

**The Need for Reform in the Law of Infants Contracts**  
**—Some Comments on the Latey Report**

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In recent years there has been considerable criticism of the law relating to infants' contracts as being both absurdly technical and out of keeping with modern conditions. In July of 1967 a British committee under the chairmanship of the Honourable Mr. Justice Latey appointed to consider, among other things, "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", brought out a report advocating a general reduction of the age of majority to 18 and making various detailed recommendations as to reform within the various fields under their consideration.<sup>1</sup> This article is devoted to a consideration of those aspects of the report suggesting reform in the field of infants' contracts. In the first part of the article I consider certain of the anomalies and uncertainties which exist in the law as it is at present. The general effect of the present rules is considered in the second part with some contrast with foreign systems of law. A summary of the recommendations made in the Latey Report is set out in the third section and comments on the Report follow thereafter.

I. THE PRESENT LAW

A. *The Infants Act 1908*

Sections 12 and 13 of the Infants Act 1908 (N.Z.) follow exactly

<sup>1</sup> Report of the Committee on the Age of Majority (July 1967) Cmnd. 3342 This report is popularly known as "the Latey Report", and is referred to in this article under that name.

Sections 1 and 2 of the Infants Relief Act 1874 (Imp.). As stated by Mr. Justice F. B. Adams in *Nelson Guarantee Corporation v. Farrell*,<sup>2</sup> "Both sections have puzzled lawyers for eighty years and in regard to Section 12 in particular there is an amazing dearth of judicial authority as to its meaning and effect, and remarkable discordance expressed by writers of text books."

Section 12 reads:

"All contracts, whether by speciality or by simple contract, 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 necessaries) and all accounts stated with infants, shall be absolutely void:

Provided 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 principle point of difficulty is as to the meaning of the words "absolutely void". It is commonly assumed that they cannot possibly mean what they say<sup>3</sup>, but the contrary has been argued with some force by G. H. Treitel<sup>4</sup> and there is in fact some authority in support of a literal interpretation<sup>5</sup>. Treitel notes the strong contrast between the words "absolutely void" as used in the first part of the section and voidable as used in the second part. He points out the injustice which could result under the law existing prior to the Act whereby such contracts were voidable at the option of the infant, the other party being bound<sup>6</sup> although he could not enforce the contract against the infant. In an article replying to this P. Atiyah<sup>7</sup> points out the severe hardship which might result to the infant from such an interpretation particularly where the contract is partially completed. The infant would be unable to sue for breach of any condition of the contract, including breach of the terms implied by the Sale of Goods Act 1908. Moreover if the contract was strictly void the infant could not obtain a good title to the property and could not pass on a good title to a third party. Atiyah suggests that the words are to be interpreted as meaning absolutely void as against the infant only.

In general the approach adopted by the courts may be rationalized by stating that such contracts are absolutely void only insofar as they are executory and that the old rules existing prior to the legislation

<sup>2</sup> [1955] N.Z.L.R. 405.

<sup>3</sup> See for example Cheshire and Fifoot, *Law of Contract* (2nd N.Z. ed. 1965) at 342; *Chitty on Contracts* (22nd ed.) 1961 Vol. 1 at 1 and 13; *M.P. Furmston* (1961) 24 M.L.R. 644 at 645. *Atiyah* 74 L.Q.R. 97.

<sup>4</sup> 73 L.Q.R. 194 at 200 and 74 L.Q.R. 104.

<sup>5</sup> *Nash v. Inman* (1908) 2 K.B. 1 at 12; *Coutts and Co. v. Brown-Lecky* [1947] K.B. 104; *Robinsons Motor Vehicles Limited v. Graham* [1956] N.Z.L.R. 545 at 556; *R. v. Wilson* (1879) 5 Q.B.D. 28.

<sup>6</sup> But note that an infant could not enforce specific performance: *Flight v. Bolland* (1828) 4 Russ. 298; 38 E.R. 817.

