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SOUTH  AUSTRALIA

FORTY-FIRST REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

**RELATING TO THE CONTRACTUAL
CAPACITY OF INFANTS**

1977

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE JACOBS, *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE KING, *Deputy Chairman.*

B. R. COX, Q.C., S.G.

D. W. BOLLEN, Q.C.

J. F. KEELER.

K. T. GRIFFIN.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Adelaide, South Australia 5000.

**FORTY-FIRST REPORT OF THE LAW REFORM COMMITTEE
OF SOUTH AUSTRALIA RELATING TO THE CONTRACTUAL
CAPACITY OF INFANTS**

To:

The Honourable Peter Duncan, M.P.,
Attorney-General for South Australia.

Sir,

Your immediate predecessor referred to this Committee the question of the law relating to contracts to which an infant is a party. The Committee reports as follows:—

Present Law

An infant is a person who has not attained the age of majority. In South Australia the age of majority is eighteen years (see the Age of Majority Reduction Act, 1970-1971). The terms "infant" and "minor" are interchangeable. The common law rules relating to contracts to which an infant is a party apply in South Australia. In general the contract is voidable at the option of the infant. In this branch of the law, however, the word "voidable" is understood in two different senses. Certain contracts by which the infant acquires some durable interest in property and which create obligations of a continuing nature are valid and binding upon the infant unless he avoids them during infancy or within a reasonable time after the attainment of his majority. Other contracts are not binding upon the infant unless ratified by him when he attains the age of majority. An infant is however bound by a contract of service which is for his benefit. He is bound to pay a reasonable price for necessaries supplied to him. This rule is embodied in section 2 of the Sale of Goods Act, 1895-1972. Where an infant avoids a contract, he cannot recover back money paid or property transferred pursuant to the contract unless there has been a total failure of consideration. The infant is not required to restore benefits received by him under the avoided contract except that in certain instances of fraud, equitable principles may be invoked to compel the infant to restore property received under the contract which is still in his possession. Contracts with infants are binding on the other party or parties to the contract and the infant may enforce the contract against such party or parties. The law does not permit the indirect enforcement of a contract by means of an action in tort. An infant therefore is not liable for a tort directly connected with any contract which is not binding upon him. Thus a false representation by an infant that he is of full age does not give rise to an action for damages by a person who was induced by such representation to contract with him. A statutory modification of the common law rules which operates in South Australia is Section 5 of Lord Tenterden's Act (9 Geo. IV c.14) which was part of the law brought to this State at settlement. It is as follows:—

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

The Moneylenders Act, 1940-1971, a section of which precluded the ratification of a voidable loan to an infant, has been repealed by the

Consumer Credit Act, 1972. The problem which led to the above enactments are still real. If protection for infants is to be effective ratification of the contract upon attainment of the age of majority must be prohibited or severely restricted. Section 85 of the Commonwealth Life Insurance Act confers certain capacities upon minors as to policies of life insurance and assignments thereof which would of course be unaffected by the State legislation recommended in this report.

Statutory Modifications of the Law in Other Countries

The longest standing statutory modifications of the common law are those contained in the Infants Relief Act, 1874 (Imp.), which have also been enacted in Victoria and Tasmania. Contracts of loan, contracts for goods (other than necessities) supplied or to be supplied and accounts stated were made "absolutely void". The power of a person who attained the age of majority to ratify contracts made by him during infancy was abolished. More thorough-going changes to the law have been adopted in New South Wales (Minors (Property and Contracts) Act, 1970) and the New Zealand (Minors Contract) Act, 1969-1971).

Options for Reform: General Principles

The law relating to contracts made by infants has been subjected to very great scrutiny in recent years, partly because of the reduction of the age of majority from twenty-one to eighteen in many jurisdictions and partly because of criticisms of the existing rules of law. The most important reviews have been those undertaken by the Committee on the Age of Majority (the Latey Committee) in the United Kingdom, the Report of which was presented to Parliament by the Lord Chancellor in 1967, and the Report on Infancy in relation to Contracts and Property of the Law Reform Commission of New South Wales in 1969. Other reports have been made by the Law Reform Commission of Ontario (1969) and the Institute of Law Research and Reform of the University of Alberta (1975); the Law Reform Commission of British Columbia produced a working paper in 1975. The legislation enacted in New Zealand in 1969-71 is also said to have followed an extensive review of the law. It is perhaps indicative of the difficulties in this area of law that these reports do not disclose a common approach, still less a common set of recommendations.

