GUNASEKERA HAMINI *v.* DON BARON.

1902.

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D. C., Colombo, 13,125.

Donation by a minor—Want of authority of guardian—Ratification after majority.

A donation by a minor unassisted by a guardian is null and void.

On the death of the minor's father, the mother does not become the guardian except by the Court appointing her under chapter 40 of the Civil Procedure Code.

Such a donation cannot be ratified subsequently, when the minor comes of age.

ACTION *rei vindicatio*, to recover one-fourth share of a land which the plaintiff alleged was originally the property of one Don Lorenzo Appuhami and his wife Francina. On the death of Don Lorenzo his widow became entitled to a half of the land, and his two daughters, the first plaintiff and Juliana, to one-fourth each. The first plaintiff, who was married to the second plaintiff, complained that the defendant was in unlawful possession of the entire land since September, 1890.

The defendant pleaded that by a deed No. 7,031, dated 20th August, 1890, the first plaintiff and her sister Juliana and their mother Francina gifted the said land to him.

The plaintiffs replied that the defendant, being the nephew and only male relative of the deceased intestate, requested the first plaintiff and her mother and sister to grant him a lease of the land

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in question for a term of eight years, and on their agreeing to do so, he had the deed No. 7,031 prepared, which they believed to be a lease and signed, but which they afterwards found was a gift in his favour. They pleaded fraud and misrepresentation on his part, and also that the first plaintiff was at the time of signing the deed a minor, and that the said deed was void and of no effect in law.

The Acting District Judge (Mr. N. E. Cooke) found that plaintiffs had failed to prove that the first plaintiff was induced to sign the deed by the false representation of the defendant that it was a lease, and as regards the minority of the first defendant, the District Judge held as follows:—

"There is no doubt that she was a minor at the date she signed the deed. Her counsel contended that a deed by a minor is void. In support of his contention he quoted *Maasdorp's Grotius. pp. 38 and 297*, and *Voet, bk. 4, tit. 4, secs. 13 and 14*. The passage on page 38 of *Grotius* refers to wards and not to all minors, and as to the passage on p. 297, it has not been shown that the Municipal Law therein referred to applies to this country. I interpret the law as stated by Voet to be that restitution *in integrum* is allowed to a minor on proof of damage sustained by him, but that in the case of a donation by him it is not necessary that damage should be proved. Whether the Roman-Dutch Law is as I have stated, or not, the Supreme Court has decided in D. C., Kegalla, No. 128, reported in *2 C. L. R. 99*, that a deed by a minor is not void but only voidable by express repudiation by him after attaining majority. The first plaintiff was married on the 29th September, 1890. She took no steps to have the deed set aside. Even this action was not instituted to have the deed set aside. It was only when the defendant pleaded it in defence to the plaintiff's action of ejectment that she has sought to have the deed set aside. It is conceded by the plaintiff's counsel that, if the deed is only voidable and not void, then the action is prescribed under sections 11 and 15 of the Prescription Ordinance. I hold that the deed is not void."

The plaintiffs appealed.

Walter Pereira, for plaintiffs, appellants.—There were two questions raised in this case: first, whether the deed of the 20th August, 1890, had been obtained on false and fraudulent representations as to its nature; and, secondly whether the deed was void, so far at least as execution thereof by the first plaintiff was concerned, by reason of her minority at the time of execution. The first was a question of fact. The District Judge had decided it on the evidence against the appellants. It is needless to contest his

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finding thereon as the appellant had a strong case on the second question. On this question, the District Judge failed to guide himself by the Roman-Dutch Law. A minor's deed was not merely voidable but absolutely void under the Roman-Dutch Law, especially if, as in the present case, it was a deed manifestly to the prejudice of the minor's interests. The present deed was a deed of gift, and Voet lays down (*4, 4, 13*) that in the case of such a deed the damage to the minor is apparent, and that (*4, 4, 52*) such a deed is void. Grotius in his *Introduction to Dutch Jurisprudence*, says (*Maasdorp, p. 297*) that a minor's deed is absolutely void, and Vander Keessel in his *Commentary* (*Lor. Trans., p. 34*) repeats this proposition, and adds that it is not so confirmed by an oath as to render it necessary to obtain *restitutio in integrum* against it. According to the *Censura Forensis, 1, 9, 5*, a son under the paternal power cannot, without the consent of the father, either make a promise or bind himself by contract, and in his *Commentaries* (*Kotze's Trans., vol. I., p. 193*) Van Leeuwen further says that a minor cannot alienate his own property.