<sup>7</sup> 74 L.Q.R. 97.

apply to contracts which are partially or wholly executed. Thus in *Stocks v. Wilson*<sup>8</sup> Lush J. rejected the contention that as a consequence of such contracts being void property did not pass to the purchaser. Further, an infant cannot recover any money paid pursuant to the contract unless there has been a total failure of consideration<sup>9</sup>. The rule applied now is the same as that applicable prior to the Infants Relief Act 1874<sup>10</sup>. In a similar way, it has been decided in several cases subsequent to the legislation<sup>11</sup> that the Act does not affect the equitable right which a lender has to recover a loan lent to an infant for the purpose of purchasing necessaries.

A novel suggestion was made by F. B. Adams J. in *Nelson Guarantee Corporation v. Farrell*<sup>12</sup> where he pointed out that the consequences of "voidness" are not necessarily the same for all types of situations<sup>13</sup> and that therefore it should be possible for the Court to evolve suitable rules appropriate to infants' contracts. To date the courts have shown no inclination to do this.

A further difficulty arising out of section 12, is that on its face it applies both to contracts for sale of goods *to* infants and contracts for sale of goods *by* infants. Presumably the words, "for goods supplied or to be supplied . . ." are to be read as relating only to contracts for the supply of goods to an infant since otherwise (as noted by Treitel<sup>14</sup>) the exception as to necessaries is meaningless.

Section 13 of the Infants Act 1908 also presents its problems. It reads as follows:

"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 or not there is or is not any new consideration for such promise or ratification after full age."

The section appears to distinguish between a promise to pay a debt and a ratification of a contract. Though there is a convincing historical explanation for the peculiar terminology<sup>15</sup> the Courts have come to the peculiar decision that while a ratification of a contract is not

<sup>8</sup> [1913] 2 K.B. 235 at 247.

<sup>9</sup> *Valentinis v. Canali* (1889) 24 Q.B.D. 166; *Pearce v. Brain* [1929] 2 K.B. 310.

<sup>10</sup> See *Homes v. Blogg* (1818) 8 Tuant 508 and *Ex parte Taylor* (1856) 8 D.M. & G. 254; note that *Ex parte Taylor* was cited as an authority in *Pearce v. Brain* (*supra*). The same rule is still applied to contracts unaffected by the Infants Relief Act 1847. See *Steinberg v. Scala (Leeds Limited)* [1923] 2 Ch. 452.

<sup>11</sup> *Martin v. Gale* (1876) 4 Ch.D. 428; *Lewis v. Alleyn* (1888) 4 T.L.R. 560; *Gardner v. Wainfur* (1920) 89 L.J. Ch. 98.

<sup>12</sup> [1955] N.Z.L.R. 405.

<sup>13</sup> For further comments on different effects of "voidness" see *Davenport v. The Queen* [1877] 3 A.C. 115 at 128-129.

<sup>14</sup> 73 L.Q.R. 194 at 195.

<sup>15</sup> *Treitel* 73 L.Q.R. 194.

binding a new promise to perform a contract is<sup>16</sup>. It is to be noted however, that the section excludes ratifications whether there is any new consideration or not. The authors of the Latey Report comment:

“. . . the distinction between a ratification for new consideration and a fresh contract is one that has defeated better minds than ours.”<sup>17</sup>

## B. Voidable Contracts

### 1. Subject matter not of a continuing nature

At common law prior to the Infants Relief Act the largest category of infants' contracts were those which were enforceable by the infant, but were unenforceable against him unless he ratified them within a reasonable time after coming of age<sup>18</sup>. This category was reduced by Section 12 of the Infants Act 1908 which rendered “absolutely void” three specific classes of case:

- (a) for the repayment of money;
- (b) for goods supplied or to be supplied (other than necessities);
- (c) accounts stated.

This still however, leaves a wide category of contracts which would appear to include amongst others: contracts of purchase of an interest in land<sup>19</sup>; all contracts of purchase, other than those for goods supplied or to be supplied; contracts of sale *by* infants; contracts of loan *by* infants; guarantees by infants<sup>20</sup>; contracts of marriage and contracts by infants to perform services.

