevant. It would be enough that the item was suitable to meet such a need if it should exist. Under this proposal, as under any other, border-line questions would no doubt arise and the courts would have to decide them. Nevertheless, we think that the concept would be clear enough to provide in most cases sufficient guidance to a potential supplier who might otherwise be deterred from providing credit by the fear that he would not be paid.

148 Cf. Chapple v. Cooper (1844) 13 M. & W. 252, 258, 153 E.R. 105, 107, per Alderson B.

7.18 This concept is a narrow one, much narrower than necessities. But it is consistent with the fundamental premise of the law of minors' contracts that minors need to be protected. It is said that the contract from which they most need protection is one under which they obtain credit, for here they are most likely to take on commitments which they cannot fulfill. The concept of necessities would not facilitate the making of credit arrangements, except in respect of a narrow range of goods and services of which minors might have a genuine need. In the past it has been thought that so narrow a restriction would cause hardship to minors.¹⁴⁹ Today goods of all kinds are more accessible to more young people than they were, and temptations are correspondingly greater. The age of majority is now 18 and those above that age are subject to no restrictions on their power to contract. In our view therefore a narrow category of necessities is not likely to cause hardship. Moreover, an advantage of this proposal would be that the supplier need not be concerned with the personal circumstances of the minor, and would not have to make a judgment about the suitability to him in particular of the goods or services in question. We have suggested above that the burden of making such a judgment is not so great as it may appear. But it will be a source of some uncertainty. Under this proposal for necessities it is not the needs of the particular customer, but the nature of the goods or services, which would be relevant, which we think is a more certain basis of decision.

149. Peters v. Fleming (1840) 6 M. & W. 42, 151 E.R. 314.

7.19 Nevertheless it is open for consideration whether, if the supplier does have actual knowledge of a special need for his customer, he should be permitted to rely on this knowledge in supplying goods or services as necessities. For example, suppose a 17 year old minor living in a rural area requires some personal transport in order to take him 10 miles to the only job available to him, in time for an early shift. There is no-one who can take him in a car. A small motorcycle would fulfill the purpose, but a minor would not ordinarily buy a motorcycle to meet a basic need, and it would therefore not normally be regarded as a necessity. If the supplier actually knows of the particular need of the minor should he be permitted to rely on it in supplying an appropriate motorcycle on credit with a view to enabling the minor to keep his job, thus turning the motorcycle into a necessity in the particular circumstances? As another possibility, should, say, the boy's employer be able to rely on his knowledge of his employee's circumstances in lending him money to buy the motorcycle, confident that as the loan is for a necessity he will be able to recover the money? Affirmative answers to these questions would to an extent detract from the intended generality of the principle underlying necessities. But there is a difference between requiring the supplier to have knowledge of the minor's particular needs, and permitting him to rely on such knowledge as he may in fact have. Affirmative answers would not therefore necessarily detract from the policy underlying the proposed concept of necessities, and they would make the concept more flexible. We would welcome comments on this point.

(iv) Abolishing necessities without instituting any alternative concept

7.20 Our own preliminary researches suggest that minors do not easily obtain commercial credit, and that the reasons for this are themselves commercial rather than legal. If all contracts were as fully binding on minors as they are on adults it seems likely that there would still be no appreciable increase in the amount of credit extended to minors. Since we are concerned here only with credit transactions it may be said that all of the foregoing discussion is therefore beside the point and will do nothing to remedy the real problem - if indeed, there is a problem. We concede that there is force in this, but there are two matters to be considered on the other side. First, a rule readily comprehensible to laymen might have an effect on the willingness of commercial lenders to consider the provision of credit to a minor in a particular case. While such cases may be few, it might still be worthwhile providing for them if this can be done relatively simply. Second, a minor may not obtain commercial credit, but he may have access to a private loan. A loan for the purchase of necessities is recoverable to the extent that it is used for that purpose. We propose the same should apply to necessities.¹⁵⁰ This may facilitate the lending of money to minors for essential purchases and could thus be of real benefit to them.

7.21 Another argument which may be made against our suggestions is this. Our concept of necessities is intended to ensure that minors can provide themselves with essential goods and services. But if a minor is living with, and maintained by, parents or guardians

150 See para. 7.34, below.

he is unlikely to need to acquire independently such goods or services: almost by definition they will be provided along with the maintenance. On the other hand if a minor over the age of 16 (when the parental obligation to maintain ceases) is living apart from parents or guardians, he may be eligible for supplementary benefit to help him meet essential items of expenditure. For example a young couple both aged 17 living with their baby in rented accommodation may be entitled to help with food, clothing, laundry and household expenses, including the rent. They may also receive assistance with hire purchase payments on necessary capital goods, such as furniture or a cooker. In a society in which financial assistance is available from the state in cases of need is there any real call for a sub-rule of the law of contract intended to facilitate the purchase of "necessities" on credit?

7.22 We think that social security benefits certainly diminish the need for such provision. But the argument is not conclusive. Supplementary benefit is not available to everyone - it is not ordinarily payable to those in full time employment, for example. It is subject to detailed regulations and it is not available simply to all those who have genuine difficulty in making ends meet. Supplementary benefit may indeed cover the majority of those in need but we do not think that this invalidates the making of alternative provision if it can be done simply and economically. Making such provision by means of rules relating either to necessities or to necessities is simple, and costs nothing. It may be helpful to some people. In our view that is sufficient justification for providing it.

7.23 Finally, it is still arguable that there is no evidence that minors experience difficulty in obtaining essential supplies; and that if they cannot obtain them on credit this is not due to the deficiencies in the present doctrine of necessities and would not be remedied by amending the rules relating to necessities, or by substituting a new category of necessities. Those who take that view will no doubt be attracted to this fourth option, namely to abolish necessities and put nothing in their place. This would result in all contracts by a minor, except employment and analogous contracts, being unenforceable against him. If such were the law, an adult who supplied necessities to a minor might then be able to invoke an old common law doctrine akin to that of "agency of necessity". Under the present law this doctrine applies in very restricted circumstances.¹⁵¹ In the context of minors' contracts the doctrine can nowadays only rarely be invoked because of the liability of the minor for necessities.¹⁵² However, in Re Rhodes Cotton L.J. said:¹⁵³

"But wherever necessities are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property."

-
- 151 For the present law in this regard see Goff and Jones, The Law of Restitution, 2nd ed., (1978) pp. 263-276; Bowstead on Agency, 14th ed., (1976) pp. 63-68.
- 152 See Goff and Jones, The Law of Restitution, 2nd ed., (1978) p. 276; see however Re Clabbon [1904] 2 Ch. 465.
- 153 (1890) 44 Ch.D. 94, 105. This was a case concerning lunatics but the principle could apply equally to minors.

It would be possible to apply this doctrine to cases where the minor has been supplied with essential goods or services under a contract otherwise unenforceable against him.

7.24 We do not, however, consider that this would be a satisfactory way of reforming the law relating to necessities. The liability of the minor would be in quasi-contract and problems would arise with regard to the supply of necessities on hire-purchase and with regard to the rendering of necessary services. The particular "necessity" for the supply of the goods and services would have to be strictly proved. Thus, the application of the doctrine of agency of necessity to the type of case now under discussion would, we think, entail undesirable complexity and in our view it would lead to uncertainty.

Provisional conclusion

7.25 On balance we favour the substitution of a new concept of necessities for the existing doctrine of necessities. We think that it is simpler than necessities and more appropriate to modern conditions, and that suppliers will find it easier to understand and apply. If that view is correct then a new concept of necessities will be of greater benefit to minors than necessities are, even though it will cover a narrower range of goods and services. Failing this new category, we would propose that the existing doctrine of necessities be amended as suggested in paragraphs 7.8 to 7.14 above. We invite comments on this conclusion; also on the point raised in paragraph 7.18 above concerning necessities; and on two further matters, namely: whether a wholly executory contract for necessities (or necessities) should be enforceable

against the minor (we provisionally think it should) and whether a minor should be fully liable in damages, as though he were an adult, for all loss resulting from a breach of a contract for necessities (or necessaries) (again we provisionally think it should).

B. Contracts of Employment

Introduction

7.26 Under the present law a contract of employment is binding on a minor if, taken as a whole, it is for his benefit. A minor is also liable under a contract for the exercise of some professional skill or service, but not under a trading contract or a contract for the provision of non-professional services.¹⁵⁴ Thus, where a minor carried on business as a haulage contractor, the contract for the acquisition on hire-purchase terms of a lorry for use in his business was held not to be binding on him;¹⁵⁵ but a minor who was a professional boxer was bound by the terms of the contract by which he had agreed to fight for a purse of £3,000.¹⁵⁶ We must now look in greater detail at the policy considerations relating to contracts of employment, and we shall then consider whether these considerations are relevant to any analogous contracts.

154 See paras. 2.8 and 2.9, above.

155 Mercantile Union Guarantee Corporation Ltd. v. Ball [1937] 2 K.B. 498.

156 Doyle v. White City Stadium [1935] 1 K.B. 110.

Policy considerations: contracts of employment

7.27 The main reason for excepting contracts of employment from the general rule of unenforceability against the minor is that minors have a particular need for such contracts and derive particular benefits from them. Many minors nowadays leave school at the earliest possible moment. In the majority of cases they seek to enter into contracts of employment, which thus can be seen as both a benefit and a need. The present law recognises this by providing that such contracts should be binding upon the minor if, when taken as a whole, they are for his benefit. This reason, or something very much like it, is the apparent rationale for the present law.¹⁵⁷

7.28 A second reason is that the law should not declare to be unenforceable (against one party) a whole class of transactions made daily and regarded as binding by both parties. In our view the law should continue to treat contracts of employment as enforceable against minors. To do otherwise would diverge from commercial reality and common sense, and run the risk of deterring adults from entering into such contracts. Moreover, contracts of employment often contain terms settled by collective bargaining and designed to regulate the relations between the employer and his work-force as a whole. It would be undesirable if these terms were not enforceable against some members of the work-force merely because they were minors.

157 Francesco v. Barnum (1890) 45 Ch.D. 430, 439, per Fry L.J.

Analogous contracts

7.29 The present law recognises that certain contracts in terms of which a minor performs services for an adult are analogous to contracts of employment and the law treats them in the same way as contracts of employment.¹⁵⁸ In our view the third of our three cardinal policy considerations, namely that adults should not be deterred from entering into certain kinds of contracts with minors, which dictates that employment contracts should be binding,¹⁵⁹ applies mutatis mutandis to all contracts of service and to all contracts for the provision of personal services. Accordingly, we provisionally recommend that contracts for the provision of personal services should be treated in the same way as contracts of employment and should generally¹⁶⁰ be binding on the minor. In making this recommendation we consider that we are merely clarifying the present law.

7.30 It will be noted that our provisional recommendation relates only to contracts of employment and contracts for the provision of personal services and not to ordinary trading contracts. It may be argued that all contracts by virtue of which a minor may earn his living (whether they be contracts of employment, contracts for the provision of any type of services or ordinary trading contracts) should be binding on the minor.¹⁶¹ In our view, however, a minor who is trading on his own

158 See para. 2.9, above.

159 See paras. 3.2 to 3.6, above.

160 Provided that the contract, taken as a whole, is for the minor's benefit.

161 This appears to be the law in Scotland. See Walker, The Law of Contracts and related Obligations in Scotland, (1979), para. 5.33.

account is generally carrying on a commercially more hazardous activity than are employees: in the latter case someone else is bearing the direct risk of the business. We have reached the provisional conclusion that, as regards contracts by virtue of which a minor might earn his living other than contracts of employment and contracts for the provision of personal services, the need to protect the minor outweighs the fact that minors may have a particular interest in such contracts and may derive particular benefits from them. Comments are invited.

Ancillary rules which should apply to contracts of employment and contracts for personal services

7.31 Under the present law a term in a contract of employment might be sufficiently harsh to render the contract, even taken as a whole, not for the minor's benefit. In such circumstances the law regards it as unfair that the minor should be bound by the contract and therefore the whole contract is unenforceable against the minor. In our view, the court should be empowered in such situations to allow the minor to enforce the contract against the adult, but without the unfair term. Thus in our view there should be a double test; the first question would be whether the contract, taken as a whole, was for the benefit of the minor. If it were, then the contract would be enforceable, as a whole, both by the minor and against him. If on the other hand the contract were not for the benefit of the minor and the reason for this was that it contained one or more unfair terms then the court should be entitled to strike out those terms, provided that they are severable from the rest of the contract. But the court should not be entitled to re-draft the contract, and the contract as enforced should be substantially the same as the

original contract. The court should of course take into account the interests of the employer before deciding to enforce the contract without the unduly onerous terms.

7.32 A further matter which should be mentioned arises only in relation to contracts of employment and covenants in restraint of trade. Under the present law such a covenant, if otherwise valid, apparently does not vitiate the contract if the minor could not have got similar work on any other terms.¹⁶³ We see no reason why it should. It is not clear whether the fact of minority may be relevant to the reasonableness of the covenant.¹⁶⁴ We consider that minority should be a factor capable of being taken into account in determining the reasonableness of such clauses. It seems to us that such is already the law, but, for the avoidance of doubt, specific provision might be made to that effect.

C. Loans of money

7.33 During our preliminary consultations on this subject¹⁶⁵ it was suggested to us that the problem of loans of money to minors is an important one which constitutes a major mischief. It is said that special rules may be needed to discourage adults from entering

163 Bromley v. Smith [1909] 2 K.B. 235; Leslie v. Fitzpatrick (1877) 3 Q.B.D. 229.

164 Sir W.C. Leng & Co. Ltd. v. Andrews [1909] 1 Ch. 763. Cozens-Hardy M.R., suggested that minority is a relevant factor whereas Fletcher Moulton L.J. left the question open. After recent dicta that "reasonableness" depends in part on fairness - see Schroeder v. Macaulay [1974] 3 All E.R. 616, 623 per Lord Diplock - it seems that minority would be relevant.

165 See para. 1.5, above.

into this type of transaction. Because of these representations we consider here whether there is a sufficient basis for the creation of a separate category of contract with rules which grant the minor greater protection than under our general recommendations, by penalising adults who lend money to minors.

7.34 At the outset it will be convenient to consider what the position would be if no such special category were to be created and if our general recommendations were to apply mutatis mutandis to loans of money by adults to minors. The position in regard to such transactions would be:

- (a) The contract would be unenforceable against the minor and consequently the adult would be unable to recover from the minor either the amount of the loan or any interest owed by the minor to the adult. Our provisional recommendation, that the remedy of restitution available to the adult should be limited to the return of the property which was the subject matter of the contract,¹⁶⁶ would mean in practice that the adult could not recover, in an action based on restitution, the money which he had lent to a minor. Probably the loan would not have been made in cash, and if it had been, it is unlikely to be possible to restore the specific bank notes and coins.