Thomson, in his *Institutes, vol. II., p. 314*, cites local cases showing that contracts by a minor to his own prejudice are void. He goes on to say that contracts by a minor which are neither certainly to his prejudice, nor necessary and for his benefit, are neither void nor absolutely valid, but are voidable. The authority he cites for this propositon is, however, one on English Law. Any way, in a footnote he cites, with approval Marshall, who says that contracts entailing a certain loss and entered into during minority are void. In the cases relied on by the District Judge no authorities appear to have been cited in argument, and the deeds involved were not deeds of gift.

Counsel also cited *Burge, vol. III., p. 178*, and *Ràmanàthan's Reports for 1863 to 1868, p. 240.*

Dornhorst, for defendant, respondent.—The mother of the minor was present at the execution of the present deed. Indeed, she herself was a party to it, and there was nothing to prevent the minor from binding herself with the consent of the *mater familias*. *Muttiah Chetty v. de Silva, 1 N. L. R. 358.* The minor married a few days after the execution of the deed. Her husband was a witness to the deed. He had thus knowledge of its execution, but neither he nor his wife took any steps to have it cancelled. By long acquiescence they have practically ratified the deed. One of the principal issues on the pleadings was left untouched in the Court below. The property really belonged to the defendant. It had been bought out of his money, although

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the conveyance had been written in the name of the minor's father. What the defendant submits is that by the deed in question the first plaintiff, her mother, and sister, merely conveyed to the defendant what really was his own property. This matter should have been adjudicated on in the Court below. According to Voet, the remedy of *restitutio in integrum* was allowed in the case of a minor's deed. That was unnecessary if the deed was absolutely void. Voet further speaks (*4, 4, 44*) of ratification of a minor's acts after he has attained majority, which ratification may be express or gathered from acts and conduct.

Walter Pereira in reply.—The mere fact that restitution was allowed in the case of a minor's deed does not show that the deed was not by itself null and void. Restitution appears to have been allowed (*Voet, 4, 1, 13*) merely by way of greater security against contracts and transactions which would otherwise be *ipso jure considered* null and void. Restitution was, however, not absolutely necessary in the case of a minor's deed. Van Leeuwen distinctly says so. (*Kotze's Trans., vol. II., p. 345.*)

Cur. adv. vult.

1st March, 1902, WENDT, J.—

The plaintiffs, who are wife and husband, sought in this action to vindicate from the defendant an undivided fourth share of a parcel of land. The plaintiffs claimed it from one Lorenzo Appuhamy, the father of the first plaintiff, on the footing that he had died intestate in 1890 possessed of the property and leaving him surviving his widow Francina and two daughters, the first plaintiff and her sister Juliana. The defendant claimed to be the owner of the entire land by virtue of a deed of gift No. 7,031, dated 20th August, 1890, executed in his favour by the first plaintiff and her mother and sister. The plaintiffs replied that the gift was void as against the first plaintiff, because she was at the date of its execution a minor, and because the execution of it was procured by the fraudulent representation of the defendant (who was a nephew of Lorenzo) that it was a deed of lease in his favour for a term of eight years, the lease being intended to recoup the defendant the expenses to be incurred in taking out letters of administration to Lorenzo's estate.

At the trial it was agreed that the evidence recorded in a previous action, No. 13,124, between the same parties and in respect of another parcel of land comprised in the deed of gift, should be read as evidence in the present action.

It appeared that a few days after Lorenzo's death there was an almsgiving at his house, and on that occasion the deed of gift was executed. The first plaintiff was the younger of the two sisters,

and was born on the 27th March. 1874. The attesting witnesses to the deed were the second plaintiff (who was subsequently, on the 29th September. 1890, married to the first plaintiff) and one Baron Perera, the brother of the widow Francina. The issues agreed to by counsel were as follows: (1) Whether the first plaintiff Helena was induced to execute the deed No. 7,031, dated 20th August, 1890, by the false representation of the defendant that it was a deed of lease? (2) Is the deed No. 7,031 void by reason of the minority of the first plaintiff? (3) Whether the plaintiffs' claim to have the deed No. 7,031 declared void is prescribed?