It is interesting to note that only a brief passing reference is made to these contracts in the modern editions of at least one leading textbook, Cheshire and Fifoot, *Law of Contract*<sup>21</sup>. This is presumably because such contracts are now similar to those included within Section 12 of the Infants Act 1908. As a result of Section 13 of that Act they cannot now be ratified, and as argued above the Court has in most respects applied to contracts included within Section 12 of the Act the rules which were applicable to voidable contracts prior to that Act.

There should however, in principle be at least one important difference, namely that the infant can enforce such a contract although

<sup>16</sup> See *Ditcham v. Worrall* (1880) 5 C.P.D. 410; *Brown v. Harper* (1893) 68 L.T. 488.

<sup>17</sup> Page 89.

<sup>18</sup> *Chitty on Contracts* (22nd ed. 1961) Vol. 1 at 402.

<sup>19</sup> Woodhouse J. in *MacFarland v. Brumby* [1966] N.Z.L.R. 230 at 233 appears to have treated these as contracts for the purchase of subject matter of a continuing nature, wrongly in my submission, because it is of the essence of such a contract that the subject matter should be one to which continuing obligations relate. See *Cheshire and Fifoot Law of Contract* (2nd N.Z. ed.) at 336.

<sup>20</sup> Except perhaps guarantees of contracts absolutely void (post).

<sup>21</sup> 2nd N.Z. ed. (1965) at 342.

the other party cannot. The infant cannot however, obtain specific performance since this could not be ordered against him.<sup>22</sup> We thus have by accident of history a class of cases that are unenforceable against an infant and cannot even be ratified by him after coming of full age; which the infant cannot enforce by specific performance; but upon which he can obtain damages. Presumably the Court would impose reasonable time limitations on the infant's right to damages and if he did not complete the contract according to its terms he would no doubt be held to have elected to repudiate it, but the present position is surely anomalous.

Such contracts also present an area of uncertainty in respect to the rights of an infant to recover property (as distinct from money) transferred under the contract, where it appears, that the infant may be able to recover property upon accounting to the other party for any benefit received.<sup>23</sup>

## 2. *Subject matter of a continuing nature*

It is generally believed that where the subject matter of an infant's contract involves property to which liabilities of a continuing nature attach that the contract is voidable in the sense that it is valid until repudiated by the infant. The infant is believed to be bound by accrued liabilities prior to repudiation,<sup>24</sup> This apparent simplicity is an illusion. Thus it appears that an infant is not liable in respect of leases which are for trading or non-necessary purposes<sup>25</sup>; nor is he liable if the other party terminates the contract on the basis of his infancy.<sup>26</sup>

## C. *Necessaries*

The trader contemplating trading with an infant had best beware the law as to necessaries. He may start with such a useful quotation as that from *Chapple v. Cooper*:<sup>27</sup>

"articles of mere luxury are always excluded though luxurious articles of utility are in *some* cases allowed."

He may then contemplate, that in one case articles of jewellery have been held to be a necessary<sup>28</sup>, as has a racing bike used only occasionally for purposes other than racing<sup>29</sup>; but that an expensive

<sup>22</sup> *Flight v. Bolland* (1828) 4 Rus. 298; 38 E.R. 817; *MacFarland v. Brumby* [1966] N.Z.L.R. 230.

<sup>23</sup> For a fuller discussion on this class of contracts generally see H. J. Hartwig, "Infants Contracts in English Law with Commonwealth & European Comparisons" (1966) I.C.L.Q. 15, 780 at 793-820.

<sup>24</sup> *North Western Rly. Co. v. M. Michael* (1850) 5 Exch. 114, 123-124; *McFerran v. McFerran* (1896) 5 N.Z.L.R. 292; *Bell v. Bell* [1953] N.Z.L.R. 805. See also *Cheshire & Fifoot Law of Contract* (2nd N.Z. ed.) 1965 at 336.