166 See paras. 6.5 to 6.11, above.

(b) The minor would not be able to recover from the adult any money which he had actually paid back to the adult or any interest which he had paid in respect of the loan, unless he were able to have the transaction re-opened by the court. But this he might be able to do: under the Consumer Credit Act 1974 the court has wide powers to re-open extortionate credit bargains,¹⁶⁷ and one of the factors to be considered by the court in determining whether or not a particular credit bargain is extortionate is the age of the debtor.¹⁶⁸ In addition, in Part VIII of this Working Paper we make a limited provisional recommendation with regard to the re-opening of unconscionable transactions where the adult has taken advantage of the minor. It seems to us that this provisional recommendation is likely to cover many of the instances where an adult has lent money to a minor at an extortionate rate of interest but the transaction does not fall within the provisions of the Consumer Credit Act 1974 (for example, because it is a private, and not a commercial, loan).

167 Sects. 137-140.

168 Sect. 138(2), (3). Sect. 50 of the Consumer Credit Act 1974 provides the minor with further protection: under that section soliciting a minor, inter alia, to borrow money is an offence. We do not propose that this provision should be altered. See also s. 114(2) of the Consumer Credit Act 1974 (not yet in force) which makes it an offence for a person to take an article in pawn from anyone whom he knows to be a minor.

7.35 Our provisional view is that an adult who might wish to lend money to minors would, under our proposals, be in a sufficiently disadvantageous position to discourage him from doing so. It seems also that a minor who borrows money is adequately protected, not only by our provisional recommendations, but also by the Consumer Credit Act 1974. We have therefore concluded that it is unnecessary to create further special rules for loans by adults to minors.

7.36 Moreover, our preliminary investigations have suggested¹⁶⁹ that the general reluctance to grant credit to minors is at its strongest when the credit takes the form of a loan of money. In view, however, of the comments which were made to us we will examine briefly alternative ways of deterring the adult further or of giving the minor greater protection.

7.37 One proposal which was suggested to us is that the lending of money by an adult to a minor should be a criminal offence. We see no justification for this proposal. Loans to minors are rarely made commercially; and when made in a domestic setting would, presumably, be exempt from the proposal.

7.38 Another possibility would be a provision by which a minor would be entitled at any time to repudiate the contract, recover money already paid under the contract (any repayments of the loan and any interest already paid), and make no further payments. The main purpose of a provision of this type would be to deter adults from lending money to minors rather than to protect the minor. If indeed loans by adults to minors

169 See paras. 1.6 to 1.9, above.

constituted a major mischief then some might think that a provision of this type would be justified, but, for the reasons we have given above, we find it difficult to accept that loans pose so serious a problem. We would welcome comments both as to whether the lending of money to minors does constitute a major mischief in practice and as to whether any greater protection is needed than that which would be provided if our provisional recommendations were implemented.

D. Loans for the purpose of acquiring necessities

7.39 It will be recalled that under the present law loans for the purpose of acquiring necessities are enforceable against a minor if the purpose of the loan was to enable the minor to purchase necessities and he in fact did so.¹⁷⁰ It follows, in our view, that the present law in regard to loans for necessities should apply to loans for the new category of necessities, should it be adopted. Accordingly we make the provisional recommendation that an adult should be entitled to recover money lent to a minor for the purpose of enabling the minor to purchase necessities, and so spent. Where money is lent for that purpose but is in fact spent otherwise, it is for consideration whether the present law should be continued. We think not. We propose that the lender should be entitled to recover the amount lent expressly for the purchase of necessities (or necessities) whether or not it was so spent. We arrive at this view for the same reasons that lead us to propose that, if the present category of necessities is to be retained, the supplier should be entitled to rely on information provided by the minor.¹⁷¹ The same principle should hold good in

170 See para. 2.17, above.

171 See para. 7.13, above.

relation to information from the minor that he needs the money in order to buy goods which are necessities or necessities.

E. Contracts which are binding until repudiated

7.40 In our discussion of the present law we considered the class of contracts which are binding on a minor unless and until he repudiates them before, or within a reasonable time after, attaining his majority.¹⁷² We concluded that it was difficult to discern any principle underlying their exception from the common law rule that contracts are generally unenforceable against a minor. Whether or not there ever was a justification for this category of contracts we do not think that the contracts which comprise the category are of sufficient importance today to warrant their continued exception from the general rule. In any case, the reduction in the age of majority to 18 makes it less likely that a minor will enter into any of these contracts. We provisionally recommend, therefore, that there be no separate category of contracts binding on the minor until repudiated by him.

172 Paras. 2.10 to 2.12, above.

PART VIII : RE-OPENING OF EXECUTED CONTRACTS

Introduction

8.1 The protection afforded to minors by the law works in two ways: it enables a minor to refuse with impunity to carry out what he has agreed to do; and if he does perform what he has agreed to do, but does it badly so that the other party suffers damage, it gives him immunity from the consequences. (Of course, we are not speaking here of contracts of employment or for necessities.) The law does not prevent a minor from making contracts and abiding by them if he so decides, and where the minor has in fact performed what he has agreed to do, and has done it satisfactorily, it seems that the law offers him no opportunity to re-open the matter if his bargain should turn out to be less favourable than he expected. Indeed, except for one possibility which we mention below, it appears to be the law¹⁷³ that, however disadvantageous a contract may be for a minor, and whether before it was performed it was void, voidable or merely unenforceable, once both sides have done what they agreed to do the minor can no longer resale. He cannot, merely on the ground of his minority, reclaim money he has paid, or recover property he has transferred, or require the other party to take back what he (the minor) has received, under the contract.

8.2 Where a minor agrees, now, to do something in the future the law therefore offers him protection. At any time before performance is due he may simply refuse to go on. But most contracts which a minor may make

173 It is necessary to be tentative, since some questions are still open and different views may be held on them: see footnote 56, above.

will not be of that kind. They are far more likely to be cash transactions, mainly contracts for the purchase of goods or services, where the interval between making and performing the contract allows no adequate time for the minor to reflect on his bargain. The law's protection may be thought to be of little use to a minor in this situation. We have accordingly considered whether protection should be extended to permit the re-opening of executed contracts in order to relieve the minor of what may turn out to be unfavourable consequences of his performed obligations.

The case for reform

8.3 We think that there is in practice less need to protect a minor from his executed contracts than from those which have yet to be performed. It may be that the minor is not less likely to strike a poor bargain for cash than for credit (where he can get it), and he may repent of his actions as easily after performance of the contract as before. But most cash transactions will probably be small ones from which no great hardship will result. A minor is unlikely to suffer much from the loss of a few pounds. Where the cash transaction is sizeable the minor will probably have saved for the purchase over a time, sufficient to allow reflection on its advisability. On the whole we do not think that large purchases will be made on whim; and it is precisely where the minor does commit himself with too little thought that he is most in need of protection.

8.4 Nevertheless there will inevitably be some cases where the minor makes a rash bargain with too little consideration beforehand or allows himself to be persuaded into a disadvantageous purchase, and others where, notwithstanding prior deliberation, things do not turn out

as he had expected. In Pearce v. Brain,¹⁷⁴ for example:

the plaintiff who was a minor exchanged his motorcycle and sidecar for the defendant's second-hand motor car. For the purposes of the exchange each article was valued (by the parties) at thirty pounds.¹⁷⁵ Four days after the exchange the car broke down owing to a defective back axle. The plaintiff sought to repudiate the contract on the ground that he was a minor, and to recover back his motorcycle in return for the car.

It was found as a fact that the motor car was worth only £15, notwithstanding its valuation by the parties. The court refused to allow the plaintiff to rescind the contract. Although the contract was "absolutely void" under the Infants Relief Act 1874, property transferred under such a transaction could not be recovered unless there had been a total failure of consideration.¹⁷⁶ The plaintiff had enjoyed the use of the motor car for five days and there had accordingly been no such total failure. Furthermore because of the breakdown the plaintiff was unable to return the car in the same condition as he had received it even though the defect which caused the breakdown had been in existence at the time of the contract. The transaction seems clearly to have caused hardship to the plaintiff.

8.5 If, then, there may be need for a power to re-open executed contracts, in which circumstances ought it to be available? It is arguable that, if a contract could have been repudiated by a minor at any time before it was performed, it ought logically to be open for review at any time afterwards. But it is one thing to

174 [1929] 2 K.B. 310.

175 Worth, at today's prices, approximately £390.

176 Valentini v. Canali (1889) 24 Q.B.D. 166.

frustrate people's expectations; it is another to disturb the basis of concluded transactions. We think that it does not follow that just because a particular transaction is not legally enforceable before it is performed it may therefore be undone after performance. If executed transactions are to be re-openable it must accordingly be on some basis other than their mere unenforceability in their executory state. The answer to the question posed above depends, in our view, on an examination of the possible circumstances in which a power of re-opening might be required.

8.6 The law of minors' contracts is intended to protect minors from the consequences of their immaturity; specifically, their lack of knowledge and experience of the world. This lack may, it seems to us, manifest itself in one of four ways. First, a minor might be exploited by an unscrupulous adult and be induced to make a contract which a sensible adult would probably not have made. For example, he may be persuaded to buy a music centre at a cost well in excess of its true value, or to purchase a second-hand motorcycle which is grossly defective. Secondly, he might squander his money on a purchase, perfectly fair in itself, which he can afford to make - in that he has sufficient resources for it - but which, given his circumstances, is an improvident waste of those resources. For example, he might receive £100 as a birthday present and spend it on a new exhaust system for his motorcycle when the existing one is perfectly serviceable but quieter: and at the same time he may badly need a suit or some textbooks for a course. Thirdly, he might make what appears to be a sensible contract on fair terms but in the event turns out to be unfortunate in its results. Had he been more experienced he might have foreseen that outcome and

guarded against it. Thus in a situation such as that which arose in Pearce v. Brain¹⁷⁷ a more experienced plaintiff might have had the car examined before completing the exchange. Fourthly, he might commit his available resources to a particular transaction, fair in itself and not beyond his capacity to sustain, but find afterwards that he would rather have done something different which he is no longer able to do because he no longer has the resources. This is the simple case of regretting one purchase because having made it he cannot then buy something else which he decides he would rather have had. To vary the example, he might have sold an article which he afterwards wishes he still possessed, or finds he could have sold elsewhere for more money.

Proposals for reform

8.7 Lack of knowledge and experience might lead to any of these results. It does not follow however that a minor is equally in need of protection from all of them. In our view the fourth possibility mentioned above does not warrant the protection of the law against it. We think that mere inconvenience in that sense is part of the minor's learning process: it does not call for legal intervention. In any case such protection could be afforded only by allowing a minor to undo any conceivable transaction he might enter into. We do not think that such sweeping powers would commend themselves to many.

8.8 The third case poses more difficult problems. In Pearce v. Brain the defendant had given no warranties regarding the state of his motor car (nor could any term as to its quality be implied), and there was no suggestion that he had been in any way fraudulent.

177 [1929] 2 K.B. 310; see para. 8.4, above.

He may, or may not, have known of the car's true condition. If he did know, ought he to have been under a duty to point it out to the plaintiff? We can see no reason why, simply because the buyer is a minor, a seller should be under a legal duty to point out defects in the article sold. The maxim caveat emptor still, we think, applies generally to sales notwithstanding that statutory provisions have done much in recent times to mitigate its rigour. We see no reason to depart from this principle only in sales made by an adult to a minor. If this view is accepted it is difficult to justify the re-opening of an executed contract simply because the minor has failed to spot something to his disadvantage, which the adult party might have pointed out to him. Where the adult himself was unaware of the potential disadvantage it would seem additionally hard to make him bear the burden of the minor's misfortune. Accordingly, in our provisional view, where an adult has taken no advantage of a minor, and has not been fraudulent, the contract should not be subject to review after it has been performed merely because it turns out to the minor's disadvantage, even if a more experienced person might not have entered into that contract. Our view would be different if the adult deliberately took advantage of the minor, persuaded the minor into making the contract against the minor's own hesitations or better judgment or covered up (by means short of fraud) the extent of the likely disadvantage to the minor if he went ahead. Such conduct is discussed in paragraphs 8.12 to 8.14, below.

8.9 Where, as in the second case, the minor has been improvident the argument for a power of re-opening would appear to be stronger. In our view however it founders on the difficulties which a general power would pose for the adult party to the transaction. It will be

remembered that one of the principles of the law of minors' contracts is that the adult party should, so far as possible, be treated fairly at the same time as the minor is protected.¹⁷⁸ It is not always easy to achieve a proper balance between this principle and the primary principle of protecting the minor. However, we think that to permit re-opening of executed contracts on the ground simply of improvidence would operate unduly to penalise the adult. The adult cannot be expected to know the circumstances of a minor with whom he is dealing, but whether or not a transaction is improvident may depend on the total resources available to the minor. A £100 transaction may be trivial to the son of a millionaire, but a considerable sum to another whose widowed mother is struggling to bring up him and two others on a barely adequate income. It would be unrealistic to require the adult shopkeeper to inquire of the minor whether he could afford the prospective purchase. There is to be considered not only the problem of verifying the answer (which is almost bound to be in the affirmative)¹⁷⁹ but also the position of, for example, the salesman in a busy electronics and hi-fi discount store on a Saturday afternoon with a crowd of customers queuing behind a seventeen-year old schoolboy whom the salesman is quizzing as to his financial resources. Yet if the adult has taken no advantage of the minor, but sold him goods on the same - perfectly fair - terms that he would offer to anyone else, it would seem unjust to allow the minor to set the transaction aside afterwards because, unknown to the adult, the minor has suffered hardship as a result of it.

178 See paras. 3.2 to 3.6, above.

179 We are here considering only cash sales, where the machinery for ascertaining the minor's resources, which exists for credit sales, is not available.

8.10 It may be objected that possible injustice to the adult is not enough on its own to justify refusing a re-opening power in this situation. Any protection for a minor must inevitably involve some risk of injustice to an adult. But in this case there is more. The result of a power to set aside executed contracts on the ground that the minor has been improvident and consequently suffered hardship is likely, so far as the adult party is concerned, to be little different in practice from a power to re-open on the ground merely that the minor had found the transaction to be inconvenient to him; the reason being that the adult would have no means of knowing the minor's circumstances. Any minor could, after repenting of a bargain, or growing bored with his acquisition, threaten the supplier with proceedings if the bargain were not rescinded or varied. No shopkeeper could be certain that an apparently concluded transaction with a minor was in fact final, and there would be nothing he could effectively do to ensure that it was. We think that the law ought not to foster a state of uncertainty of this kind. Should it do so, one possible effect might be to make some shopkeepers unwilling to deal with minors at all, except perhaps for small transactions. We do not think that this would be in minors' own best interests.

8.11 The difficulties in the way of a general re-opening power on the ground of hardship would be mitigated by confining it to transactions exceeding a certain sum and by requiring it to be exercised within a stated time from the completion of the contract. The adult party would then be sure of finality for transactions below the limit, or after the expiration of the due time. But limits of this kind are inevitably arbitrary, and borderline cases would occur which could hardly be justified by policy considerations. In particular a

money limit would be difficult to work: as we have pointed out above, a sum which might be meaningless to one minor could be ruinous to another. The effect might be to withhold protection from those who would most need it. With the passage of time the money limit would probably become too low and it would have constantly to be updated; in the meantime it might become inconvenient and cause hardship. Inevitably there would be some uncertainty from time to time about what the limit was. In our view a re-opening power without limit would effectively be unworkable, but any limits would be arbitrary and would inevitably produce some odd results. The existence of limits would certainly reduce the potential injustice to the adult party which this power could cause, but it would not eliminate it. Our provisional conclusion therefore is that there should be no power to re-open executed contracts solely on the ground of improvidence leading to hardship on the part of the minor.