The Latey Report proposed as its general principle for reform of the law (and it admitted no exceptions to this principle) that contracts should not be binding on those under the age of majority; but that the law should in future operate on the restitutionary principle that infants would be liable to restore benefits they have received if they were unwilling to perform their part of the contract. The Committee expressly rejected a proposal that all contracts of infants should be binding, subject to a wide power given to the court to grant relief to the infant, on the ground that the need to protect the infant against his own immaturity and inexperience is such that nothing should be done to make it more difficult for an infant to withdraw from an unwise transaction. It said that it did not wish to do anything that would enlarge the possibility of an infant being sued for damages for breach of contract, especially a contract still executory on both sides. On the other hand it believed that the law should not enable (as it now does) an infant to profit materially from infancy.

The Report of the Law Reform Commission of New South Wales on the other hand, began from the premise that infants ought to be able to enter into contracts beneficial to themselves, and that any general rule that a contract is unenforceable against an infant deters adults from

contracting with infants. It recommended, therefore, that very many contracts should be "presumptively binding" on an infant, meaning by this phrase no more than that the contract have effect as if the infant were not under the disability of infancy. Such contracts include all those that are for the benefit of the infant. It also recommended as presumptively binding dispositions of property made by the infant for a consideration, where the consideration is not manifestly inadequate at the time of the disposition and has been wholly or partly received, and dispositions of property made to an infant for a consideration that is not manifestly excessive at the time of the disposition. It further recommended that contracts that were not presumptively binding should not be enforceable by or against the infant; but that an infant might affirm a contract made during infancy upon attaining majority, and a contract entered during infancy would automatically become presumptively binding unless disaffirmed before the nineteenth birthday. The courts were to be given extensive powers to approve, affirm or repudiate contracts entered into during infancy. Upon repudiation of a contract the courts were to have conferred upon them very broad and extensive powers to confirm or adjust the rights of the parties with respect to any acts performed under the contract. The Commission further proposed that no contract should bind the infant who lacked, by reason of youth, the understanding necessary to make it.

These recommendations were adopted by the Parliament of New South Wales and are enacted in the Minors (Property and Contracts) Act, 1970.

The New Zealand Minors Contract Act and the Report of the Institute of Law Research and Reform of the University of Alberta try to combine something of the philosophy of each of the Latey and the New South Wales Reports. Both begin by declaring all contracts made by an infant to be unenforceable against him, but each goes on to make exceptions to this general principle. The New Zealand Act excepted contracts of service from the general rule and conferred on the Court a discretionary power, where the court is satisfied that the contract is fair and reasonable, to enforce the contract against the infant or to declare that the contract is binding on the infant, whether in whole or part. Where a contract is governed by the general principle broad powers are conferred on the court to order restitution or compensation. A contract of service is enforceable against the infant unless the consideration provided for the minor is so inadequate as to be unconscionable, or the contract is in any other way harsh or oppressive. The University of Alberta Institute recommends that an adult party should be able to enforce a contract against an infant if he satisfies the court that at the time it was made he believed on reasonable grounds that, in the light of the circumstances that were or should have been known to him, the contract was fair and reasonable in itself and in the circumstances of the infant; though the court may decline to enforce such a contract if satisfied that the contract was in fact improvident in the interests of the infant and that the infant, by restitution or compensation, can put the adult party in as good a position as if the contract had not been made. Where the contract is unenforceable powers similar to those conferred on the court in New Zealand are recommended. This proposal differs from those considered before in that the New South Wales and New Zealand legislation direct attention to an objective assessment of the contract, while the Alberta proposal looks rather to the conduct of the adult party in the first instance.