<sup>25</sup> *Lowe v. Griffith* (1835) 1 Scott 458 and 4 L.J.C.P. 94.

<sup>26</sup> *Blake v. Concommon* (1870) Ir. Rep. 4 C.L. 323. See generally on this topic A. H. Hudson (1957) 35 Canadian Bar Review 1213.

<sup>27</sup> (1844) 13 M. & M.W.

<sup>28</sup> *Peters v. Fleming* (1840) 6 M. and W. 42; 151 E.R. 314.

<sup>29</sup> *Clyde Cycle Co. v. Hargreaves* (1898) 14 T.L.R. 338.

lorry purchased for purposes of a business has been held to be not a necessary.<sup>30</sup> All this however, is really of little use to him since in any event he can not rely upon the nature of the article he sells, but must make himself cognisant with the infant's way of life, and personal circumstances, and must discover whether or not the infant already has a sufficient supply of the article in question.

#### D. Separation Agreements

One of the common causes of difficulty in the law is that words such as "contracts" apply to what are in fact an enormously varied set of social arrangements. Thus it is principally by a verbal accident that the same rules come to be applied to the personal and domestic arrangements of individuals in marriage and to commercial transactions with which they share almost no similarity except some form of agreement between the parties. The result of this in the present field is that while an infant can marry at sixteen<sup>31</sup> he or she cannot enter into a fully binding separation or maintenance agreement until the age of twenty-one,<sup>32</sup> and yet such agreements are at the present time probably the most common method of settling matrimonial disputes.

Whatever else is achieved in the way of reform of the present law this anomaly should be removed.

#### E. The position of an Adult Guarantor of an Infant's Contract

In *Coutts and Co. v. Brown Lecky*<sup>33</sup> it was held that several adults who had guaranteed an infant's overdraft could not be held liable by the bank as the guarantee of a nullity is itself a nullity. In *Yeoman Credit Limited v. Latter*<sup>34</sup> the decision in *Coutts and Co. v. Brown Lecky* was distinguished on the basis that the contract in that case was one of indemnity rather than guarantee, and thus involved an original obligation on the adult. The present situation therefore depends on a purely verbal distinction which appears to be entirely without merit or value.

In any event the decision in *Coutts & Co. v. Brown Lecky* is open to serious criticism. Oliver J. based his decision on the case of *Swan v. Bank of Scotland*<sup>35</sup> where guarantees of a contract void for illegality were themselves treated as being void, and on a passage from Pothier to the effect that before a guarantee can be effective there must be a

<sup>30</sup> *Mercantile Union Guarantee Corporation Limited v. Ball* [1937] 3 All.E.R. 1.

<sup>31</sup> Marriage Act 1955, s. 17.

<sup>32</sup> *Nicholson v. Nicholson* [1952] N.Z.L.R. 53; *Bell v. Bell* [1953] N.Z.L.R. 805; *McGurn v. McGurn* [1956] N.Z.L.R. 106.

<sup>33</sup> [1947] K.B. 104.

<sup>34</sup> [1961] 2 All.E.R. 294.

<sup>35</sup> 10 Bligh, N. S., 627.

binding debt on the principal. So far as the decision in *Swan v. Bank of Scotland* is concerned, this was a contract expressly declared void by the prohibiting Act and the guarantors were aware of the illegality. The ancillary transaction would have been void even had it been an indemnity. In regard to the passage from Pothier it appears that Oliver J. overlooked the fact that subsequently Pothier points out that at Roman Law (and in most civil law jurisdictions) an infants contract is at least sufficient to establish a "naturalis obligatio" which can form the basis of a guarantee.<sup>36</sup>

The Latey Report while advocating that a guarantee should in all cases be binding, expresses some concern that adults may sign guarantees without appreciating they may become personally liable.<sup>37</sup>

They suggest a guarantee should only be binding if signed in a space marked in large letters in red and stating "If you sign this you may become personally liable to pay the money".