8.12 There remains to be considered the first of the possible situations mentioned in paragraph 8.6, above, in which a power of re-opening might be called for - namely, where the adult party has exploited the minor's lack of knowledge and experience and induced him to enter a contract which a more mature person probably would not have made. In this case we are not faced with the difficulty that the adult party, through no fault of his own and for reasons that he could not know at the relevant time, is deprived of the bargain he thought he had secured. Our hypothesis here is that the adult has himself acted improperly and he cannot therefore complain if the contract is set aside. In our view there is here a stronger case for the intervention of the law. The minor can be protected without treating the adult party unfairly, and

without inhibiting dealings between adult and minor conducted on an honest and reasonable basis. If all three of the principles of the law of minors' contracts¹⁸⁰ can in this instance be accommodated there would seem to be no reason not to make some appropriate provision.

8.13 It is indeed likely that the law does already offer a remedy in this case. This is the possibility referred to in paragraph 8.1 above. There is an equitable doctrine extending back to the end of the eighteenth century which suggests that equity may avoid a contract if the parties to it did not meet on equal terms and one party has taken advantage of the circumstances of the other.¹⁸¹ In Evans v. Llewellyn,¹⁸² the earliest of these cases:

the defendant had persuaded the plaintiff to sell him a freehold estate which the plaintiff had inherited from his sister, the defendant's deceased wife. The estate was worth £1,700 but the defendant offered to pay only 200 guineas for it. The plaintiff, who was impoverished, accepted the sum, though advised of his rights and of all the relevant circumstances. Subsequently he sought to have the sale set aside.

The court found that there had been no fraud on the part of the defendant, but the plaintiff was poor and uneducated and in need of the money offered to him. He had had time to reflect on the transaction even though fully advised of his rights. The court avoided the sale.

180 See paras. 3.2 to 3.6, above.

181 See Evans v. Llewellyn (1787) 1 Cox C.C. 333, 29 E.R. 1191; Wood v. Abrey (1818) 3 Madd. 417, 56 E.R. 558; O'Rorke v. Bolingbroke (1877) 2 App. Cas. 814, 823; Fry v. Lane (1888) 40 Ch.D. 312, 321; Lloyds Bank v. Bundy [1975] Q.B. 326, 339.

182 (1787) 1 Cox C.C. 333, 29 E.R. 1191.

In Wood v. Abrey the principle behind this decision was stated as follows:

"... a Court of Equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and if advantage was taken of that distress, it will avoid the contract."¹⁸³

8.14 There appears to be no case in this line of authority in which a contract with a minor was set aside on the ground that advantage had been taken of his lack of knowledge and experience. Nevertheless we think that, if it could be shown in any particular contract that a minor had made a bad bargain and did so because the adult had taken advantage of his immaturity, the court might well set it aside under the existing law. We certainly think that there should be some such power if it does not already exist, and for the avoidance of doubt we would provisionally favour specific statutory provision. Even in this case, however, we think the court should be wary of upsetting concluded transactions. Accordingly in our provisional view the exercise of the power should be subject to conditions, and should not be automatically available in every case where a minor can allege that the adult party has taken advantage of him. We think, first, that the court must be satisfied that the adult party induced the minor to make the contract. Secondly, the inducement, while not fraudulent, must have consisted in some way in the adult's taking advantage of the minor's immaturity, his lack of years, experience and knowledge of the world, though it should not matter that the inducement might equally have persuaded an undiscerning adult. Finally, the bargain must have resulted in hardship to the minor. It should be for the

183 (1818) 3 Madd. 417, 423; 56 E.R. 558, 560.

minor to establish that all these conditions have been met. In making any order, the court should have power to adjust the rights of the parties, having regard to the minor's ability to restore the subject matter of the contract.

Conclusion

8.15 We provisionally recommend that there should be no power to re-open executed contracts merely on the ground that the minor has acted improvidently or has suffered hardship by reason of the contract. But if the adult, by taking advantage of the minor's lack of knowledge and experience, has induced a transaction which has caused hardship to the minor, the court should be able to set the contract aside. This may already be the law, and one possible course is to leave the existing law to supply the necessary power. But for the avoidance of doubt we provisionally favour specific statutory provision to this effect. We think the burden of proving unconscionable conduct on the part of the adult should be on the minor. Comments are invited.

PART IX : RATIFICATION

The present law

9.1 Before the Infants Relief Act 1874 contracts which under the common law were unenforceable against a minor, or voidable at his option, could be ratified by him after majority. Ratification had the effect of binding the former minor to the performance of his contract as if he had made the contract as an adult. No consideration was necessary to support a ratification: it was a unilateral act. Although the precise legal nature of such a ratification seems not to have been fully worked out,¹⁸⁴ the manner of its operation was succinctly stated by Lindley J. in Ditcham v. Worrall:¹⁸⁵

"... a ratification is simply an intentional recognition of some previous promise made by [the minor], and an adoption and confirmation of such promise with the intention of making it binding. In other words, a ratification of a voidable promise is a recognition of it and an election not to avoid it but to be bound by it."

9.2 The Infants Relief Act put an end to ratification of this kind. Section 2 of the Act provides that:

No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

184 See Williams v. Moor (1843) 11 M. & W. 256, 263, 152 E.R. 798, 801-802. But see Harris v. Wall (1847) 1 Ex. 122, 130, 154 E.R. 51, 55, per Rolfe B.

185 (1880) 5 C.P.D. 410, 412-413.

All contracts, of whatever kind, made during infancy are, since 1874, incapable of being ratified.

9.3 But a new contract, made for good consideration after coming of age, notwithstanding that it may do the same thing as intended by an earlier contract made during minority, is not a ratification of that earlier contract. This is so notwithstanding that the Act expressly envisages that there might be some new consideration for a ratification. Apparently new consideration is not in itself enough to distinguish ratification from a new contract. It would seem that a ratification looks back to the past, while a new contract does not, and a purported ratification, if it contains new terms and stipulations is, if consideration is present, to that extent a new contract.¹⁸⁶ Accordingly a minor may after he comes of age make a new contract, with the same person with whom he made the earlier one, to do the same thing as promised by the earlier one, and the new contract will be enforceable in the same way as any contract made between adults, as though the earlier one had never been made.¹⁸⁷ What acts constitute a new contract as distinct from a mere ratification of an old one is a question of fact. It is sometimes a nicely balanced question on which differing

186 Ditcham v. Worrall (1880) 5 C.P.D. 410, 412-413 per Lindley L.J. This case concerned breach of promise of marriage, a cause of action abolished by the Law Reform (Miscellaneous Provisions) Act 1970, s. 1(1). Nevertheless the principle of law remains applicable.

187 Ditcham v. Worrall above; Re Foulkes (1893) 69 L.T. 183 (another breach of promise case). But the Betting and Loans (Infants) Act 1892, s. 5, prohibits any new contract to repay an existing loan.

opinions are possible and equally valid.¹⁸⁸ Not unnaturally in these circumstances, it also sometimes leads to results which are fortuitous and artificial.¹⁸⁹ Nevertheless, if a new contract can be established it may be enforced however fine the line which separates it from a mere repetition of a previous promise which is void or voidable, or simply unenforceable, for having been made during minority.¹⁹⁰

Defects of the present law

9.4 Some of the defects in the present law are apparent from the previous paragraph. Ratifications after majority of promises made during minority are ineffective, but new contracts to do the very same thing are not. This distinction, though clear in theory, is in practice obscure. Thus in practice the working of the law is uncertain.

9.5 The law would be more certain if it permitted a minor effectively to ratify after coming of age his contracts made during minority, as he was able to do before the Infants Relief Act 1874. Equally the law would be more certain if it prohibited not only ratification of contracts

188 See, for example, Ditcham v. Morrall, above.

189 Compare, for example, Coxhead v. Mullis (1878) 3 C.P.D. 439 with Northcote v. Doughty (1879) 4 C.P.D. 385.

190 It is suggested in Cheshire and Fifoot's Law of Contract 10th ed., (1981) p. 394, that, on the wording of s.2, a new contract to pay a debt contracted during minority is not enforceable. Treitel, The Law of Contract, 5th ed., (1979) pp. 431-432 suggests otherwise. See also Treitel: "The Infants Relief Act, 1874" (1957) 73 L.Q.R. 194- 210.

made during minority, but also new contracts to do the same thing. Any such provision would, however, be an interference with the capacity of adults to enter into contracts. Nevertheless, it is worth observing that, if the purpose of section 2 of the 1874 Act was to prevent minors from being pressured into making new promises after they come of age, rendering enforceable what was previously unenforceable, it is not easy to see how this policy is secured if the Act does not also strike at new contracts by which the same might be done for a trifling additional consideration.¹⁹¹ We shall return to this point in a moment.

Proposals for reform

9.6 The view of the Latey Committee on this subject was expressed as follows:

"We have received no evidence to suggest that persons of full age still need the protection afforded them by section 2 of the Infants Relief Act 1874. We are quite clear that while protection against contractual liability is needed by persons under the age of majority there is no justification for protecting adults against the consequences of fresh contracts or of ratification. We have already proposed the repeal of the Infants Relief Act 1874. We think that no provision in the nature of section 2 of that Act is needed in the law."¹⁹²

9.7 The Committee proposed as a general principle that no contracts made by a minor should be binding on him.¹⁹³

191 It seems that the Bill's sponsor thought that the Bill would effectively render new contracts unenforceable: see Hansard (1874) vol. 219, col. 1668 (H.L.).

192 (1967) Cmnd. 3342, para. 339.

193 Ibid., para. 290.

If such a principle were implemented by legislation, and the Infants Relief Act repealed as part of that process, we do not think it would necessarily follow automatically that thereafter a minor could, after coming of age, ratify his contracts made during minority. Certainly the common law permitted this before 1874, and even permitted ratification to be merely verbal, until the Statute of Frauds Amendment Act 1828 required that it be made in writing. It is not clear, however, that the old common law would revive simply on repeal of the 1874 Act. In our view if ratification is to be permitted in any reformed law of minors' contracts, it would be safer to provide specifically for it, and for the manner in which it is to be done.

9.8 We too have proposed the repeal of the Infants Relief Act,¹⁹⁴ and we have considered whether or not it is desirable to provide expressly that contracts may be ratified. Our provisional view is that it is not desirable. We think a minor should not be permitted to ratify after coming of age a contract made during his minority. Indeed, we would go further than this. While we do not think it is practicable to propose that an adult, albeit one who has only just come of age, should not be permitted to enter into a new contract binding himself to perform an act which he agreed to do during his minority, we would, in any action brought against him on any such contract, allow him to plead that the effect of the contract was to render enforceable an obligation previously unenforceable because of his minority; that its terms are unfair; and that he should therefore be relieved in whole or in part from its performance. It would be for the court to determine

194 See para. 6.1, above.

whether the contract was a contract of that kind and to what extent it should be enforced against the former minor.¹⁹⁵

9.9 In making this proposal we are conscious that we are differing from the view of the Latey Committee. We do so because it does not seem to us realistic to afford to a minor legal protection against the consequences of his immaturity and inexperience and yet to allow that protection to be withdrawn retrospectively immediately he comes of age. A minor may choose voluntarily to perform his contracts even while he is a minor. Similarly, he may after he comes of age choose to do that which he agreed to do while he was a minor. For example, having entered into a hire purchase agreement during his minority, he may continue to make the payments under it after he comes of age. No law can, or should attempt to, prevent this. But this is not at all the same thing as to permit a former minor to assume a legally binding obligation to do that which he was not previously bound to do. We think that to allow this would be to subject young adults to the obvious risk of pressure from creditors (and others) which in some cases might negate the whole purpose of the law which previously protected him. Comments are invited on our proposal.

195 The Betting and Loans (Infants) Act 1892, s. 5 need not be affected. This effectively precludes a new contract for the repayment of an existing loan contracted during minority.

PART X : VALIDATION

Introduction

10.1 An adult who trades with, lends money to, or supplies non-necessary goods and services to a minor is unable to obtain the security of a binding contract with him. On the other hand, a minor is bound by certain contracts provided they are overall for his benefit.¹⁹⁶ These contracts are mainly of the type that enable a minor to earn his living, but they do not include trading contracts. Our proposal is that there should be a general rule that contracts entered into by a minor should be unenforceable against him,¹⁹⁷ but that this general rule should not apply to contracts for necessities,¹⁹⁸ or to contracts of employment.¹⁹⁹ Thus an adult who lends money or supplies goods and services, other than necessities, to a minor, or enters into a trading contract with him, would still not have the security of a binding contract. Moreover, in order to enforce a contract of employment or an analogous contract the adult would, under our proposals, have to prove that the contract was for the minor's benefit.²⁰⁰ It may be that the parties would prefer to see these matters determined at the outset, rather than have them remain uncertain and unresolved until a dispute arose. By an effective validation procedure the adult could be sure of the minor's obligation to perform the contract. It is with the proposal that such a procedure be provided that we are now concerned.

196 See paras. 2.2-2.9, above.

197 See para. 6.1, above.

198 See paras. 7.1-7.25, above.

199 See paras. 7.26-7.29, above.

200 See para. 7.31, above.

10.2 A validation procedure is a means of rendering a contract, which is normally unenforceable, wholly or in part, against the minor, fully binding on him, so placing the minor in the same contractual position as if he were an adult. There are two main ways in which a validation procedure can operate:²⁰¹

- (a) by judicial conferment upon the minor of either full contractual capacity or a limited contractual capacity;
- (b) by the validation (judicial or otherwise) of particular contracts.

We shall deal with each of these procedures in turn.

A. Judicial conferment of contractual capacity

10.3 Under this procedure the court would be empowered to grant a particular minor full contractual capacity²⁰² so that all contracts made by him thereafter would be as valid and enforceable as if he were of full age. The attraction of this proposal is that it would enable a mature seventeen-year old to enter into binding transactions

201 These two procedures are not mutually exclusive: in New South Wales there is provision for the granting of general or limited capacity and for the approval of particular contracts - see Appendix, paras. (17) and (18), below.

202 The court would also be empowered to grant a particular minor limited contractual capacity. In our view the considerations relating to the grant of limited capacity are the same as those relating to the grant of full contractual capacity and for convenience we shall refer only to the judicial grant of full contractual capacity.

without the necessity of seeking the court's approval each time. However, in our view such a procedure is open to powerful objections. As the Latey Committee pointed out,²⁰³ it would be difficult to determine what principles should guide the court in deciding whether to grant contractual emancipation to a minor. One of the considerations, possibly the main one, would have to be the maturity of judgment of the minor in question. It is doubtful whether this could be accurately gauged at a single court hearing. Our provisional view is that this kind of procedure would not be satisfactory, and would probably not justify its existence if it were introduced. The potential utility of such a procedure has been much diminished by the reduction of the age of majority to 18.