Upon these issues the District Judge found for the defendant. He was satisfied that the first plaintiff knew what she was signing when she executed the deed of gift. He was of opinion that according to the law, as stated by Voet, a minor was entitled in the case of a donation to *restitutio in integrum* without any proof of damage sustained; but whether that was the Roman-Dutch Law or not, he held that in Ceylon, on the authority of *Siriwardena v. Banda* (*2 C. L. R. 99*), the deed of a minor was not void, but only voidable by express repudiation after attaining majority. The first plaintiff attained majority by marriage on the 29th September. 1890, but took no steps to have the deed set aside, and the plaintiffs' right of action to effect that object was therefore now barred under section 11 of the Prescription Ordinance by the lapse of three years from the time the cause of action arose, the present action not having been brought until the 10th October, 1899.

The principal question argued before us was whether under the circumstances the first plaintiff's deed of donation was void or only voidable.

In the case of *Siriwardena v. Banda*, the remarks of the Court as to the minor's deed being voidable only were *obiter dicta*, for Burnside. C.J., held that the title was not in the minor, but in his father's administrator, who had conveyed to the defendant in that action. The minor therefore had nothing to convey subsequently to the plaintiff. Withers, J., put his judgment on the ground that the alleged minor was estopped by his conduct from denying the administrator's title. Moreover, the question now under consideration does not appear from the report to have been argued, nor were any of the authorities upon the point cited to the Court. The decision is not therefore binding upon us in the present action.

The case of *Sello Hamy v. Rapheal* in *1 S. C. R. 73*, was cited to us at the argument by the defendant. Here, too, it was generally stated that a conveyance by an infant was not void but

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voidable, but Clarence, J., points out that the defendant, who then attacked the deed, had no *locus standi* to do so, because he in no sense represented the minor, and he expressly abstains from finding whether the grantor was or was not a minor, because such a finding would have no bearing on the decision of the case. Besides, that was the case of a sale which might or might not be beneficial to the minor making it. A donation certainly cannot possibly be beneficial to the donor. There is no doubt on the authorities that the first plaintiff could have obtained *restitutio in integrum* if she had applied in time, but that remedy is now barred, and she can only succeed by showing title to the land, which defendant's nine years' possession would be insufficient to defeat. Did then the title continue all along in the first plaintiff on account of the nullity of her donation?

Thomson, dealing with the contracts of minors, says (*Inst., vol. II., p. 314*) "that a minor, having in law no free will, cannot "make a contract except for profit alone, so that a contract by a "minor to his own prejudice—as for example the sale of his "reversion (*3 Lorenz, 146*)—is void, but contracts which are neces- "sary, as for his food, &c. (which is to his profit), and which are "to his benefit, as a contract for wages, &c., are valid. Contracts "which are neither certainly to his prejudice nor necessary and "for his benefit, are neither void nor absolutely valid, but are "voidable; these he may by confirmation, or in some cases by "mere acquiescence, after he becomes of age, render himself "liable to perform." In a footnote, he quotes the authority of Grotius for making all contracts of an infant, except for profit alone, absolutely void.

Grotius (*Introduction, bk. 3, chap. 1, § 26, Maasdorp's Trans., p. 297*) lays it down that Municipal Law (by which term he means the *Jus civile—see p. 5*) considers all obligations incurred by minors as invalid, except through delict or in so far as they have been benefited.

Vander Keessel, whose *Select Theses* is one of the most modern works of authority on the Roman-Dutch Law, and who wrote in order, as it were, to bring Grotius' *Introduction* up to date, passes the passage I have cited without comment, and adds (*Thesis 474*), "the opinion entertained by Voet and Groenewegen, "namely, that children who have attained the age of puberty may "be made civilly liable on their own contracts, and be used after "they have attained majority or after the death of the parents, is "wholly opposed to the analogy of our law."