By contrast with all of these, the *Report of the Law Reform Commission of Ontario* recommended that no changes be made to the law at

present. The Ontario Committee gave careful consideration to the proposals in the Latey Report, since it expressly adopted as its basic premises that the law should continue to protect infants and that its fundamental purpose should be to protect them from exploitation by others and from their own immaturity. The points which caused it to refrain from approving those proposals were that it believed that the restitutionary principle adopted in them would, in practice, lead to an indirect enforcement of the contract (a point conceded in the Latey Report itself). It pointed out in particular that the Latey proposals extended to ordering the restitution of benefits received by the infant, or compensation for services received; and that this went far beyond the restitution of goods or benefits retained. At the same time it considered that a restitutionary principle confined to benefits retained would appear unrealistic and to operate arbitrarily. In effect, therefore, it saw the Latey proposals as internally contradictory, and ultimately opposed to the objective of protecting the infant. The Ontario Committee further expressed concern at the breadth of the discretions proposed to be conferred on the courts to give relief from the full restitutionary principle in the absence of guidelines as to their execution.

A proposal canvassed in the Latey Report but not adopted by it or any other Report or legislation is to classify those under the age of majority into different age groups with different rules applying to different ages. Another proposal, adopted in New Zealand but rejected elsewhere, is to confer full contractual capacity upon marriage.

Recommendations as to General Principles

The Committee has been unable to agree on the general approach that should lie at the basis of the law governing the contractual capacity of infants. It is, however, unanimous in believing that the general principle should be that contracts should not be enforceable against infants, and that the law should continue to protect infants against exploitation by others and their own immaturity. It therefore rejects the approach of the Law Reform Commission of New South Wales, and the proposals of the Institute of Law Research and Reform of the University of Alberta. It is also unanimous in rejecting the proposals that there should be different age groups with different rules applying to them, on the basis that this would simply produce further and undesirable complexity in the law, that full contractual capacity should be given to married infants, on the ground that it might work as an incentive to hasty and early marriage, and the New Zealand principle that a court may declare a contract previously entered into to be binding, on the basis that it renders the status of all contracts uncertain at the time of their making.

A majority of the Committee believes that there should be no change in the general approach to the law and that, in consequence, contracts should continue to be unenforceable against infants, that the exceptions in favour of contracts for necessities and beneficial contracts of service should continue to exist, and that the existing rules as to restitution should remain substantially unaltered. The majority is impressed by the fact that for all its seeming complexity the law has caused little difficulty in practice for many years, and such difficulties as did arise (see *Bojczuk v. Gregorczewicz* [1961] S.A.S.A. 128), as well as most of those that may have arisen in the case of youthful traders, have been adequately dealt with by the reduction in the age of majority to eighteen. Consultations with the senior personnel of the Supreme Court, the Local Court, the Industrial Court, the Credit Tribunal and the Prices and Consumer Affairs Branch revealed that none have encountered

problems in this area for many years. The majority has also noted that the U.K. Law Commission has encountered grave difficulties in proceeding to practical methods of implementing the Latey proposals. Consultation with that Commission revealed that it has set the matter aside to deal with more urgent matters; the Committee understands that the Law Commission is concerned at the points raised by the Law Reform Commission of Ontario and at its encountering difficulties in abolishing, in particular, the category of beneficial contracts of service (which still constitute an exception to the new general rules adopted in New Zealand). It may be that the exceptions in favour of contracts for necessities and contracts of service are less important than they were before the reduction in the age of majority to eighteen, but it is not clear that they no longer serve a useful purpose. The majority of the Committee, therefore, sees no pressing need for major changes to the law.

The minority of the Committee, on the other hand, would have preferred to recommend the adoption of a scheme based on the proposals of the Latey Committee, for the reasons set out in that Committee's Report. The combination of the reduction in the age of majority and the fact that it is doubtful whether the existence of categories as ill defined as those of necessities and beneficial contracts of service does in fact encourage adults to enter into contracts within them with infants leads the minority to believe that they have become a useless complexity in the law. The minority further believes that the existing rules governing restitution of benefits provided by the infant are inadequate, and that those which preclude restitution of benefits received by the infant except in the case of fraud are unjust and have provoked much of the criticism of the present law.

Specific Proposals

(1) The distinction between contracts which may be *affirmed* upon attaining majority and those which are binding unless *repudiated* within a reasonable time after the attainment of majority.