B. Validation of particular contracts

(i) Introduction

10.4 Under this type of procedure the courts would have the power to approve a particular contract, before or at the time it is made, thereby rendering the contract fully binding on the minor concerned. The Latey Committee considered such a procedure but made no recommendation in respect of it. They said:

"... some of us are attracted by the idea of a power enabling the courts to approve a particular transaction which would then become binding on the [minor] concerned. We recommend later the repeal of the Infants Settlements Act 1855: but a wider power of this nature - perhaps without any age

203 (1967) Cmnd. 3342, para. 276.

limit, since on the whole judges are to be trusted - might be a useful last resort, even if it were seldom used."²⁰⁴

10.5 A procedure for the prior judicial approval of contracts or other arrangements by or on behalf of minors is not a novel concept in English law. Examples are the powers of the court provided by the Variation of Trusts Act 1958²⁰⁵ and the common law rule that the compromise of an action to which a minor is a party cannot be effected without the sanction of the court in which the action is pending.²⁰⁶ Until 1970 the Chancery Division of the High Court was able to validate by its approval marriage settlements by male minors of 20 and females of 17.²⁰⁷

10.6 There are two situations in which a validation procedure of this type might be useful: first, in relation to small transactions which a minor might wish to enter into but which would fall within the general rule as to unenforceability; second, in relation to very large and complex transactions such as, for example, a young pop-star might wish to enter into. In our view different policy considerations apply in each of these two situations and a different validation procedure might be appropriate in each case. We shall therefore deal with each situation in turn.

204 (1967) Cmnd. 3342, para. 276. The Infants Settlements Act 1855 has been repealed: see footnote 207, below.

205 The Act empowers the High Court to approve arrangements whereby trusts in which minors are interested are varied or revoked. In such cases, of course, the benefit to the minor is capable of evaluation in terms of cash and is fairly easily calculable.

206 This rule has been embodied in rules of court: see R.S.C., O. 80, rr. 10-11; County Court Rules 1936, O. 5, r. 19(1). (C.C.R. 1981, O. 10, r. 10; in force from 1.9.1982)

207 Infants Settlements Act 1855, repealed as from 1st January 1970 by the Family Law Reform Act 1969.

(ii) Validation of small transactions

10.7 The types of contract we are concerned with here are the purchase of non-necessities on credit (if the minor can get credit) and the supply by the minor of goods or services otherwise than in the course of employment.²⁰⁸ Whether or not a particular contract constitutes a "small transaction" would necessarily depend on an arbitrary limit. Illustrations of the sort of contract we have in mind as falling within the category of "small transactions" are the purchase by a minor of a music centre on credit or an agreement by a schoolboy to do the gardening for an adult every Saturday morning.

10.8 Such a validation procedure would be of use only if, as a matter of practice, adults would contract with the minor if the contract were validated but not otherwise; and if, as a matter of policy, it is desirable that such contracts when validated should be fully binding on the minor. In our view such a procedure of validation by a court would rarely be used because the time and cost would be incommensurate with the value of the contract. We think that similar considerations would apply even to a procedure whereby contracts could be validated less formally by some suitable local official.

208 Under our provisional recommendations, these contracts would fall within the general rule of unenforceability: see para. 6.1 and Part VII, above.

10.9 Another alternative would be to have a procedure whereby the small transaction could be validated by the minor's parents or guardian.²⁰⁹ The Latey Committee said:

"... None of us were persuaded that contracts should become binding on [minors] by virtue of the consent of a parent or guardian."²¹⁰

We agree with this attitude. First, there may be clashes of interest between parents and their children. We think it undesirable to put parents in the position where they were needed to validate certain transactions, because to do so might well lead to an increase in tensions within the family. Secondly, there would be a danger that parents might validate particular contracts without considering the matter sufficiently while not they, but their children, would become liable under the contract. We do not consider it desirable as a matter of policy that a minor should become potentially liable for substantial damages just because a parent or guardian has approved the contract.

10.10 In addition, we think that in many cases the fact that the parent has validated, or is willing to validate, the contract would not have the effect of persuading the

209 In Scotland a minor's curator (usually his father) - if he has one - may consent to the minor's entering into the contract. If he does so consent, the contract is binding (and indeed if the minor has a curator and contracts without his consent the contract may be unenforceable). But even with the curator's consent, the contract may be set aside if the adult has taken gross advantage of the minor's immaturity: see Walker, The Law of Contracts and related obligations in Scotland (1979) paras. 5.22-5.34.

210 (1967) Cmd. 3342, para. 276.

adult to deal with the minor. The adult might well deal with the minor only if there were a guarantee because the adult would then himself be liable.²¹¹

10.11 For the reasons we have given above, our provisional conclusion is that a validation procedure in respect of small transactions is neither necessary nor desirable.

(iii) Validation of large transactions

10.12 The kinds of contract which we are considering here are those which a young pop-star, entertainer or sportsman might enter into. Such contracts are likely to be complex, involving large sums of money and resulting in long term commitments for the minor. We have provisionally recommended²¹² that contracts of employment and analogous contracts should be fully binding on the minor if they are for the minor's benefit. The types of large transaction that we are considering here would almost always be either a contract of employment or an analogous contract. A validation procedure would be of use chiefly to enable the adult to ascertain before the contract is entered into whether or not it would be for the minor's benefit and whether or not it would be fully binding on the minor.

10.13 Because the contracts under consideration are likely to be complex and to involve large sums of money it

211 See paras. 11.10 to 11.13, below, for a discussion of guarantees and indemnities.

212 See paras. 7.26 to 7.31, above.

seems to us wholly inappropriate that a minor's parent or guardian or a local official should be entitled to validate them. Our provisional view is, therefore, that if a validation procedure were to be introduced in respect of large transactions the power of validation should reside in the courts. We think that the appropriate court would be the High Court.

10.14 The issue before the court on an application for validation would be whether the particular contract was for the benefit of the minor. Since the parties to the contract will already have concluded their negotiations, both the minor and the adult would, in most cases, invite the court to approve the contract. In many cases, no doubt, the court would be able to assess the fairness of what was proposed. The court would probably be concerned to see that the terms were reasonable, that the minor was not being exploited and that proper provision was being made for the care and safeguarding of money payable to the minor under the contract, whether by investment in suitable trustee securities or otherwise.²¹³

10.15 Under the present law there is no procedure for validation. Its absence does not seem to cause problems. We do not think that the provisional recommendations we have made in this Working Paper would themselves create difficulties giving rise to the need for such a procedure. Our provisional conclusion is that there is no need for a validation procedure in respect of large transactions. Comments on this issue would be welcome.

213 See California Civil Code, ss. 36a and b, at Appendix, paras. (37) and (38), below.

Developments in other common law jurisdictions

10.16 Other common law jurisdictions²¹⁴ have enacted, or proposed, that their courts should be empowered either to grant full contractual capacity to a particular minor or to pronounce valid and enforceable a particular minor's contract before or at the time it is made. We are not persuaded by the existence of those provisions or proposals that we need any similar provisions in this country.

Acquisition of contractual capacity on marriage

10.17 It is convenient at this point to consider the question whether a minor should attain full contractual capacity on marriage. This is a different question from validation of contracts, whether generally or of particular contracts. The effect of the marriage would be to confer automatically on a minor the immediate capacity to contract as if he were an adult. Such provision is made by the New Zealand Minors' Contracts Act 1969 as amended by similar Acts of 1970, 1971 and 1974.²¹⁵ Should similar provision be made under our law?

214 See Appendix, where we outline the various reforms of the law of minors' contracts which have either been proposed or implemented in other common law jurisdictions. We have confined ourselves to an examination of developments in common law jurisdictions because in civil law jurisdictions the validation procedures cannot be isolated from the whole infra-structure of family law. Comparisons with our system of law would therefore be inappropriate.

215 See Appendix, para. (6), below.

10.18 This question was considered by the Latey Committee. They opposed the suggestion on the ground that it would add undesirably to incentives to an early marriage.²¹⁶ Since then the age of majority has been reduced from 21 to 18 and the force of this particular objection must have been considerably diminished. By the same token so has the extent of the problem. The reasons for the proposal appear to be first that a married minor is likely to have a greater need than an unmarried one to enter into contracts, for example for accommodation or for the purchase of furniture or domestic appliances; and second that many such purchases may need to be made on credit which is generally unavailable to a minor, but might be more easily available if the contract were binding on him.

10.19 We question whether, under modern conditions, married minors have a greater need to enter into binding contracts than unmarried ones. A couple who live together without being married, or an unmarried minor who lives away from home, do not have less need of contractual capacity than, for example, married minors living with the parents of one of them. Furthermore, the main purpose of the law of minors' contracts is to protect minors from the consequences of their immaturity and lack of experience. Such lack is not made good automatically on marriage and, if minors do require the special protection which the law provides, the automatic conferment of full contractual capacity on marriage would run counter to the best interests of the married minor.

10.20 For these reasons therefore our provisional conclusion is that full contractual capacity should not be automatically conferred on minors by marriage. Comments are invited.

216 (1967) Cmnd. 3342, para. 276.

PART XI : MISCELLANEOUS MATTERS

A. The liability of fraudulent minors

11.1 Where a minor has fraudulently induced an adult to enter into a contract with him the initial feeling of many may be that the minor should forfeit the special protection which is granted to him under the law.²¹⁷ In Scotland a minor who falsely represents himself to be of age, and is reasonably believed, loses his protection.²¹⁸ If all cases of fraud involved planned, deliberate and calculated lies this approach might well be justified. In practice, however, many cases of fraud will consist of a fraudulent misrepresentation as to age, and many of these representations may be made by the minor more or less on the spur of the moment. A minor may, for example, sign a tear-off slip attached to an advertisement containing a statement that the person who signs is over the age of 18, or he may answer an unexpected question as to his age by saying that he is 19. This type of fraud may be committed without any premeditation. We appreciate that when an adult enquires about a person's age, precisely so as to avoid dealing with a minor, it is hard on the adult if the fraudulent minor still retains his protection from liability under the contract. However, we consider that the probable absence of premeditation outweighs this factor. In any event we think that if the minor is to be punished because of his fraud, this should be achieved by the criminal law. Our provisional view is that a fraudulent minor should not forfeit the protection against liability in contract which he would have under our recommendations in this Working Paper.

217 Under the existing law this is generally not the case: see paras. 2.13 and 2.24, above.

218 See Walker, The Law of Contracts and related obligations in Scotland (1979) para. 5.33.

11.2 Our view is in line with the policy of the present law.²¹⁹ But we think that the present law goes too far in protecting the fraudulent minor by refusing the adult a remedy in tort in circumstances where allowing such a remedy would be an indirect way of enforcing the contract.²²⁰ What then should the position of a fraudulent minor be? Our starting point is that, as under the present law, the adult party should be entitled to rely on the minor's fraud as a ground for rescission, or as a defence if the minor sues to enforce the contract. We consider that, while the minor should retain his protection in respect of actions in contract, he should nevertheless be liable for the tort of deceit and he should be so liable whether or not the remedy sought by the adult might amount to indirectly enforcing the contract. We provisionally recommend accordingly. An adult will thus be entitled to be put into the position he would have been in had the representation not been made; that is to say he could recover only his expenditure made in reliance on the misrepresentation. This is the consequence of liability under the tort of deceit.²²¹ He would not be entitled to recover damages in respect of his loss of bargain. Comments on this provisional recommendation would be welcome.

B. The liability of minors in tort

11.3 The position under the present law can be summarised as follows:²²²

219 See para. 2.24, above.

220 See para. 2.23, above.

221 See generally McGregor on Damages 14th ed., (1980) paras. 1459 et seq.

222 See para. 2.22, above.

- (a) in general minors are liable in tort in the same way as adults;
- (b) where a minor commits a tort which is also a breach of contract the adult cannot indirectly enforce an unenforceable contract by suing the minor in tort.

11.4 We do not propose any changes in the present law other than that above regarding fraudulent misrepresentation.

C. Contracts between two minors

11.5 It will be rare for a contract between two minors to cause difficulties requiring the application of legal principles. The value of any such contract is unlikely to be large and it will therefore be unusual for it to lead to litigation. Nevertheless, for the sake of completeness, some consideration must be given to contracts between two minors.

11.6 One possibility would be to treat both minors as adults. We know of no system of law which takes that course. A minor is no less in need of protection because he contracts with another minor rather than with an adult. The primary policy must be to protect minors from their immaturity and inexperience, regardless of the age of the parties with whom they contract.

11.7 The existing law makes no special provision for contracts between minors. We are not aware that any particular difficulty has arisen in dealing with such contracts. It does not seem to us that any special set of rules is required for them. If our main proposals were

implemented, a minor could rely on his minority in defence of a claim brought in contract by another minor; and a minor could, in making a claim based on contract against another minor, enforce a contract only in those circumstances in which an adult could enforce it. The fact that a minor, claiming to enforce a contract against another minor, could not himself be made liable in damages on the same contract would possibly limit the extent to which any enforceable but executory contract could be enforced. Relevant in this context is the point advanced for consideration at paragraph 6.20 above, namely whether a minor who seeks to enforce a contract by legal proceedings should thereby become fully liable upon it.

11.8 An alternative method of dealing with contracts between minors would be to provide that in such cases the court should have power to do what is just and equitable in any case. Guidelines could be devised to assist the court and to assist lawyers to predict with confidence the outcome of disputes. Factors to which the court might be required to have regard would, no doubt, include the age of each party; their business capacity or experience; conduct of each party in bringing about the contract; and the extent to which either side has benefitted or suffered loss in performance of the contract.

11.9 Our provisional conclusion is that no special set of rules is required for contracts between minors. We ask for comments upon this conclusion and, if it is thought that disposal of disputes under such contracts should be left to the discretion of the court, we would welcome suggestions as to the factors in accordance with which that discretion should be exercised.

D. Guarantees and indemnities

11.10 A consequence of the Infants Relief Act 1874 has been that a guarantee of a loan made to a minor is void, because the contract of loan is itself "void" under the Act and there cannot be a valid guarantee of a void contract.²²³ The same would apply to credit advanced to a minor for the purchase of goods or services, unless such goods or services were necessities.²²⁴ It follows that one who might be prepared to advance money to a minor upon the additional security of a guarantee from an adult will not be able to do so: the guarantee will be worthless. The legal reasoning behind this state of affairs is impeccable. Nevertheless, the rule does not work to the advantage of the minor and it is not for his protection. Provided that the guarantor would be in no better position vis-à-vis the minor than the original creditor (meaning that if called upon under the guarantee to make good the minor's default, he could not subsequently recover his loss from the minor, any more than the creditor could in the first place compel payment by the minor), the minor could only benefit by being enabled to obtain a loan or credit which the guarantee might make possible. It is legal logic and not the dictates of policy which insists on this rule.