#### F. Deceit by Infants

In *R. Leslie (Limited) v. Shiell*<sup>38</sup> the plaintiff which was a registered moneylender had advanced £475 to an infant who had fraudulently represented himself to be of full age. He defaulted and the company sued in tort on the basis of fraud, but the Court of Appeal held that it could not recover. To permit the plaintiff to recover would be in effect to enforce a void contract. For a similar reason the Courts will not permit recovery against an infant for money had and received if the receipt of the money is in any way related to the contract.<sup>39</sup>

The Latey Report supports the view that an infant should not be liable on a fraudulent representation as to his age. Otherwise, they suggest, a way might be found around the law; "we should soon find in contracts a clause to the effect that 'I am over the age of 18' (or whatever the age of capacity is to be.)"<sup>40</sup> But this surely would not give rise to an action in fraud? There is a clear distinction between an action in tort based on a representation which induced a contract, and an action pursuant to the contract which was induced.

I would advocate that this present rule should be abolished.

## II. THE SITUATION OF INFANTS UNDER THE PRESENT LAW

According to figures contained in the 1966 New Zealand Official Year Book there were in 1964 approximately 273,000 people in New Zealand between 15 and 21, and approximately a third of the population

<sup>36</sup> This point is made by E. J. Cohn (1947) 10 M.L.R. 40.

<sup>37</sup> Pages 93-95.

<sup>38</sup> (1914) T.L.R. 460.

<sup>39</sup> *Cowern v. Neild* [1912] 2 K.B. 419.

<sup>40</sup> Page 92.

was under 21.<sup>41</sup> The number between 18 and 21, being those most directly affected by the recommendations in the Latey Report, would have been approximately 131,000. The present law therefore affects a very considerable number of people. Of these numbers, something over 14,000 were married, this number being weighted, interestingly enough, towards females in the ratio of about 5 to 1.<sup>42</sup>

None of these people, married or otherwise, can without the assistance of an adult or the Court satisfactorily purchase a house, or even rent one, borrow money, set up in business on their own account or enter into a proper business partnership, or obtain goods on credit or hire purchase unless the other party can be certain that they are necessities, and in practice most traders are naturally reluctant to attempt the fine legal distinction involved.

The present law both molly-coddles and hampers infants. It molly-coddles them since for the vast majority of contracts and the vast majority of infants the present rules are unnecessary. It is no doubt socially desirable to protect infants from exploitation. It is probably also desirable to have some sort of shield to protect infants from their own folly, where they may enter into a contract (or a number of contracts) perfectly fair in themselves but clearly from the infants point of view, detrimental. But in both instances this must surely only apply to a fringe of cases.

The present law achieves its effect by applying indiscriminately to all infants of whatever age, no matter what their intelligence or experience, and to all contracts of the various classes affected, no matter how fair and advantageous. As such it is out of keeping with social reality since in the vast majority of cases people of whatever age do keep their bargains as they ought. The present law thus allows the potential for an infant knave to shield behind a plea of infancy against a clear moral obligation.<sup>43</sup> The law hampers infants for the very reason that because of these restrictions they are in many cases legally unable to carry on normal commercial activities. Section 12A of the Infants Act 1908 provides some relief<sup>44</sup> but the procedure is cumbersome and of no use to the infant trader. Further, in my experience, and that of at least one Court<sup>45</sup> almost all applications made are approved without query. This leads to the feeling that from the point of view of the time

<sup>41</sup> Based on projections from the 1961 census.

<sup>42</sup> New Zealand Official Year Book (1967) at 86.

<sup>43</sup> See for instance *Cowern v. Neild* [1912] 2 K.B. 419; *R. Leslie Limited v. Sheill* [1914] 3 K.B. 607.

<sup>44</sup> This section permits a magistrate on application to approve a contract which then becomes binding for all purposes.

