Present: Ennis J. and Schneider A.J. 1916.

FERNANDO *et al. v.* FERNANDO.

307—D. C. Negombo, 11,126.

Lease by a minor—Is lease void or voidable—Action for declaration that lease was null and void and mesne profits—Claim by defendant for refund of rent—Prescription.

Land was leased by a minor to raise money for her marriage. The lessee knew the girl was a minor, but acted in good faith for her benefit. The minor brought an action for a declaration that the lease was null and void, and for mesne profits for a period of three years immediately preceding the action. The defendant prayed, *inter alia*, for the return of the lease money, with interest, if the lease be declared null and void.

Held, that as the lease was invalid in the circumstances, the plaintiff was entitled to mesne profits, and the defendant to the return of the lease money.

"Inasmuch as the lease was voidable at the option of the minor, the defendant's cause of action arose only when the plaintiff began to disturb him in his possession, and the claim for restitution of lease money is not prescribed."

ENNIS J.—There is no doubt that the Roman-Dutch jurists expressed the opinion that a deed by a minor was "null and void," but they do not appear to have had in mind the distinction made by later-day jurists between a "void" contract and a "voidable" one . . . . . It would seem, therefore, that an alienation by a minor is voidable at the option of the minor, and it is only when the minor exercises the option that the law takes effect, and the transaction is said to be "*ipso jure* void."

SCHNEIDER A.J.—A minor's contract is neither void nor voidable in the sense in which those words are understood in the English law . . . . . According to the Roman-Dutch law a minor's contract is such that it does not bind the minor unless he ratified it on attaining majority, while it binds the other party to it.

THE facts are set out in the judgment of Schneider A.J.

Samarawickreme and *De Alwis*, for defendant, appellant.

A. St. V. Jayewardene and *Zoysa*, for plaintiffs, respondents.

Cur. adv. vult.

September 7, 1916. ENNIS J.—

This was an action for a declaration that a lease made by the first plaintiff was null and void; for a declaration of title to the land leased; for ejectment; and for mesne profits. The defendant

1916.

ENNIS J.

Fernando v. Fernando

admitted that the plaintiff was a minor at the time she executed the lease, but denied that the lease was null and void. In the alternative the defendant claimed the return of the consideration, Rs. 1,000, paid for the lease. On the defendant's alternative claim the plaintiff raised the issue of prescription. The learned District Judge declared the plaintiff entitled to the land, but refused the plaintiff's prayer for mesne profits and the defendant's prayer for the return of the lease money. He, however, gave no costs to the plaintiff.

The defendant appeals from the order refusing the prayer for the return of the consideration, and the plaintiff has filed objections to the rejection of her claim for mesne profits and the order as to costs.

It has been decided in a series of cases (*e.g.*, *Andris Appu v. Abanchi Appu*,[1] *Perera v. Perera*,[2] *Ratwatte v. Hevawitarna*,[3] *Gunasekera Hamini v. Don Baron* [4] and *Sinno Appu v. Podi Nona* [5]) that a conveyance by a minor without the sanction of a Court is, by Roman-Dutch law, said to be null and void. The questions for determination on the appeal are whether, the lease being null and void, mesne profits can be recovered; whether restitution of the consideration can be ordered, and if so, from what date prescription begins to run?

It was argued for the appellant that the logical result of declaring a lease null and void was to leave the ownership untouched; that the transaction could not be ratified; that the mesne profits must belong to the owner; and that any money paid for the lease must be held to be money paid without consideration, and recoverable by the lessee at any time after payment (*i.e.*, a cause of action would accrue from the date of payment, and hence prescription would run from that date). A passage in the judgment of Wendt J. in *Gunasekera Hamini v. Don Baron* [4]—"For these reasons I come to the conclusion that the plaintiff's donation was a nullity and could not be ratified by her own or her husband's acquiescence"—was cited in support of the contention as to the effect of declaring the act a nullity, and the case of *Cowper v. Godmond* [6] was cited in support of the contention that prescription runs from the date of payment. There is no doubt that the Roman-Dutch jurists expressed the opinion that a deed by a minor was "null and void," but they do not appear to have had in mind the distinction made by later-day jurists between a "void" contract and a "voidable" one. For instance, Sandé (*Restraints upon the Alienation of Things, Webber's Translation 42*), after declaring that an alienation by a minor without good cause and an order of the Court is "*ipso jure* void," goes on to say (articles 82 to 84) that in an action for vindication the minor could recover mesne profits if the purchaser knew at