11.11 Doubts about the wisdom of this situation are reinforced by the fact that, while a guarantee of a void contract is itself void, an indemnity given in support of a void contract is not.²²⁵ The logic which kills off the

223 See para. 2.16, above.

224 See paras. 2.3 to 2.7, and 2.15, above.

225 See footnote 49, above.

guarantee leaves the indemnity unharmed. The reason lies in the distinction between the two. A guarantee is

a collateral promise to answer for the debt, default or miscarriage of another, as distinguished from an original and direct contract for the promisor's own act. It is, therefore, of the essence of a guarantee that there should be someone liable as principal: consequently where one person agrees to become responsible for another, but no valid claim ever arises against the latter, no contract of guarantee exists ...²²⁶

whereas an indemnity is

a collateral contract or security to prevent a person from being damnified by an act or forbearance which he does at the request of the indemnitor. Thus, if A agrees not to sue B for a debt during a certain period in consideration of a promise by C to repay him any loss which he may suffer from not suing B at once, C's promise constitutes an indemnity.²²⁷

A guarantee refers to a legal liability and is dependent on it: an indemnity refers to an act or forbearance done or suffered by the person indemnified, and it is not necessary that there should be any legal liability on the part of the person actually benefitting from that act or forbearance. A creditor who is alive to the difference between these two concepts may adequately protect himself by framing his security in the right way. The correct form of words will at the same time protect him and benefit the minor.

226 Jowitt's Dictionary of English Law, 2nd ed., (1977).

227 Ibid.

11.12 Thus under the present law indemnities are beneficial for minors, and for lenders, and guarantees are not. We could leave matters at that, since it is easy enough for a potential lender to ensure, if necessary by recourse to expert legal advice, that he employs the right formula. But the objection to doing so is threefold: first, the efficacy of what is intended to be an essentially simple transaction with an agreed objective should not have to depend on the use of the technically correct form of words; secondly, even if the potential lender is aware that there is a difference in form, and in consequences, between a guarantee and an indemnity, the required expert advice may not be available to him and it is an impediment to entering into the transaction that he should have to seek and pay for it; thirdly, the difference between a guarantee and an indemnity is a real one - the former may be chosen precisely because all parties intend that the third party should not be liable if the primary contract fails (but, in our context, fails for a reason other than the minority of the borrower). For example, many guarantees may be standard-form printed documents, deliberately framed as guarantees and not indemnities because it is intended, as a matter of general principle, that the guarantee should depend on the validity of the primary obligation. Such standard forms may work well where only adults are involved but the introduction of a minor to the equation involves a vitiating element which none of the parties concerned may (at the time) intend or desire. Here the lender must go to some lengths to circumvent the obstacle for which he is unprepared, and it is not unlikely that he will fail to do so.

11.13 In our view therefore there is a strong case for providing that a guarantee given to support a contract of loan or for the advance of credit to a minor should be valid and enforceable notwithstanding that the contract

itself cannot be enforced against the minor. Such a provision would violate, to that extent, the logical consistency of the legal concept of guarantee. However, we think that where it is intended, by all parties concerned, that a loan to a minor should be supported by a guarantee, it is absurd that the guarantee should be vitiated solely because the borrower is not an adult. Our provisional view is that this consideration should prevail over the purity of the legal concept. We think that the proposal would do no injustice,²²⁸ and would be to the minor's advantage without in any way diminishing the protection afforded to him: neither a guarantee nor an indemnity should give the guarantor/indemnifier recourse against the minor. On the other hand, it is important that the distinction between a guarantee and an indemnity should be in all other respects observed, and a guarantee is not to be enforced as though it were an indemnity. Accordingly, we provisionally recommend that a guarantee given to support a loan of money or an advance of credit to a minor should be enforceable by the lender to the same extent as if the minor had at the time of the loan or advance been of full age, and should not fail solely by reason of the minority. Comments are invited.

228 Except perhaps where the guarantor was not aware that the borrower was a minor. But since guarantors ordinarily are well acquainted with those whose liability they are guaranteeing we think this will be a rare occurrence. Even in this case, however, it is hard to see why a guarantor who in every other respect was prepared to assist the borrower should cease to be so willing merely because the borrower turns out to have been under age at the time.

PART XII : AN ALTERNATIVE PROPOSAL

Introduction

12.1 In the Introduction to this Working Paper we said that we were attracted by the possibilities of a radical reform of the law of minors' contracts. The proposal was to break completely with the complications of the present law by reducing the age of full contractual capacity to 16. From that age onwards there would be no contract on which a minor was not fully liable. Below that age, on the other hand, though a minor would be capable of making a contract, he would have no liability at all under, or by reason of, it.

12.2 At first sight this proposal may seem to be at variance with our endorsement of the principles on which the present law is based. In Part III of this Working Paper we discussed at length the policies which we thought the law should pursue with regard to minors' contracts, and we reached the provisional conclusion that the policies of the present law were correct, though the law did not always give the best effect to them. On the face of it this alternative proposal may be thought inconsistent with everything we have said there. If the primary policy consideration of the law should be to protect the minor from the consequences of his immaturity and inexperience of the world, how is that achieved by giving a minor of 16 full contractual capacity and making him fully liable for a breach of his contract? But we think that any inconsistency is more apparent than real. In the first place the hypothesis behind the present law is that all minors, regardless of age, require the same degree of protection. It is not necessary to dispute the validity of the policy consideration in order to question the accuracy of this assumption. It seems to us that minors of 16 and over do

not necessarily need the same degree of protection as those below that age. Secondly protection for the minor may be provided by the law in general and not necessarily by special rules relating to minors. Indeed, the very concept of a law of minors' contracts to some extent begs the question: special rules are needed only insofar as the required degree of protection is not provided by the general law. We think it arguable that the protection afforded to consumers by the general law is adequate to meet the needs of minors aged 16 and over. Finally, none of these issues can be judged in a vacuum. The needs of minors, and the level at which the law must supply them, depend on the social and economic circumstances under which minors must live. We think it arguable that looked at in this light the present law of minors' contracts protects older minors to a degree greater than they really require.

12.3 In putting forward this proposal we must also meet the possible objection that the Latey Committee considered these issues comparatively recently and thought that 18 was the appropriate age for full contractual capacity. Since 1967 there has been much legislation which affects the issue, such as the Supply of Goods (Implied Terms) Act 1973,²²⁹ the Consumer Credit Act 1974 and the Unfair Contract Terms Act 1977, which have all strengthened the position of the consumer since the Latey Committee reported. Minors between the ages of 16 and 18 are active

229 Now largely re-enacted by the Sale of Goods Act 1979.

members of our consumer society and benefit as much as any from these enactments.²³⁰

12.4 In making this alternative proposal, therefore, we are not departing from the provisional conclusions which we reached in Part III of this Working Paper. We are attracted to the proposal in the first place because we think that it does satisfy the relevant policy considerations and offers a simple and comprehensive means of giving effect to them.

Why reduce the age to 16?

12.5 Before we explain in detail why we think this, we should first say why it is considered that a distinction might reasonably be made between minors of 16 and over, and those under 16. Why 16? The answer is because society, as a practical matter, already recognises to some extent such a distinction. At 16 compulsory schooling ends: a minor is judged fit to enter the labour market in search of his own living. The parental obligation to maintain the child ceases at this age. At 16 a person becomes eligible to claim social security benefits. At 16 a minor may legally marry (though he or she requires parental consent) and may legally consent to sexual relations. At 16 a minor may acquire for himself a domicile of choice. Not all of these things are directly relevant to contractual liability but they are all evidence of the law's view of the maturity of 16-year olds. There are of course other dividing lines both above and below this age (the major one, at 18, is the

230 The Lately Committee itself looked forward to consumer protection legislation as a means of protecting minors and adults alike: (1967) Cmnd. 3342, para. 280.

one we are, to some extent, examining here), but these distinctions which we have mentioned correspond, we think, to an important social reality, namely that at 16 a minor is probably in practice making many of his own decisions and the decisions he makes may to a considerable extent determine the future course of his life. He may need advice and assistance, and will no doubt continue to receive it after 16 as before, but at this age he, and not his parents or his teachers, or, if he is at work, his employers, or his adult acquaintances, will be deciding what he is to do and to become. At this age most minors do in fact leave school and begin to make their own way in the world. We think that it is arguable that among the decisions which a 16-year old minor is fully capable of taking are on what he shall spend his money and what obligations he shall incur. These considerations give some support to the argument that young people of 16 should be given full contractual capacity.

12.6 On the other side of this dividing line a minor under 16 is not generally expected to exercise responsibility for his own life. He is in full-time education. He is maintained by his parents or guardians. He is likely to have no resources of his own, or, at least, under his control. If, nearer the dividing line, he has left behind the innocence of childhood, he has still not attained the sophistication of the world. We think that few would object to a law which precluded him from entering into contracts enforceable against him.²³¹ In any case, since

231 In Scotland boys aged under 14 and girls aged under 12 have the status of pupils and have no contractual capacity. A pupil requires a tutor, who may make valid contracts on his behalf but only within narrow limits. See Walker, The Law of Contracts and related obligations in Scotland (1979) paras. 5.17-5.20. For the position between those ages and 18, see footnote 209, above.

neither the existing concept of necessities nor that of necessities, which we are recommending in its place,²³² would be likely to apply in respect of a 15-year old, still less to anyone younger, and a minor of that age would be unlikely to acquire one of those interests in permanent property by which he may (until the contract is avoided) be bound,²³³ this is probably, by and large, the position under the present law. We think that it is reasonably arguable that if the line is drawn at 16 those above the line will be old enough to assume full contractual liability, and those below the line will be young enough to escape such liability altogether.

Implementing our policy considerations

12.7 If this alternative proposal were adopted, it would permit a very radical simplification of the law of minors' contracts. We should emphasise, however, that while this may be a valuable side effect of the proposal it is not in itself a justification of it. Simplicity is a virtue, but it should not be pursued beyond the borders of practicality or justice. We have suggested that from a social point of view there may be grounds on which the proposal might be thought practical and realistic. But even this is not enough. The proposal is not acceptable if it fails to give effect to the policy requirements which underlie the present law, and must, in our view, continue to form the basis of any future law of minors' contracts.

12.8 We have said that there are three important principles underlying the law of minors' contracts.²³⁴

232 See paras. 7.1 to 7.25, above.

233 See paras. 2.10 to 2.12, above.

234 See paras. 3.2 to 3.7, above.

These are: first, that the law should protect minors from the possible consequences of their lack of experience of the world; second, that in doing this the law should at the same time strive not to cause unnecessary prejudice to adults who deal contractually with minors; and third, that in order that adults should not be deterred from dealing with minors in respect of contracts which a minor may need to make for his own benefit, such contracts should in any event be binding on a minor. It is obvious that our alternative proposal would in respect of those aged 16 and over achieve the second and third of these policies, and in respect of those aged less than 16 would achieve the first. With regard to those under 16 we believe that the second and third principles are not of great importance.

Regarding the second principle, an adult contracting with a child or a young person of evident immaturity needs to do so with discretion: if his dealings with the minor lead to hardship to himself few, probably, would sympathise with him. As to the third principle, a minor below the age of 16 will be living with his parents or other guardians and will be fully maintained by them. He has no need to make contracts for necessities,²³⁵ or even for necessities.²³⁶ He is below the school leaving age and cannot take a full-time job. We think, therefore, that the alternative proposal does give practical effect to the three principles mentioned so far as concerns those under 16, and to two of the three so far as concerns those of 16 and over. The one remaining question for examination is whether minors of 16 and over really do need the protection afforded by the present law - or by our proposals to reform it. In the paragraphs which follow we discuss this issue. After

235 See paras. 2.3 to 2.7, above.

236 See paras. 7.1 to 7.25, above.

that, we consider what might be the precise position of minors under 16, since there are several possible ways of giving effect to the principle that they should not be bound at all by their contracts.

12.9 It should be recognised from the outset, however, that we are concerned with adequate, and not with absolute, protection for minors. Total protection could, we think, be provided only under a system which denied binding effect to any contract made by a minor; but this would run counter to the second and third principles to which weight must also be given. Almost total protection might be provided by a law which gave the court a discretion to deal with each question as its own conception of justice required; but this would cause other difficulties, as we have pointed out.²³⁷ Nevertheless there are degrees of protection, and one scheme may offer more than another. We think it inevitable that, if all contracts were binding on minors of 16 and over, there would be more actions for breach of contract than if some only of such contracts were binding. On the other hand we do not think that there would in practice be very many more such actions. There are two reasons for this. First, some important categories of contract are binding on minors under the present law and would continue to be binding under our other provisional proposals for its reform. The number of additional categories of contract which would be binding under this alternative proposal would not in practice be great, or, save for loans and credit transactions, very important. Second, in any case a sensible plaintiff will tailor his action to the resources of the defendant. There is no point in suing a defendant who has neither money nor

237 See paras. 3.12 and 3.13, and 4.8 to 4.13, above.

realisable assets. Many minors will be in that category. Nevertheless, many minors will also be in work and earning wages, and it is inevitable that there would be some actions for damages, and some judgments (perhaps enforced by attachment of earnings orders) under the alternative proposal which would not occur under our other proposals for reform of the present law. Minors may of course be liable in damages under the present law of contract in some cases, and under the law of tort, and this does not appear to cause problems. Whether or not, if the alternative proposal be judged otherwise viable, the gain in simplicity and certainty would be worth the possibility that some 16-year olds, who would not now be liable, would be compelled to abide by their agreements, or pay damages for their breach, is a matter on which we would welcome comments. We mention this point now because we think it should be borne in mind as we go on to consider whether a 16-year old minor would have adequate protection, under the alternative proposal, in the legal and commercial world in which he moves in practice.

Specific transactions examined in the light of the alternative proposal

12.10 It will be necessary to consider separately the various kinds of transactions which a minor may make, so that the effect of this alternative proposal might be more accurately estimated.

(i) Cash transactions

12.11 During the course of a year millions of contracts are made between minors and adults. All but a tiny proportion of these are straightforward cash transactions made on the same terms as similar contracts between adults, performed as soon as they are made and having no

complications or repercussions. Moreover they are made for the most part probably without knowledge of, and certainly without thought for, the peculiarities of the law of minors' contracts. In other words the law is effectively irrelevant to them. No question of enforcing such contracts, either by the minor or against him, ever arises simply because the contract is completely performed by both parties more or less as soon as it is made. The present law of minors' contracts, and any modifications which might be made to it, would have no application to these contracts, and the alternative proposal would accordingly have no material effect on them.²³⁸

(ii) Credit transactions

12.12 It is in this area of commercial life that nearly all the questions concerning the protection of minors are concentrated in practice. Here, if nowhere else, the minor is at the risk of his own inexperience and at the mercy of the unscrupulous adult who may exploit it. At this point a proposal to lower the age of full contractual capacity to 16 faces one of its hardest tests. Yet it is possible both to overestimate and to overstate the challenge. In the first place the entire credit industry is now subject to the provisions of the Consumer Credit Act 1974 and to the supervision of the Office of Fair Trading which administers the Act. Loans of money, made by way of business, and whether straight loans or made through the

238 In Part VIII, above, we suggested that an executed transaction should be capable of re-examination if the adult party has taken unfair advantage of the minor in inducing it. Though this may already be the law, we proposed that specific statutory provision to this effect should be made. This proposal could be equally applicable to the alternative scheme discussed here.

medium of hire purchase, are unenforceable (irrespective of minority) if they do not conform to the statutory prescriptions. Soliciting a minor to borrow money or to obtain goods on credit or hire purchase is an offence.²³⁹ So, also, will be the taking of pledges from minors.²⁴⁰ (But consideration would have to be given to altering these rules in respect of those of 16 and over: we would welcome views on this point.) Extortionate credit bargains may be re-opened and the court is empowered in such cases "to do justice between the parties".²⁴¹ In determining whether a credit bargain is extortionate the court is required to take into consideration, among other things, the age and experience of the debtor.²⁴² It may be that images of the back street loan-shark, the moneylender extorting excessive sums from naive borrowers, are out of date. This is not to deny that the credit industry may not have its seamy side, but the scope of operation for the unscrupulous is limited. On the other hand it must be recognised that there may be perfectly fair and valid credit transactions which a minor might make (if he can find the credit) which would yet strain his resources and mortgage his future.