Van Leeuwen (*Commentaries, bk. 4, chap. 2, § 3, Kotze's Trans., p. 13*) states "that minors cannot without the knowledge and

"assistance of their guardians bind themselves; with this "distinction, that, by accepting anything from another they may "indeed acquire something but do not bind themselves in favour "of another further than they have been actually benefited "thereby." Dealing later with the remedy of restitution, he particularizes the principal instances in which it is granted and says: "Where the obligation has been made by or on behalf of a "minor in the presence of the guardian or otherwise effectually "entered into, he may ask to be relieved against it, for a minor "ought not to be prejudiced by the act of his guardian; otherwise, "if the obligation has been effected by a minor in person, it will "be void of itself, and no restitution is necessary" (p. 345). Decker, who published his edition of Van Leeuwen's *Commentaries* in 1780, adds in a note that by way of greater security relief by restitution is generally asked at the present day against contracts and transactions which would otherwise be *ipso jure* considered null and void, and he refers to *Voet* (*4, 4, 13*), where that author assumes that restitution is competent (as no doubt it is) against a donation. See also *Voet, 4, 4, 18.*

Burge (*3 Col. and For. Laws, 178*) says that the obligation of an infant is illegal. Dealing with the subject of sales, the requisites of which as to capacity are also necessary for donation, he says: "There must exist also the power of alienating on the "part of such owners; a delivery by a minor or person under "interdict, without the authority of the guardian or the curator, "is ineffectual."

These authorities, I think, show that the donation by a minor, unassisted by a guardian, is null and void. It was, however, argued that in this instance the first plaintiff was in fact assisted by guardian, that is to say, by her mother Francina, and Vander Linden (*Juta's Trans., p. 29*) was cited to prove that the mother becomes on the father's death the guardian of the children by virtue of the *patria potestas*. But Vander Linden goes on to say that this power of the parents consists in a general supervision of the maintenance and education of their children and in the administration of their property. Such guardianship is no longer recognized by our Courts. Chapter 40 of the Civil Procedure Code requires every person who shall claim a right to have charge of property in trust for a minor to apply to the Court for a certificate of curatorship. The Court may also, unless a guardian have been appointed by the father, appoint such person or any relative or friend to be guardian of the person of the minor. Francina did not, besides, profess to act in the capacity of first plaintiff's guardian or to assist her in the transaction. She did not

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obtain the leave of the Court to donate the minor's property, and this is one of the formalities necessary to a regular alienation of a ward's property by the guardian. See *in re Hider, ex parte Corbet, 3 S. C. C. 46; Perera v. Perera, 1 N. L. R. 140; 3 Burge, 178; Voet 4, 4. 18:* where a decree of Court is said to be necessary even for the sale of the infant's real property. The donation, therefore, cannot be said to have been an alienation by guardian in due form.

For these reasons I come to the conclusion that the plaintiff's donation was a nullity, and could not be ratified by her own and her husband's acquiescence. The defendant endeavoured, by his evidence recorded in case No. 13,124, to make out that Lorenzo had purchased the land in 1887 with the defendant's money and held it under a secret trust for him so as to keep it beyond the reach of his creditors, but this was not made the subject of any issue and was not tried in the present case.

Upon the opinion I have expressed, the first plaintiff would be entitled to a declaration of her right to a fourth of the land in question but for a defect in her original title, due to the fact that the estate of her father Lorenzo has not been regularly administered. That estate was admittedly over Rs. 1,000 in value, and falls within the rule enacted in section 547 of the Civil Procedure Code. It was argued that the defendant, himself claiming under the first plaintiff, could not dispute her title, nor did he dispute it in the Court below, though the objection was taken before us. Section 545 of the Code, however, renders it obligatory on the Court, whenever it appears that a right is claimed to any portion of such an estate by intestate succession, to refuse to entertain such claim until the appointment of a proper legal representative (*M. Fernando v. A. Fernando, 4 N. L. R. 201; 1 Browne, 295*).

The appeal will be allowed and the case sent back to the District Court, in order that plaintiffs may take steps for the appointment of an administrator to Lorenzo's estate, after which the first plaintiff will be given a declaration of title with such damages as the parties may agree upon or, in default of agreement, the plaintiffs may prove.

The defendant will pay the plaintiffs' costs in both Courts.

BONSER, C.J.—

I agree with the judgment which has been read by my learned brother. I think the authorities which he has cited tend to support the proposition that a donation by a minor is *ipso jure* void, and not merely voidable; and, in addition to the authorities cited by him, I wish to add the authority of *Sandè on*

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Alienations, chap. 1, § 3, para. 21, where he says : "And "indeed so strongly is the donation of the property of a pupil or "minor forbidden, that it cannot be made even under an "order of Court. For such consideration can be validly alienated "for good consideration only, and there can be no consideration "in a donation."