<sup>45</sup> This is confirmed by the Magistrates Court at Auckland. About 99% of all applications made are approved. Almost without exception those not approved are because of faulty documents.

and effort involved the procedure is an inefficient way of dealing with whatever problems do exist. There is however, a good case for retaining the section to deal with occasional cases, if the number of cases requiring approval can in other ways be reduced.<sup>46</sup>

Both the above defects obviously become more serious as the age of the infant increases. Of the 14,000 odd married infants at the last census only 6,000 were under the age of 20. Very few infants below 18 would wish to rent a flat, or buy a house. Some no doubt would want to buy cars on hire purchase, but in general the purchasing power of infants must in the nature of things increase drastically between the ages of 18 and 21. This group however, has nowadays such earnings and freedom from commitments as to have become an important factor in retail markets. In addition, as the Latey Report notes,<sup>47</sup> by the age of 18, the vast majority of people are in fact running their own lives and making their own decisions, and it is in general undesirable to hamper them with unnecessary restrictions.

The age of 21 is nominally the age of full contractual capacity for most countries.<sup>48</sup> But in fact there are several factors which render the effect generally less restrictive than in New Zealand. Thus in several countries an infant can become emancipated at 18. Under Federal Swiss Law and Federal German Law<sup>49</sup> this carries full contractual rights. Under Swiss law emancipation is automatic on marriage. Under French law it carries the right to enter into certain classes of contracts and the right to trade provided the infant is registered.<sup>50</sup>

The general approach of those countries which have followed the Roman law pattern is different from the common law. Under Roman law, transactions concluded with infants under 7 years of age were void. Transactions concluded with minors between 7 and 12 years of age required the authorisation of a tutor. If the tutor had not given his authority the minor was nevertheless not free from all liability. First he was bound to return anything still in his possession by which he was unjustly enriched, secondly, the transaction was considered as imposing on the minor a *naturalis obligatio* sufficient to form the basis of a guarantee. Minors between 12 and 25 could conclude valid contracts. Where, owing to their minority they had been induced to enter transactions that were unfavourable to them, or where their curators had entered into such transactions for them, they could claim

<sup>46</sup> See similar comments in the Latey Report, page 75.

<sup>47</sup> Page 39.

<sup>48</sup> Latey Report appendix 7; H. J. Hartwig. *Infants Contracts in English Law: With Commonwealth and European Comparisons* (1966) 15 I.C.L.Q. 780 at 824-831.

<sup>49</sup> H. J. Hartwig (*Ibid.*) at 830-831.

<sup>50</sup> H. J. Hartwig (*Ibid.*) at 828.

*restitutio in integrum*, but were bound themselves to make restitution.<sup>51</sup> This approach has survived in French law where an infant can repudiate a contract only on the grounds of lesion (prejudice).<sup>52</sup>

The best of this type of approach might be synthesized in the following three propositions:

- (1) An infant should not be held to have entered into contractual obligations unless he is old enough for *consensus ad idem* to be presumed.
- (2) All persons under a certain age should be entitled to appropriate remedies where they have been exploited.
- (3) All persons under a certain age should be protected against their own folly by being entitled to rescind a contract, but should be bound to make proper restitution to the other party.

The biggest defect of such an approach is that it inevitably introduces an element of uncertainty into contractual dealings.

### III. THE LATEY REPORT

The Lately Report recommends that full contractual capacity should be attained at age 18.

With regard to contracts by those under 18 its recommends a general tidying up of the law:

- (1) Contracts by those under 18 should be unenforceable by action or otherwise against the infant.
- (2) The infant should be bound however, to account to the other party for any money, property or services, he has received from the other party under a contract which he fails to perform. The Court should be entitled to relieve the infant from this obligation to such extent as it thinks fit.
- (3) An infant who has parted with money or property should be entitled to its return subject to an obligation to account to the other party for any benefit the infant has received. This should not apply to fully executed contracts.
- (4) It should not be possible to sue an infant for damages on an executory contract.
- (5) There should be no distinction with regard to necessities, beneficial contracts of service or apprenticeships.
- (6) An infant should remain exempt from liability in tort for deceit as to his age which induces a contract.
- (7) A guarantee by an adult of an infant's contract should be

<sup>51</sup> This exposition is derived from E. J. Cohn (1947) 10 M.L.R. 40.