[1] *3 Br. 12.*
[2] *3 Br. 50.*
[3] *3 Bal. 26.*
[4] *(1902) 5 N. L. R. 273, 280.*
[5] *(1912) 15 N. L. R. 241.*
[6] *(1833) 9 Bing. 748.*

the time that the property belonged to a minor, or acted *mala fide*, but not if the buyer was of good faith. He also says that minors who vindicate their property which has been alienated without an order of Court ought to refund to the purchaser the purchase price with interest. Further, that the minor on becoming a major may confirm the alienation by ratification. It would seem, therefore, that an alienation by a minor is voidable at the option of the minor, and it is only when the minor exercises the option that the law takes effect, and the transaction is said to be "*ipso jure* void."

Strictly speaking, a contract which is "null and void" is a contradiction in terms; if it is regarded as not existing, clearly there is nothing to ratify. In this connection I quote the following passage from *Pollock on Contracts*, which applies with equal force when considering the use of the term by Roman-Dutch jurists, "It is commonly said that an agreement made by an infant, if such that it cannot be for his benefit, is not merely voidable, but absolutely void; though in general his contracts are only voidable at his option. This distinction, it is submitted, is in itself unreasonable, and is supported by little or no real authority, while there is considerable authority against it. The unreasonablenesss of it seems hardly to need any demonstration. The object of the law, which is a protection of the infant, is amply secured by not allowing the contract to be enforced against him during his infancy, and leaving it in his option to affirm or repudiate it at his full age. Moreover, the distinction is arbitrary and doubtful, for it must always be difficult to say whether a particular contract cannot possibly be beneficial to the party. As for the authorities, the word 'void' is no doubt frequently used; but, then, it is likewise to be found in cases where it is quite settled that the contract is in truth only voidable. And, as applied to other subject-matters, it has been held to mean only voidable in formal instruments and even in Acts of Parliament. The fact is (as was justly remarked in the argument of a modern case we shall presently cite) that there is 'a constant confusion in the books, and sometimes even in recent books, between void and voidable.' So that the language of text writers, of Judges, and even of the Legislature, is no safe guide apart from actual decision. But when we look at the decisions, they appear to establish in cases now in question only, that the contract be enforced against the infant or some other collateral point equally consistent with its being only voidable . . . . . The general law is that the contract of an infant may be avoided or not at his own option."

After citing cases, Pollock goes on to say: "It appears to be agreed that the sale, purchase, or exchange of land by an infant is both as to the contract and the conveyance only voidable at his option."

1916.

ENNIS J.

Fernando v. Fernando

In the case of *Molyneux v. Natal Land and Colonization Co.*,[1] the Privy Council, on an appeal from a decision of the Supreme Court of Natal in the case of a transaction by an insane person, held that the Roman-Dutch authorities say that it is absolutely void, but added that "Roman-Dutch law, while denying the capacity of an insane person to bind himself by contract, recognized the equity of allowing a person who has in good faith expended money on behalf of a lunatic to have his expenses recouped."

In the case of a minor, it would appear that Roman-Dutch law goes further, and enunciates that principle that a minor on coming of age may ratify the contract, and that the other party to the contract is bound by it. This is equivalent to saying that the contract, in equity, if not in law, is voidable. In the case of *Gunasekera Hamini v. Don Baron*[2] the point for determination was one of title, not of ratification or restitution, and the case is, therefore, no authority for the proposition that a minor cannot ratify his act on coming of age. The Roman-Dutch authorities all speak to the contrary.