12.13 In the second place the primary concern of those whose business it is to lend money is that the money once lent shall be repaid. Of all the considerations that underlie the decision to lend, the ability of the borrower to repay is paramount. The legal position of the minor does have some effect on this decision, but much more important is the fact that the financial ability of most

239 Consumer Credit Act 1974, s. 50.

240 Ibid., s. 114(2). This section is not yet in force.

241 Ibid., s. 137(1).

242 Ibid., s. 138(3).

minors to sustain a long term credit agreement is not great and is not proven. As a matter of purely commercial judgment a lender would be cautious in advancing money to a borrower so young. We are told that the lowering of the age of majority from 21 to 18 did not result in any great extension of credit to those between those ages. If this is so, the effect of a further reduction in the age of full contractual capacity to 16 may be expected to be even more marginal.

12.14 In proposing the lowering of the age of full contractual capacity from 21 to 18 the Latey Committee were worried about the effect on the susceptibilities of the young regarding credit transactions.²⁴³ The fears expressed by Latey obviously apply with greater force to those aged between 16 and 18. It is clear that this issue is crucial to the acceptability of the alternative proposal. We would point out, however, that, for the reasons advanced in the two foregoing paragraphs, the difficulties may not be as great as at first sight they may seem.

(iii) Contracts of employment and contracts for personal services

12.15 Under the present law contracts of employment are binding on a minor if, taken as a whole, they are for his benefit.²⁴⁴ The days of exploitation of child labour are long gone and for the most part minors of 16 and over are employed on terms which, save perhaps in rates of pay, do not differ greatly from those on which adults are employed in similar occupations, terms which are frequently

243 (1967) Cmnd. 3342, para. 280.

244 See paras. 2.8 and 2.9, above.

determined, directly or indirectly, by collective bargaining. It seems on the whole unlikely that an ordinary employment contract would today be held not to be binding on a minor if the question should arise. But another point is that such questions, in practice, very seldom do arise. Employers do not, by and large, take their employees to court in order to enforce the contract of employment. If an employee fails for any reason to perform his duties satisfactorily he is dismissed - and then of course he may bring his employer before an industrial tribunal which will, if appropriate, adjudicate on the justification for the dismissal. The employee is not sued for damages. In practice, therefore, the overwhelming majority of contracts of employment are already binding on minors under the present law and the consequences of this give no cause for concern. A proposal that all such contracts should be binding on all young persons of 16 years or over would again make little practical difference to their legal position and might accord more closely with present realities and expectations. It must be admitted, however, that the present law does offer long-stop protection for exceptional cases by requiring that contracts of employment must be beneficial to the minor before they can be enforced. This alternative proposal would necessarily dispense with that. In paragraph 7.32 above, we proposed that specific statutory provision be made to enable the court, in considering the enforceability of covenants in restraint of trade, to take into account the fact that the employee is a minor. Such provision could equally be made in respect of this alternative scheme.

(iv) Trading contracts

12.16 A further type of contract which does not come within the category of immediate cash transactions is that by which a minor agrees to perform some service for an

adult. We do not believe that, outside the 'simple favour' category (where for example the young person agrees for a small reward to mow the lawn for an elderly neighbour) which probably do not in any case contemplate legal relations, there will be many such contracts. Where they exist they may well be made in the course of a full- or part-time business carried on by the minor. These will be trading contracts, which are not binding under the present law, nor would be under our other proposals for its reform made earlier in this Working Paper. But we think that a very small proportion of minors will be carrying on business for themselves. Where they do so it is at least arguable that they should be liable on their trading contracts to members of the public dealing with them, who may not be aware that they are doing business with a minor.²⁴⁵ Full contractual liability in trading contracts would make little difference to the great majority of minors of 16 and over, but possibly a big difference to a few.

The practical effect of the alternative proposal

12.17 It is arguable that, in relation to the vast majority of contracts in which minors engage, namely cash transactions, the present law confers no effective protection. If all 16-year olds were fully liable on their contracts they would therefore be in no greatly different position in respect of cash transactions from that in which they now are. Nor would the position be different for those under 16 who would have no contractual liability at all, since the absence of such liability implies no inability to make contracts but merely an immunity from

245 Such is the law in Scotland: see Walker, The Law of Contracts and related obligations in Scotland (1979) para. 5.33.

action in respect of them. Employment contracts are now by and large binding on minors and the alternative proposal would make little practical difference in this field either. The major difference would lie in the treatment of loan and credit transactions. Those of 16 years and over would be bound by them: but those under 16 would not. The latter would probably not obtain any form of credit in any event, and we think that the former are unlikely to find it very much easier than they do at present. To adopt the remark of the Latey Committee,²⁴⁶ no lender willingly buys a law-suit. Trading contracts, too, would be binding on those of 16 and over, contrary to the present law and to our recommendations for its reform, but there are probably not going to be many people in business on their own account under the age of 18. There would be other contracts which are not now binding and would not be so under our proposals for reform of the present law, but would be binding under this alternative proposal on those aged 16 and over - for example, a contract by a minor to sell a motorcycle or stereo equipment would be binding even while still executory. Nevertheless we think that most such contracts would not be of great importance. For most minors all of the time, and for all minors most of the time, their position in the last two years before majority, even under such radical reform of the law as now contemplated, might still not be greatly different in practice from what it is today.

12.18 But we would not argue that the alternative proposal would make no difference to the practical position of minors. If there are any circumstances in which a minor would be bound where he is not bound under the existing law, or under our other proposals for its reform, it is inevitable that there would be some attempts to enforce

246 (1967) Cmnd. 3342, para. 280.

contracts in those cases. Whether or not the gain in simplicity, and in conformity with economic and social reality, would be worth the price of a few additional actions against 16-year olds is a matter of judgment. As we have said,²⁴⁷ we think it unlikely that there would be many such actions. But there would be some. Some of our readers may feel that it would be better to opt for a simple, easily understood system which might seem to match what in fact happens anyway, than to retain the relative complexities (even if amended) of the present law, notwithstanding that some 16-year olds may then be compelled to abide by their agreements. Others may disagree, holding that realistic or not, well known or totally ignored, the present law of minors' contracts by and large offers minors protection which they need, and which is not adequately provided by the general law.

Under 16s

12.19 It remains to be considered what should be the position of minors below the age of 16 under this alternative proposal for reform of the present law. In this Working Paper where we have referred to the alternative proposal we have suggested that minors below the age of 16 should be subject to no liability at all in respect of contracts they might make. This is not a necessary concomitant of the other part of the proposal - that minors of 16 and over should be fully liable for breach of contract. There is no reason why minors below 16 should not continue to be subject to the present law, or to all the proposals which we have made for reform of the present law, while their older brothers and sisters attain full contractual capacity on their sixteenth birthday. The question for consideration is whether the need for protection of adults

247 See para. 12.9, above.

in any contracts which they may make with minors under 16 requires the retention of the complicated provisions of law which were developed when incapacity extended to age 21. The reasons for putting forward our alternative proposal on the basis of "no contractual liability under age 16" were the attractive simplicity of such a rule and the probable absence of need for any greater protection in law for adults.

12.20 This proposal itself, however, is not entirely simple. Granted that the minor is to be subject to no contractual liability, is he yet to be permitted to enforce his contracts against the adult party, or a minor of 16 years or over? An affirmative answer produces a one-sided arrangement in which the minor holds all the cards, the adult none. A negative answer would preserve maximum simplicity, and have the arguable merit of keeping young minors out of the courts altogether; but it would make them worse off than they are under the present law, or would be under our proposed reforms of it. It would detract from, rather than add to, the protection which the law now confers. Suppose, for example, that a young minor purchases sub-standard goods from a retailer: if he were unable to enforce his contract, he could not compel the shopkeeper to repair or change them. We do not find that acceptable. One possibility, therefore, would be to preclude a young minor from enforcing a contract except insofar as the performance of it by the adult party, or the failure of the adult to perform at all, had caused him loss. The minor would then be permitted to recover that loss by whatever remedy might be appropriate. Where the minor had suffered no loss by a defective performance or failure to perform he could not sue. This would maintain as much simplicity as is consistent with adequate protection but still it would leave a young minor with less protection than he now has.

12.21 Against this we must balance the fact that the absence of any contractual liability at all would render him better off than he is now. However we think that this improvement in his position would be marginal, since under the present law, and under our proposed reforms of it, there would be few cases in which a young minor would be legally liable and even fewer in which he would actually be sued. On the other hand we think the deterioration in his present position might be substantial if he had not the full right to enforce his contracts. If young minors in particular are in the greatest need of protection, we think it would be a curious reform of the law to deprive them of even a part of the protection which they now enjoy. Accordingly we think that young minors should be entitled to enforce their contracts as if they were adults, even though their contracts could not be enforced against them. For the reasons we have mentioned in paragraph 12.6 above we consider that the one-sided nature of this arrangement is acceptable.

12.22 The inability of an adult to enforce a contract against a minor below the age of 16 would not preclude an adult, sued by a minor, from relying on any appropriate defence in the action (such as failure by the minor to perform his side of the bargain). We suggest that an adult should be entitled to make a counterclaim, or plead a set-off, up to the amount of the minor's claim, if necessary so as to extinguish that claim, but not beyond. We also suggest that if a young minor has in his possession property, which he has retained in breach of a contract made by him, the other party should be entitled to recover that property in specie.²⁴⁸ This last remedy should not extend to the proceeds of sale of any such property or of any other property exchanged for the original property.

248 But subject to the same provisions mentioned in paras. 6.9 to 6.11, above.

Nor should it extend to money at all, except in the unlikely case that the minor possessed identifiable cash obtained under the contract.

12.23 The rules we propose elsewhere in this Working Paper, regarding the liability of minors for fraud and in tort,²⁴⁹ should also apply under this alternative proposal to minors below the age of 16.

12.24 If the proposal of "no contractual liability under age 16" were thought to be acceptable, it is for consideration whether in such circumstances it would be necessary to introduce a special validation procedure for individual contracts in order to deal with a minor under 16 who is able to earn large sums of money.²⁵⁰

12.25 In the light of the discussion above it may appear to some who read this Working Paper that the proposal of "no contractual liability under age 16" is of less stark simplicity than it first appears. If that part of our alternative proposal which would make minors of 16 and over fully responsible as adults on their contracts is thought to be acceptable, the other part, namely "no contractual liability under age 16", could be rejected. As

249 See paras. 11.1 to 11.4, above.

250 For a discussion of validation as it might apply to this proposal see paras. 10.2 and 10.12 to 14, above. A young minor who possesses an exploitable skill or talent may experience difficulty in realising that asset unless he is able to enter into a binding contract. There are also other situations in which it might be advantageous for a young minor to be able to make a binding contract. See, for example, Practice Direction (Minor: School Fees) [1980] 1 W.L.R. 1441, and I.R.C. v. Mills [1975] A.C. 38.

we have said, the existing law could be left to apply to minors under 16 without any amendment at all, or the law as amended by our proposals for reform could be made to apply to them. The answer to this question must depend upon whether the risk of injustice to adults contracting with minors under 16 justifies the retention of the existing law or the enactment of our proposals. We ask for comments upon this further alternative to our alternative proposal.

Conclusion

12.26 The alternative proposal discussed in this Part would permit a radical simplification of the law of minors' contracts. It is arguable that a law based on this proposal would be more realistic than the present law, even the present law reformed as we provisionally propose elsewhere in this Working Paper. Being both simpler and more realistic it might be more easily understood, and therefore more widely known and accepted. But it is based on a premise that minors of 16 and over need less protection than the law now affords them, or would afford them under our proposals for reform, both because they are mature enough to manage their affairs themselves and because commercial reality and the general law give them all the protection they really require. This may, or may not, be true. Furthermore, the alternative proposal would in practice subject minors of 16 and over to some liabilities to which they are not now subject, and the chances that some of those minors would find themselves in court defending actions for breach of contract are therefore inevitably - however marginally - increased. Finally, it may be that acceptance of this alternative proposal might require reconsideration of some other rules of law affecting minors, such as the rule that precludes a minor from holding a legal estate in land, or acting as a trustee. Whether or not the alternative proposal is acceptable is, we think, not primarily a legal question. It has social implications

on which in the absence of consultation we do not feel able to express a view. If our readers feel that there are no serious social objections to this proposal we can see very real advantages in this simple scheme over the relative complexities of the present law, amended as we have proposed elsewhere in this Working Paper. We shall not, however, make any formal recommendations in regard to it until we have seen the results of our consultation.

PART XIII : SUMMARY OF PROVISIONAL RECOMMENDATIONS

13.1 This summary is divided into three parts. The first consists of those general conclusions which underlie our approach to this subject. The second summarises our alternative proposal which, if it should prove generally acceptable, we believe would radically simplify the law of minors' contracts. Although we are not at this stage recommending the adoption of this scheme it seemed to us that it might be helpful to set out here its essential points. The third part is made up of the detailed proposals for the reform of the present law which we provisionally recommend should the simpler scheme not prove acceptable to the general opinion of our readers.

A. General Conclusions

13.2 Three policy considerations should underlie any law relating to minors' contracts. These are that the law:

- (a) should protect minors against their inexperience and immaturity;
- (b) should not cause unnecessary prejudice to adults who deal with minors;
- (c) should not deter adults from entering into certain kinds of contract with minors.

(paragraphs 3.2-3.5)

13.3 The suggestions made by the Latey Committee regarding the law of minors' contracts would not provide the most satisfactory basis for reform.

(paragraphs 3.14 and 4.15)

13.4 The general approach of the present law provides an acceptable way of balancing the policy considerations which should form the basis of the law of minors' contracts. Short of our alternative proposal that all contracts should be fully binding on minors aged 16 and over, and not binding at all on those aged below 16, the general approach of the present law - "qualified unenforceability" - best gives effect to those policy considerations.

(paragraph 5.8)

B. The essential points of the alternative proposal

13.5 All contracts of whatever nature should be fully binding on minors aged 16 years and over. At the age of 16 a minor should attain full contractual capacity.

(paragraphs 12.1 - 12.18)

13.6 A minor below the age of 16 should have no liability under or by reason of any contract.

(paragraph 12.19)

13.7 A minor below the age of 16 should be able to enforce his contracts against the adult party, notwithstanding that such contracts are not enforceable against the minor. In any action brought by a minor below the age of 16 to enforce a contract the adult party should be entitled to put forward any defence which he might make if the action had been brought against him by another adult, and to plead any set-off or counterclaim up to, but not exceeding, the value of the minor's claim against him.