<sup>52</sup> H. J. Hartwig (*ante*) at 826.

binding if signed in a square making it clear that personal liability may attach.

- (8) An infant should not be liable on a negotiable instrument.

#### IV. COMMENTS ON THE LATEY REPORT

Many of the recommendations in the report depend upon the reduction of the age of contractual capacity to 18. An approach which inevitably involves a certain amount of inconvenience for those under the age of majority, and those dealing with them, is perhaps acceptable for its other virtues when the number of people affected, and the extent to which they are affected, is small. But this would not be the case unless the age is lowered. For the reasons more fully set out in Part II, I should not like to see a pattern of unenforceable contracts operative if the age limit is left at 21.

The principle virtue of the recommendations is their simplicity and the relative certainty which they would provide in the law. Their principle defects are that they fail to provide any protection whatsoever for those between the ages of 18 and 21 insofar as this may be still needed, and they fail to provide any protection where an infant has been exploited on a contract which is executed. Since however, I believe that these defects can be specifically provided for, I would support the adoption of the Latey Report recommendations subject to the following provisos:

##### 1. *Residual protection*

In a minority dissent from the report two members of the committee<sup>53</sup> who in general support the lowering of the age of majority to 18 advocate some form of residual protection. They are particularly concerned on the following points:

- (a) The danger that 18–21 year olds will enter into hire purchase and other commitments beyond their capacity.
- (b) The danger in allowing the under 21's to have absolute control of large sums of money which they may come into from inheritances or damages from personal injury claims.
- (c) The inconvenience that could arise when an immature 18 year old becomes a sole trustee or administrator.

They therefore advocate a residual right for a person between 18 and 21 to have a contract set aside if he can show that it is, or was, harsh or oppressive.<sup>54</sup>

<sup>53</sup> G. Howe and J. Stebbings.

<sup>54</sup> 155–157.

The majority of the committee while tempted by the idea decide against it on the basis that it would be "self defeating" in that traders would then still tend to treat such person as being in a special class and hesitate to trade with them.<sup>55</sup> A further difficulty is that the proposal does not really deal with the problems which cause the minority concern. Thus, it would not help the infant with a lot of money, nor would it protect the infant against most hire purchase agreements or do anything about infant trustees.

A point of some importance noted by the majority<sup>55</sup> is that if 18 year olds make mistakes they are less likely to make the same mistakes later, and their mistakes, it may be hoped, will be smaller. In general this is true and there is much to be said for letting youth learn by experience. There are however, certain contracts which 18-21 year olds may well be invited to enter into, which may involve very large sums of money, such as purchases of houses, businesses, and expensive equipment. Further these are in areas in which people in general are often subject to high pressure salesmanship. I suggest that people between the ages of 18 and 21 are in general not adequately equipped to deal with the pitfalls of such contracts. I would therefore advocate the adoption of a provision along the line of the following:

"Where a person between the age of 18 and 21 has entered into a contract in respect of which the consideration on either side is of a greater value than \$2000, then that person shall have the right while the contract is still wholly or substantially executory, to rescind the contract upon making restitutio in integrum or as near in the circumstances as may be possible. Where the contract is one of loan a party shall not be deemed to have made restitutio in integrum unless he returns the money borrowed together with any interest due thereon at the date of return.

A party returning property in order to effect restitutio in integrum shall be bound to return it in the state it was in at the date possession was given provided that where damage has resulted to it which may fairly be said to be due to the condition it was in at the time possession was given it shall be sufficient merely to return the property.

These provisions shall apply to a lease during the first four months of its term if the term is for a longer period than one year and the rental is greater than \$1000 per annum."