On the question of the refund of the purchase price, Nathan[3] says that a person who surrenders without action property acquired from a minor may, nevertheless, recover the purchase price by an action *condictio sine causa* (*i.e.*, as money paid without consideration). In the present case the land was leased to raise the money for the marriage of the minor; the money was paid to her, and she has had the benefit; the property came to her from her father, and was property out of which dowry and marriage expenses would, in the ordinary course of events, properly be taken; and the learned Judge has found that the lessee knew the girl was a minor, but acted in good faith for her benefit. In the circumstances, on the authority of Sandé, the plaintiff would be entitled to mesne profits, and the defendant to return of the lease money and interest, but as the lease money and interest approximately represent the profits, there is no reason for an account of the mesne profits, I would set off the one against the other. Inasmuch as the lease was voidable at the option of the minor, the defendant's cause of action arose only when the plaintiff began to disturb him in his possession (see *Silva v. Silva*[4] *and Senaratna v. Jane Nona*,[5] in which the case of *Cowper v. Godmond*[6] is discussed), and the claim for restitution is not prescribed. The lessee, in my opinion, is entitled to a refund of any money paid in excess of the rent for the period of his occupation.

I would vary the decree accordingly, but would make no order for costs on the appeal, as each side has been partially successful.

[1] *(1905) A. C. 555.*
[2] *(1902) 5 N. L. R. 273, 280.*
[3] *Vol. I., art. 206.*
[4] *(1913) 16 N. L. R. 303.*
[5] *(1913) 16 N. L. R. 389.*
[6] *(1838) 9 Bing. 748.*

SCHNEIDER A.J.— 1916.

Fernando v. Fernando

By an indenture executed by her and the defendant the first plaintiff purported to lease to the defendant an allotment of land for a term of ten years and five months from the date of the indenture in consideration of a rental of Rs. 1,000. It is stated in the indenture that this rental is at the rate of Rs. 100 a year, as the possession during the period of five months immediately following the date of execution was to be free of rent. It was stipulated that Rs. 200 was to be paid at the execution of the indenture as the rent for the first two years, and that the balance Rs. 800 was to be paid by instalments of Rs. 200 at the beginning of each period of two years. The defendant paid the sum of Rs. 200 in terms of the indenture, and the whole of the balance sum of Rs. 800 on June 20, 1912. For this latter payment the first plaintiff granted him a receipt to the effect that, although that money was not then payable according to the terms of the indenture, she had received the same " on account of a necessity of mine."

The defendant obtained possession in terms of the indenture. The first plaintiff was born on October 20, 1897. She was therefore a minor at the date of the execution of the indenture. She married the second plaintiff on August 13, 1912. In their plaint, which is dated March 22, 1916, and which I shall deem as the date of the institution of this action, the plaintiffs prayed that—

(1) The indenture be declared null and void.
(2) The defendant be ejected, and the first plaintiff restored to possession.
(3) The defendant be decreed to pay plaintiffs Rs. 450 as the mesne profits for the period of three years immediately preceding the action, together with a further sum at Rs. 12.50 a month from the date of the plaint till restoration to possession.

In his answer the defendant, *inter alia*, prayed that if the indenture be declared void, that the first plaintiff be ordered to pay him the sum of Rs. 1,000, with interest at 9 per cent. per annum from " date of decree."

At the commencement of the trial plaintiffs' counsel moved, and was allowed to withdraw, the prayer that the indenture be declared void.

The parties proceeded to trial on a number of issues. Upon these issues the learned District Judge held (1) that the first plaintiff had been benefited by the lease, because the consideration for the lease was spent for the expenses of her marriage and on account of her dowry, and that the Rs. 1,000 had been paid to her by the defendant; (2) that the defendant was entitled to recover this sum, but that " his claim was prescribed," he does not say why it was prescribed; (3) that the first plaintiff was not entitled to recover mesne profits, because " she allowed the defendant to possess after

1916.

SCHNEIDER A. J.

Fernando v. Fernando

she attained majority about three and a half years ago, and is estopped by her conduct from recovering; (4) that the first plaintiff was entitled to have the defendant ejected and to be restored to possession; and (5) that the plaintiffs were not entitled to their costs of the action. In the course of the judgment he holds that the defendant was well aware of the minority of the first plaintiff at the date of the execution of the indenture.