(paragraphs 12.20 - 12.22)

13.8 Where a minor below the age of 16 is in breach of a contract and has in his possession property which has passed to him under the contract the adult party should be

entitled to the return of that property in specie, but not to any other remedy. The court should have power to make any adjustment of rights as between the minor and the adult, as it may think appropriate. This remedy should not apply to the proceeds of sale of the property if the minor has sold it, or to any other property acquired by the minor wholly or partly in exchange for that property. Nor should the remedy apply to money lent to the minor.

(paragraph 12.22)

13.9 A minor below the age of 16 should not ordinarily be civilly liable in tort for fraud if the effect of such liability would be indirectly to enforce against him an unenforceable contract. But, where such a minor has induced a contract by misrepresenting himself to be 16 or over, he should be liable in tort for deceit whether or not rendering him so liable may amount to an indirect enforcement of the contract.

(paragraphs 11.1 - 11.4
and 12.23)

C. Proposals for reform of the present law if the alternative proposal should not prove generally acceptable

(i) The general rule

13.10 The basic principle of the law of minors' contracts should be "qualified unenforceability". That is to say a minor's contracts should ordinarily be unenforceable against him though enforceable by him. To this general rule there should be certain specific exceptions (see paragraphs 13.19 - 13.23, below).

(paragraphs 5.8 and 6.1 -
6.3)

13.11 The Infants Relief Act 1874 is unsatisfactory and should be repealed.

(paragraph 6.1)

13.12 Property should be capable of passing under any contract made with a minor notwithstanding that the contract is unenforceable against him.

(paragraph 6.2)

13.13 In any action brought by a minor to enforce a contract the adult party should be entitled to raise any defence to the action which would be available to him if the minor had been an adult. The adult party should also be able to plead a set-off or counterclaim up to the value of the minor's claim, but not beyond.

(paragraph 6.3)

13.14 Where a minor is in breach of a contract and is in possession of property which has passed to him under the contract, the adult party should be entitled to the return in specie of that property, but not to any other remedy. If the minor wished to retain the property he should pay for it. If the minor is unable to return the property he should be liable to pay for it unless he can prove that he did not dispose of it in order to defeat the claims of the supplier. The adult should not be entitled to recover the proceeds of sale of any such property which the minor has sold, or property acquired by the minor wholly or partly in exchange for that property.

(paragraphs 6.5 - 6.12)

13.15 In ordinary contracts of sale, the adult should not be entitled to exercise the remedy mentioned in the foregoing paragraph except by order of the court. The court should have power to order restitution, or to order payment of the purchase price, in each case subject to such variations and conditions as it thinks fit. In hire purchase and credit sale transactions existing statutory provisions should apply.

(paragraphs 6.10 - 6.11)

(ii) An exception to the general rule

13.16 Where, under any contract, the minor's performance is postponed to that of the adult, and the minor sues to enforce performance by the adult, the act of issuing the writ should make the minor himself liable on the contract, as an exception to the general rule. In such a case the adult, having performed his part, should be able to enforce the contract against the minor if, when the time comes for the minor's performance, the minor fails to abide by his own obligations.

(paragraphs 6.14 - 6.20)

13.17 This exception should be confined to the case mentioned above, and should not be extended.

(paragraph 6.21)

(iii) Specific performance

13.18 A minor should be entitled, in an appropriate case, to enforce a contract by a decree of specific performance against the adult, if he (the minor) has already performed his part of the bargain or if the contract is in any event binding on him (but then on condition that he perform his part when the relevant time comes). Similarly if the minor has made himself liable on the contract in circumstances mentioned in paragraph 13.16, above, he should be liable to have a decree of specific performance made against him.

(paragraphs 6.22 - 6.24)

(iv) Contracts for necessities

13.19 The present category of "necessaries" should be abolished, and should be replaced by "necessities". These "necessities" should be limited to items essential to

maintain a minimum standard of living.

(paragraphs 7.1 - 7.35)

13.20 In deciding what are, and what are not, "necessities", the court should not have regard to the status, social position, means or state of supply of the minor in question.

(paragraphs 7.15 - 7.19)

13.21 Failing the abolition of "necessaries" the concept should be amended in order to render it more appropriate to modern trading conditions.

(paragraphs 7.5 - 7.14,
7.25)

(v) Contracts of employment and for personal services

13.22 Contracts of employment should continue to be excepted from the general rule and should be binding on a minor, provided that, taken as a whole, the contract is for the minor's benefit. The court should have power to sever from the contract any term which is not for the minor's benefit and can reasonably be severed from the rest of the contract without unduly prejudicing the employer, and to enforce the contract without that term.

(paragraphs 7.26 - 7.28,
7.31)

13.23 Contracts for the provision of personal services by a minor should be treated in the same way as employment contracts, and should be binding on the minor subject to the same provisos and restrictions as employment contracts.

(paragraph 7.29)

(vi) Trading contracts

13.24 Trading contracts should continue to be governed by the general rule and should be unenforceable against a minor.

(paragraph 7.30)

(vii) Covenants in restraint of trade

13.25 A minor should be bound by a covenant in restraint of trade if, in accordance with the general law concerning such covenants, it is an enforceable covenant. In considering whether or not the covenant is an enforceable covenant the court should be specifically empowered to take into account the fact that the employee is a minor.

(paragraph 7.32)

(viii) Loans of money

13.26 Loans of money to minors should be governed by the general rule of unenforceability. We do not consider that there is any need for particular rules further penalising contracts of loan to minors.

(paragraphs 7.33 - 7.38)

13.27 Loans of money made to a minor for the purchase of necessities (see paragraph 13.19, above) or necessities, if the present concept is retained, should be recoverable (that is to say, the contract should be binding on the minor) whether or not the money was in fact used for that purpose.

(paragraph 7.39)

(ix) Contracts binding until repudiated

13.28 There is no reason to retain any category of contracts binding on a minor until formally repudiated by

him before, or within a reasonable time after, attaining his majority. This category should be abolished.

(paragraph 7.40)

(x) Re-opening executed transactions

13.29 There is less need to protect minors from the consequences of executed transactions than from obligations incurred in respect of executory transactions. We do not consider that there should be any general power to re-open executed contracts. Where, however, a minor can prove that an adult induced him to enter into an improvident transaction, by taking advantage of his immaturity and lack of experience, the court should have power to re-open the contract. This may already be the law, but for the avoidance of doubt specific provision should be made.

(paragraphs 5.6, 8.1 -8.15)

(xi) Ratification

13.30 An adult recently come of age should not be permitted to ratify a contract made during his minority, so as to render that contract binding on him. Section 2 of the Infants Relief Act 1874 should be repealed (see paragraph 13.11, above). It would be inappropriate to prohibit the making of a new contract, for fresh consideration, to do the same thing as previously contracted for during the young adult's minority, but in any action brought against the erstwhile minor to enforce such a contract he should be entitled to claim relief from it on the ground that its terms are unfair.

(paragraphs 9.1 - 9.9)

(xiii) Validation

13.31 There is no need for any procedure for the judicial or other validation of contracts made by minors which may be otherwise unenforceable against them.

(paragraphs 10.1 - 10.15)

13.32 Minors should not acquire full contractual capacity automatically on marriage.

(paragraphs 10.17 - 10.20)

(xiii) Liability for fraud

13.33 A minor should not forfeit his protection under the law of contract if he induces the making of a contract by fraud, whether by misrepresenting his age or otherwise.

(paragraph 11.1)

13.34 However, a minor who induces the making of a contract by fraud should be liable in tort for deceit, so that the adult party should be able to recover any loss he has incurred in reliance on the fraudulent misrepresentation. The minor should be so liable even if a judgment against him should amount in effect to a full or partial indirect enforcement of the contract. In addition the minor's fraud should be available to the adult as a defence in any action brought to enforce the contract, or as a ground for rescinding the contract.

(paragraph 11.2)

(xiv) Liability in tort

13.35 Save for the minor's liability for the tort of deceit, mentioned in the foregoing paragraph, a minor should not be liable in tort if such liability would amount to an indirect enforcement of the contract.

(paragraphs 11.3 - 11.4)

(xv) Contracts between two minors

13.36. A dispute arising out of a contract between two minors should be decided according to the same principles of law as apply between a minor and an adult.

(paragraphs 11.5 - 11.9)

(xvi) Guarantees and indemnities

13.37 A guarantee by an adult of a minor's obligation under a contract should not fail by reason of the fact that the contract is unenforceable against the minor. Neither a guarantor nor an indemnifier should be entitled to recover from the minor anything which they may have been called upon to pay under the guarantee or indemnity.

(paragraphs 11.10 - 11.13)

APPENDIX

THE LAW IN OTHER JURISDICTIONS

A. Other Common Law Jurisdictions

INTRODUCTION

(1) The most important proposals for reform of the law of minors' contracts have been made in New Zealand, New South Wales, Alberta and British Columbia. In New Zealand and New South Wales legislation has been enacted to implement these proposals, whilst in Alberta and in British Columbia reports have been published respectively by the Institute of Law Research and Reform of Alberta (University of Alberta, 1975), and by the Law Reform Commission of British Columbia (1976, L.R.C. 26). The States of California and New York have enacted legislation relating to the prior judicial validation of certain types of minors' contracts.

NEW ZEALAND - The Minors' Contracts Act 1969 as amended by Minors' Contracts Amendment Acts, 1970, 1971 and 1974

[Age of Majority is 20]

Enforceability of contracts

(2) The Act, which codifies the law relating to minors' contracts, distinguishes between contracts made by minors over 18 and contracts made by minors under 18. Contracts of service are treated separately.

(3) The contracts made by minors over 18, and contracts of service, and certain contracts of insurance are treated as having full effect as though they had been made by an adult (s. 5(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 where, in its opinion, 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 (s. 5(2)).

(4) Where contracts are made by minors under 18, it is provided that they are to be unenforceable against the minor, although in all other respects to be of full effect (s. 6(1)). However, the court can 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, or it can order such

compensation or restitution as it thinks just (s.6(2), as amended by Minors' Contracts (Amendment) Act 1971). The effect of this provision is to enable the court to give relief to an adult who is bound by a contract under which the minor refuses to perform his obligation. In deciding whether a contract was fair and reasonable when made, the court is to have regard to the circumstances surrounding the 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 (s.6(3)).

(5) The court is given wide powers in the making of compensatory or restitutionary orders, which may also be made for the benefit of guarantors of the minor's contractual obligations (s.7).

Married minors

(6) The Act provides that married minors are to have full contractual capacity (s.4(1)).

Executed contracts

(7) No distinction is made by the Act between executed and executory contracts.

Judicial grants of capacity

(8) Any party to a proposed contract with a minor, including the minor himself or his guardian, may apply to the Magistrates' Court for its approval of the contract, upon the giving of which the contract is fully binding on the minor (s.9).

Contracts of guarantee

(9) Contracts whereby the performance of minors' obligations are guaranteed are provided to be enforceable against the guarantor (s.10).

Torts

(10) The common law rules relating to the tortious liability of minors are left unchanged, but where the minor has made a false representation that he is of full age which induces a contract, the court can take this into account in the making of any order for compensation or restitution (s.15(4)).

NEW SOUTH WALES - The Minors' (Property and Contracts) Act 1970

[Age of Majority is 18]

(11) This Act codifies the law relating to all aspects of the legal capacity of minors; the term "civil act" is used to refer to all civil transactions, including the making of contracts and the disposition of property.

Enforceability of contracts

(12) A contract is presumed to be binding, providing it is for the minor's benefit, unless, at the time he made it, he lacked, by reason of youth, the necessary understanding of its consequences (ss.18, 19). A disposition of property to a minor is also presumptively binding on him, unless the consideration for it was manifestly excessive and a disposition of property by the minor is presumptively binding on him unless the consideration was manifestly inadequate (s.20).

Married minors

(13) The Act makes no provision for minors to acquire contractual capacity on marriage.

Executed contracts

(14) No distinction is drawn by the Act between executed and executory contracts.

Affirmation and repudiation

(15) Where a contract is made by a person while he is still a minor, it may be affirmed by the court during his minority on the application of any interested person or by him on attaining majority. The court can only affirm where this would be for the minor's benefit (s.30).

(16) Provided that the contract is not for his benefit, a person can repudiate it either during his minority or within one year after attaining full age (s.32). A court may also repudiate the contract during the person's minority (s.24). However, the repudiation has no effect on third parties where the contract is presumptively binding on the minor (s.35). Where the contract is not presumptively binding on the minor, the court may, on the application of an interested party, either affirm it or repudiate it (s.36). Where repudiation has taken place, the court has wide powers to adjust the rights of the parties to the contract. However, where the contract is presumptively binding in

favour of a particular person, the court may not make an order adversely affecting that person's rights without his consent (s.37).

Judicial grants of capacity

(17) On application by the minor, the Supreme Court may grant the minor general or limited capacity to enter into contracts on being satisfied that this would be for the minor's benefit (s.26).

(18) A minor may also apply to the Court of Petty Sessions for approval of a proposed contract, and if the court is satisfied that this would be for the minor's benefit and that the minor would not thereby be undertaking obligations involving over \$A.750, it may grant such approval (s.27).

Contracts of guarantee

(19) Contracts guaranteeing the performance of minors' obligations are provided to be enforceable against the guarantor (s.47).

Torts

(20) Minors are to be liable in tort, whether or not the action based on that liability amounts to the indirect enforcement of a contract (s.48).

ALBERTA - The Report of the Institute of Law Research and Reform (1975)

[Age of Majority is 18]

(21) There was both a majority and a minority report, but we concentrate here on the proposals of the majority. The report has not been implemented.

Enforceability of contracts

(22) The basic recommendation is that contracts should be unenforceable against minors (pp. 28-29). However, if the adult can satisfy the court that he reasonably believed at the time of making the contract that its terms were reasonable both inherently and in the circumstances of the minor the onus then shifts to the minor either to show that the contract was improvident in his interests, or that by restitution and/or compensation the adult can be placed in as good a position as if the contract had not been made. In determining whether the adult's belief was reasonable, the court should only have regard to the circumstances which were or which should have been known to the adult (pp.32-33).

Married minors

(23) The Institute did not favour the conferment of contractual capacity on minors who are or have been married (pp.33-34).

Executed contracts

(24) The Institute's proposals make no distinction between executed and executory contracts.

Affirmation and repudiation

(25) A former minor should be able to affirm a contract made during his minority on attaining full age upon which the contract will become fully enforceable against him. The former minor should also be able to repudiate a contract made while a minor within one year of reaching his majority; failure to do so is equivalent in effect to affirmation. An adult should, however, be able, by giving a written notice to the former minor when he has become of full age, to require the minor either to affirm or to repudiate the contract within 30 days. If the minor does not repudiate, the contract becomes fully enforceable against him. If he does repudiate, the adult should be able to apply to the court for a compensatory or restitutionary order (pp.34-35).