The distinction between these classes of contract is said to rest on the basis that contracts of the latter are confined to contracts by which the infant acquires an interest in some subject matter of a permanent nature. The precise scope of the latter class does not appear to be certain, though it is generally confined to contracts for the purchase, lease, or mortgage of land, the acquisition of shares (at any rate with respect to obligations vis-à-vis the company), partnership agreements and marriage settlements. The validity of the distinction between the purchase of land or shares and that of a truck or consumer durable has frequently been questioned (*Treitel, Law of Contract* (4th ed.) pp. 377-8). The Committee can see no good reason for the retention of this distinction, and proposes that all contracts (other than those for necessities or of service) should require subsequent ratification in writing.

(2) Lord Tenterden's Act, section 5. The Committee has already indicated that it believes that if protection for infants is to be effective ratification of the contract upon attainment of the age of majority must be prohibited (as it is in jurisdictions which have enacted the Infants Relief Act) or restricted. In neither case would there be any inhibition upon the making of a new contract to perform the same obligation as that entered into during infancy. Where ratification is impossible the new promise is likely to make binding only agreements where there are still executory promises on both sides and a fresh promise to pay for

property already supplied by the adult may well fall foul of the doctrine of past consideration. But if ratification is possible, then the proposers of the Infants Relief Act feared that an offer of a further minor benefit by the adult might well induce a ratification of the whole contract by the infant upon attaining majority. The Committee has encountered no evidence that this possibility constitutes a pressing social problem in South Australia today, and adoption of the proposal made in the previous paragraph may perhaps give further weight to the retention of the power to ratify the contract. The Committee recommends that the principle of the present law that ratification be in writing be retained, but it draws attention to criticisms of the drafting of Lord Tenterden's Act (e.g. *Treitel, op. cit.*, pp 385-8) and to the desirability of replacing section 5 with a clause in more intelligible form and in closer harmony with twentieth century legal concepts.

(3) The distinction between guarantees and indemnities. If an adult guarantees the contractual obligations entered into by an infant he is generally not bound by his guarantee; since there is no valid primary obligation there is nothing to which a secondary obligation may attach. But if the adult promises to indemnify the other contracting party against non-performance by the infant he will be bound. Although the distinction is clearly capable of causing difficulties these are in practice generally avoided by making the adult a co-contractor with the infant; it is apparently hoped that this device will also avoid the problems caused to those who allow credit to others that arise from sections 43-44 of the Consumer Transactions Act, 1972. It is nevertheless unsatisfactory that the conjoint effect of the technicalities of the common law of infancy and of guarantee renders the undertaking of the adult guarantor nugatory, and the Committee recommends that the infancy of the principal contracting party should not of itself protect an adult guarantor.

(4) In both New South Wales and New Zealand, statutes established machinery by which an infant may enter into binding contracts and dispositions with the prior sanction of the Court. It is unlikely that recourse to such a provision is frequent, but there may be circumstances in which such a power in the Court would be useful. The Committee recommends that such a provision be enacted in South Australia.

(5) Restitution. Although the need to protect infants has led the majority of the Committee to recommend that there be no general principle adopted that a defaulting infant contractor should have no more extensive obligation to restitution than the common law presently imposes upon him this reasoning does not bear on the rule that no restitution may be ordered to an infant unless there is a total failure of consideration on the side of the adult party. There are a number of cases in which an infant may obtain trivial benefits from a very partial performance of the contract by the adult party, and yet, having avoided the contract, be unable to have restored to him property that he has transferred under it. The majority recommends that a discretion be granted to the Court to enable it to order restitution of some or all of property provided by the infant when a contract is properly avoided.

(6) Infants holding estates in land under the Real Property Act, 1886-1975. It has been the practice for many years in this State that when an infant, who is the registered proprietor of an estate in land which is under the provisions of the Real Property Act, desires to deal with his interest in the land, application is made to the Supreme Court for the appointment of a guardian, and for the empowering of the guardian to carry out the intended transaction on the infant's behalf. The jurisdiction to make such orders is very doubtful (see the judgment

of Napier J. (as he then was) in *In re Coombe* 1941 S.A.S.R. 197 at 198-9). However as there is at present no other way in which a purchaser mortgagee or lessee from the infant can obtain a good title, orders of this kind continue to be made. The Committee recommends that the present practice which seems to work well, be given statutory backing.

We have the honour to be

HOWARD ZELLING
S. J. JACOBS
L. J. KING
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Law Reform Committee of South Australia

Dated 6th December, 1977.