## *2. Protection in respect of executed contracts*

There are certain contracts likely to be entered into by those under the age of majority which will become more or less immediately executed. An example would be where an infant buys a car and pays cash. I believe there is a case for protecting those under the age of 18 from the more gross cases of exploitation in respect of such contracts. This could be achieved by a provision such as the following:

"Where the Court is of the view that an infant (i.e. under 18) has been exploited by virtue of his age or immaturity on a contract whether executed or otherwise

<sup>55</sup> At 76.

the Court may make such order between the parties to the contract as shall in the circumstances be just.”

### 3. *Rights against Third Parties*

One of the difficulties in rendering contracts with an infant unenforceable against an infant is that it may prevent a party dealing with the infant, from enforcing a claim against that infant which the infant may well be able to pass on to a third party. The facts in *Godley v. Perry*<sup>56</sup> are instructive. A boy of six had purchased a plastic catapult from a neighbourhood store. It was badly moulded and shattered as a result of which he lost an eye. He was held entitled to damages against the store owner for breach of the warranties implied by the Sale of Goods Act 1893 (Imp.) that it was of merchantable quality and that it was reasonably fit for the purpose for which it was purchased. There was no negligence on the part of the store keeper. The store keeper in turn recovered from the wholesaler from whom he had purchased, who recovered from the importer who had purchased the goods from a Hong Kong manufacturing firm. Assume that the infant had traded the catapult with a friend for some marbles, with a warranty as to quality, and the friend had lost an eye. Then under the present law and under the proposed law the whole chain of responsibility would be broken.

I suggest that a provision should be enacted:

“That where a party who has contracted with an infant would have rights under the contract against the infant were it not for the fact that the contract is unenforceable and the infant would have in respect of those rights any rights against a third party then the party contracting with the infant shall be deemed to possess all rights which the infant would have against any such third party”.

### 4. *Cheques*

I suggest that if an infant is allowed to have a cheque book he should be liable on a cheque to a holder in due course without notice of the infancy otherwise nobody could safely receive a cheque without personally knowing the age of the drawer.

### 5. *Apprentices*

The Latey Report does not advocate that any special rules should be applicable to apprentices, so that apprenticeship contracts would be unenforceable, apart from the fact that to gain the benefits of the contract the apprentice would have to perform his part.<sup>57</sup> I do not agree with this. Actions against apprentices may well be rare, but it seems to me desirable that apprentices should at least feel bound to

<sup>56</sup> (1960) 1 W.L.R. 9.

<sup>57</sup> Page 86.

their contracts. The whole subject of apprenticeship is no doubt ripe for reform, but until this is undertaken I would advocate that apprentices remain bound to their contracts.

#### V. SUMMARY

I advocate the following reforms in the field of infants' contracts:

- (1) The age of majority should be lowered to 18.
- (2) Contracts against persons under 18 should be unenforceable by action or otherwise against the infant.
- (3) The infant should be bound to account for any benefit he has received subject to the Court's discretion to relieve him from this obligation to such extent as it thinks fit.
- (4) While the contract is not wholly executed an infant should be entitled to the return of any consideration given subject to an obligation to account for any benefit received.
- (5) Where an infant has clearly been exploited he should be entitled to relief whether the contract is executed or not.
- (6) A person between the age of 18 and 21 should be able to rescind a contract entered into for consideration more than \$2000 while wholly or substantially executory upon making *restitutio in integrum*.
- (7) Section 12A of the Infants Act 1908 should be retained.
- (8) A guarantee by an adult of an infants' contract should be binding (if necessary only if it has been made clear that the guarantor may be personally liable).
- (9) A married person of any age should be entitled to enter into a binding separation or maintenance agreement.
- (10) Where a third party would have rights against an infant if the contract were enforceable he should be deemed to have personally any similar rights which the infant would have against a third party.
- (11) An infant should be liable on a cheque to a *bona fide* holder in due course without notice.
- (12) Apprenticeship contracts should remain binding.