Judicial grants of capacity

(26) The minor or other party to a contract may apply to the court for its approval either before or after the contract has been entered into. The court must not approve a contract unless satisfied that it will be for the minor's benefit. A contract so approved becomes enforceable against the minor. To which court application should be made depends on the amount of consideration to be given under the contract; where it is less than \$ Canadian 2,500 the court is the Family Court, and where it exceeds that sum the court is the Trial Division of the Supreme Court of Alberta (recommendation 11). The minor may also apply to the Trial Division of the Supreme Court for a grant of full capacity to enter into contracts generally or a particular category of contracts. The court must not make such a grant unless satisfied it will be for the minor's benefit. A contract made under a judicial grant of capacity is to be fully enforceable against the minor (recommendation 12, pp.37-40).

Disposition of property

(27) Where property is disposed of by a minor under a contract, the title to the property will pass under that contract unless and until the court or the parties decide

otherwise. Third parties who acquire the property or an interest in it in good faith and for value should not, however, be prejudiced by any such decision (pp.40-41).

Torts

(28) A minor should be liable in tort whether or not it is connected with a contract; however, he should remain exempt from liability for deceit as to age inducing a contract (pp.36-37).

BRITISH COLUMBIA - The Law Reform Commission Report
(1976, L.R.C. 26) This report has not been implemented
[Age of Majority is 19]

Enforceability of contracts

(29) A contract made by a minor should not be enforceable against the minor but should be enforceable by him against the adult. Where a contract is unenforceable against a minor due to his minority, and either he repudiates his obligations under it or he wishes to obtain relief against the adult, the court may grant to any of the parties such relief by way of compensation or restitution as is just, and should, in the granting of such relief, have regard to the circumstances surrounding the making of the contract, and subject-matter and nature of the contract, the nature and value of any property transferred under it, the age and means of the minor and all other relevant circumstances (pp.29-32).

Married minors

(30) No special rules are needed for minors who are or have been married (pp.32-33).

Executed contracts

(31) The proposals apply to executed as well as to executory contracts (pp.33-34).

Affirmation and repudiation

(32) A former minor may affirm a contract on attaining full age, and that contract becomes fully enforceable against him. An adult should be able, by giving a written notice to the former minor when he has attained his majority, to require him either to affirm or to repudiate the contract within 60 days, and if the minor does not repudiate within that time the contract becomes fully enforceable against him. Where no notice is issued by the adult, the former minor becomes bound by the contract unless he repudiates it within one year of his attaining full age (pp.34-35).

Judicial grants of validation or capacity

- (33) (i) On application by a minor or his parent or guardian, the Supreme Court of British Columbia may grant to the minor capacity to enter into contracts or into any particular category of contracts, but will not make such a grant unless satisfied that it is for the minor's benefit and that in the circumstances the minor is not in need of the protection afforded by the law to minors. A contract made under a grant of capacity will be enforceable against the minor.
- (ii) On application by a minor, his parent or guardian, or an adult party to the contract, the Public Trustee may grant the minor capacity to enter into a particular contract either before or after the contract has been made and the Public Trustee, when deciding whether to make a grant of capacity, should take into account the nature, subject-matter and terms of the contract, the minor's requirements having regard to his circumstances, his financial resources, and the wishes, if any, of his parents or guardian. A contract made by a minor under such a grant of capacity is to be fully enforceable against him (pp.38-42).

Disposition of property

- (34) (i) A disposition of property under a contract unenforceable against a minor is effective to transfer the title to the property unless and until the court decides otherwise.
- (ii) A disposition of property to a bona fide transferee for value is not to be rendered invalid by the fact that the transferor acquired it under a contract unenforceable against a minor (p.43).

Contracts of guarantee

(35) A person who has undertaken to be responsible for the carrying out of a minor's contractual obligations is to be bound by his undertaking to the same extent that he would be bound if the minor were an adult (pp.43-44).

Torts

- (36) (i) The common law rule that a minor is not liable in tort where a cause of action founded on

that liability would be in substance indirectly to enforce a contract is to be left unchanged but where a contract has been induced by a minor's false representation of full age, this is to be taken into account by the court when granting relief to any of the parties.

- (ii) For these purposes, a minor is not to be taken to have made a false representation as to his age (a) unless the person to whom the representation was made had reasonable grounds for believing it to be true, and (b) if the minor has merely signed a standard form of contract prepared by the other party containing a statement that the minor was of full age (pp. 35-38).

THE STATE OF CALIFORNIA
[Age of Majority is 18]

(37) Section 36(a)(2) and (3) and section 36(b) of the Californian Civil Code provides that a contract entered into during minority cannot be disaffirmed on the ground of minority, either during the actual minority of the person entering into such contract, or at any time thereafter, in the following cases:

"36(a)(2)(i) A contract or agreement pursuant to which such person is employed or agrees to render artistic or creative services, or agrees to purchase, or otherwise secure, sell, lease, license or otherwise dispose of literary, musical or dramatic properties (either tangible or intangible), or any rights therein for use in motion pictures, television, the production of phonograph records, the legitimate or living stage, or otherwise in the entertainment field, where such a contract or agreement has been approved by the superior court in the county in which such minor resides or is employed or, if the minor neither resides in or is employed in this State, where any party to the contract or agreement has its principal office in this State for the transaction of business.

(ii) As used in this paragraph, "artistic or creative services" shall include, but not be limited to, services as an actor, actress, dancer, musician, comedian, singer or other performer or entertainer, or as a writer, director, producer, production executive, choreographer, composer, conductor or designer.

(3) A contract or agreement pursuant to which such person is employed or agrees to render services as a participant or player in professional sports, including, but without being

limited to, professional boxers, professional wrestlers and professional jockeys, where such contract or agreement has been approved by the superior court in the county in which such minor resides or is employed or, if the minor neither resides in or is employed in this State, where any party to the contract or agreement has its principal office in this State for the transaction of business.

36(b) The approval of the superior court referred to in paragraphs (2) and (3) of subdivision (a) may be given upon the petition of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and its approval when given shall extend to the whole of said contract or agreement, and all of the terms and provisions thereof, including, but without being limited to, any optional or conditional provisions contained therein for extension, prolongation or termination of the term thereof."

(38) The court may require, as a condition of its approval, the setting aside of not more than one half of the net earnings as defined in the Code, to be kept in a trust fund or other savings plan (Californian Civil Code, section 36.1). The court has continuing jurisdiction over the trust or savings plan, with power at any time upon good cause being shown, to order that it be amended or terminated, notwithstanding its provisions. Such an order may only be made after notice to the beneficiary or parent or guardian with an opportunity for all to appear and be heard (Californian Civil Code, section 36.2).

THE STATE OF NEW YORK

[Age of Majority is 18]

(39) In 1960 the New York State Law Revision Commission made recommendations which follow section 35 of the Californian Civil Code quite closely in that they provide for the judicial approval of contracts for the employment of minors as performing artists or participants in professional sports and of contracts under which other persons are employed to render services to the minor in connection with his professional work. The recommendations also provided that the court may require "guardianship" of the minor's

earnings as a condition for approval of the contract. The draft statute proposed by the Commission also authorises approval of a contract made by a parent or guardian on the minor's behalf, and contains provisions whereby minimum standards are set before contracts can be approved and whereby the court may revoke the approval if it finds that the minor's well-being is being impaired by performance of the contract. The draft statute also provides that judicial approval of contracts made by parents or guardians on behalf of minors where the contracts are for the employment of minors in the entertainment field and in professional sports should be a condition precedent to the enforcement of the contracts, or of any contract of guarantee against the parents or guardians either as parties to the contracts or as guarantors of their performance by the minors.

- (c) The above recommendations were enacted into law by section 74 of the Domestic Relations Law 1961, which in its turn was re-enacted as section 3-105 of the General Obligations Law. Section 3-105(2) of that Law provides that judicial approval shall not be given of any contract the term of which extends beyond 3 years or which contains covenants or conditions binding upon the minor or his parents or guardian for longer than 3 years. The Law Revision Commission recommended in 1965 that the court should be able to approve certain terms and conditions, if they were reasonable, which ran beyond the 3 year period, enabling the court to exercise the power to revoke approval of a contract not only during the term of a contract for services but also during the term of any covenant or condition.

B. Scotland

Introduction

(1) The following account of the present law relating to minors' contracts in Scotland is abridged from that which was prepared for the Latey Committee by the Scottish Law Commission. The Scottish Law Commission intend in due course to review this branch of the law. (See Item 12, second Programme, (1968) Scot. Law Com. No. 8, and 16th Annual Report 1980-1981, Scot. Law Com. No. 70, para. 3.28).

(2) The law of Scotland divides persons under the age of 18 into two categories:-

- (1) Pupils - males under the age of 14, and females under the age of 12; and
- (2) Minors - males between the ages of 14 and 18, and females between the ages of 12 and 18.

Pupils

(3) A pupil cannot enter into a contract, but his tutor may do so on his behalf. The tutor would normally be the pupil's father, or, if his father is dead, his mother. A deceased parent may nominate a tutor: failing this the court will nominate one. A tutor's power to enter into contracts on behalf of the pupil is limited to transactions which are not at variance with the purposes of his office, and, since his duty normally is to preserve rather than dispose of the pupil's property, transactions of sale, other than mere changes of investment or necessary realisations, may not be within his competence. Notwithstanding this, purchases from a tutor are statutorily protected from challenge, but the tutor may be liable for breach of trust. If the tutor desires to be protected against this risk, he may, in a proper case, obtain the authority of the court to sell.

(4) Contracts by a tutor on behalf of the pupil may be challenged by the pupil, when he is between the ages of 21 and 25, on the grounds of minority and lesion. Challenges of contracts on this ground are difficult to establish and are of rare occurrence.

(5) Any agreement a pupil purports to make himself is null in the sense that it cannot be enforced against the pupil although he may be able to enforce the contract so far as it is beneficial to him. It has been suggested that there is a right, not contractual, but implied by law, to recover the cost of necessaries sold and delivered to a pupil for his benefit, under the proviso to section 3 of the Sale of Goods Act 1979, but the opinion has been expressed that this proviso has served to "obscure rather than to

alter the position at common law" which was regulated by principles of unjust enrichment.

Minors

(6) When the child reaches the age of 12 in the case of a girl or 14 in the case of a boy, authority over him or her continues but to a lesser, and so far undefined, extent. The position then generally may be gathered from the following propositions set out in the case of Harvey v. Harvey (1860) 22 D. 1198:-

"(1) That the control to which a minor is subjected does not proceed on any notion of his incapacity to exercise a rational judgment or choice, but rather arises, on the one hand, from a consideration of the reverence and obedience to parents which both the law of nature and the divine law enjoin, and, on the other hand, from a regard to the inexperience and immaturity of judgment on the part of the child, which require friendly and affectionate counsel and aid.

(2) That the power of a father at this age is conferred not as a right of dominion, or even as a privilege for the father's own benefit or pleasure, but merely, or at least mainly, for the benefit, guidance and comfort of the child.

(3) That, therefore, the father's authority and right of control may at this age of the child be easily lost, either by an apparent intention to abandon it and leave the child to his own guidance, or by circumstances or conduct showing the father's inability or unwillingness to discharge rightly the parental duty towards his child.

(4) That in all questions as to the loss of the parental control during puberty from any of these causes, the wishes and feelings of the child himself are entitled to a degree of weight corresponding to the amount of intelligence and right feeling which he may exhibit."

(7) A minor who has no curator has capacity to act legally on his own.

(8) A minor may, however, have a curator, who is normally his father. If the father is dead, or, if the father consents, or, in a case where the father or other curator has failed in his duty as curator or there is a conflict of interest between him and the child, the court may appoint in his place another curator to look after the child's estate. A curator may be nominated by the father to take office on his death, and a factor loco tutoris to a pupil child automatically becomes the child's curator when

the child reaches minority unless another curator has been appointed. A minor may ask the court to appoint a curator if the father is dead and no curator has been nominated and has taken up office.

(9) The curator's obligation is no more than to give the minor child advice and to assist in the management of his estate. As curator he has no rights of control over the minor's person. An act in relation to a minor's estate by the curator alone is null. If a minor will not take his curator's advice, the latter may apply to the court to be relieved of the office of curator.

(10) Curatory may come to an end in several ways:-

- (i) when the minor reaches the age of 18 or when the minor or the curator dies before the minor reaches that age;
- (ii) if terminated by the court; and
- (iii) if the minor is forisfamiliarated - that is to say, if the father is dead, or if, with the father's consent, the minor sets out on an independent course of life or marries, or if the father has by failure in his duties forfeited his right to the office of curator.

(11) A minor has capacity to enter into valid contracts whether he has a curator or not. If there is a curator, the minor can enter into all ordinary kinds of contract with the curator's consent and concurrence. If the minor has a curator and enters into a contract without the curator's consent, the general rule is that the contract is unenforceable against the minor if it is to his detriment, but may be enforceable against the other party or parties if enforcement would be to his advantage. As exceptions to this rule, contracts which may be enforced against a minor who contracts without his curator's consent are contracts of service or apprenticeship, contracts in the course of a particular trade or business carried on by the minor, and contracts for the supply to the minor of necessaries consistent with his or her station in life. If, on the other hand, a minor has no curator, the minor has the same power to contract as he would have if he had a curator and were acting with that curator's consent and concurrence.

(12) In all cases in which a valid contract has been entered into by a minor, whether he has a curator or not, reduction and restitution may be decreed during his minority or within four years after he attains majority (the quadriennium utile) on the ground of minority and lesion. The basis of this remedy was the restitutio in integrum granted in Roman law to minors - i.e. those under the age of 25 - who had entered into transactions to their prejudice. A contract of this kind, however, may not be reduced

(rescinded) (a) if the minor, when entering into it, represented that he was of full age, (b) if the minor ratified the contract after he reached the age of 18, or (c) if the contract was made in connection with the minor's business or trade.

(13) In the expression "minority and lesion", "minority" needs no explanation. "Lesion" (laesio enormis in Roman law) involves some considerable injury to the minor's estate. The contract will not be reduced if damage arising out of it to the estate was slight. What constitutes lesion in any particular case depends on the circumstances; examples might be where a minor has given something away gratuitously, or has obviously failed to receive value for money, or has discharged a debt for considerably less than the sum lent, or has entered into a contract the terms of which were not reasonably fair to the minor, or even where the minor has squandered the sum paid to him so reducing the value of the estate at the date of his majority. It is probably true to say that, where a minor enters into a contract with the consent of a curator, it will be necessary if the minor wishes the contract to be reduced, to be able to show a greater degree of lesion than the minor would have had to show if he had entered into the contract without the curator's consent. Generally, therefore, in matters of importance and, in particular, in matters relating to heritable property, parties are reluctant to deal with a minor unless he or she has a curator who has consented to the transaction.

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB

13a Castle Street, Edinburgh EH2 3AR

41 The Hayes, Cardiff CF1 1JW

Brazennose Street, Manchester M60 8AS

Southey House, Wine Street, Bristol BS1 2BQ

258 Broad Street, Birmingham B1 2HE

80 Chichester Street, Belfast BT1 4JY

*Government Publications are also available
through booksellers*