The defendant appealed against only that part of the judgment which dismissed his claim for the restitution of the Rs. 1,000 and interest, and the plaintiffs took objection to that portion of the decree which dismissed their claim for mesne profits and for costs. The appeal was argued upon the footing that the findings of the learned District Judge in regard to the facts were correct. The appeal, therefore, was confined to the question of the defendant's right to recover the Rs. 1,000 paid by him and the plaintiffs' right to recover mesne profits and to order for costs.

In regard to the claim to recover the Rs. 1,000 two points arise: (1) Can the defendant claim a refund of this sum or any part of it? And (2) Is his claim prescribed? In my opinion the defendant-appellant is entitled to succeed on both these points. The law applicable is the Roman-Dutch and any other local law. The Roman-Dutch law authorities are to my mind clear that where a minor seeks to recover possession by a vindicatory action such as this, upon the ground that the contract under which the possession was transferred from him was ineffectual, he must restore the price in whole or in part which he had received or had been applied to his use or his benefit. (*Sandé: Restraints upon Alienation of Things, ch. 1, para. 83; Nathan: Common Law of South Africa, vol. 1., s. 334; Voet, 27, 9, 10; Grotius: Introduction to Dutch Jurisprudence, 1, 8, 5; Pereira: Laws of Ceylon (1913), 185.*)

It was argued by the respondents' counsel that the passage in volume I. of Nathan indicated that the minor was under no obligation to restore the price paid to him or applied to his use if the possession was *mala fide*, because the *exceptio doli mali* was available only to a *bona fide* possessor. In this contention I think he is wrong. In the passage in question, Nathan proceeds to indicate that the extent of the liability for the mesne profits on the part of the possessor will depend on his *bona* or *mala fides;* that, in fact, in this case the general rule would apply as to the liability of a possessor to account for the mesne profits. But he clearly indicates that the exception will be available, not according to the character of the possession, but on the ground that the minor seeking to vindicate had received the price, or it had been applied to his use in whole or in part. *Dolus* is a word of many meanings. It is used to cover the want of valuable consideration (*sine causa*) (*Hunter's Roman Law, Rights in personam*). The meaning of the passage applied to this case is that the defendant could have pleaded the *exceptio doli*

mali, in that the plaintiff had received the money paid for the possession of the property, and that it was against good conscience for her to retain the money and at the same time to seek to recover the possession which was the *quid pro quo* for that money. Nathan adds at the end of the passage in question, that where the possessor had restored possession without pleading the exception, he may recover the money received by, or applied to the use of, the minor by a *condictio sine causa*, that is, by an action to recover money paid *sine causa*, in that the *causa* had failed *pro tanto* or totally by the recovery of the possession of the property.

I come next to the question whether the claim for the recovery of the sum paid or any part of it is prescribed. It was argued that time began to run as from the date of payment, because a minor's contract is void, and the money was therefore recoverable by the defendant the moment it was paid, and that the time would begin to run as from the date when steps were taken to have the contract avoided only if the contract were voidable. I cannot agree with this contention. Time begins to run from "the time when the cause of action shall have arisen or accrued," in the words of the Ordinance No. 22 of 1871. We are therefore concerned primarily with what is the "cause of action" in regard to the defendant's claim? Although the Civil Procedure Code, 1890, was enacted long after the Ordinance No. 22 of 1871, I think we must interpret the words "cause of action" in Ordinance No. 22 of 1871 in the light of the Civil Procedure Code. "Cause of action," therefore, for purposes of time limitation, is the "wrong for the prevention or redress of which an action may be brought." What is the "wrong" or the grievance of which the defendant can complain? It is not that he paid Rs. 1,000 upon a contract which is ineffectual. He got all he bargained for. So long as he remained or was allowed to remain in possession he had no cause of complaint. It is the institution of this action which constitutes his grievance. His grievance or the "wrong" is that the first plaintiff is taking away from him the benefits of the possession of certain property, for which benefits he had paid at the rate of Rs. 100 per annum. His cause of action, therefore, arises with the interference with his possession, and his right to ask for the return of the whole or part of the sum he has paid does not arise till the first plaintiff makes her claim to vindicate the property. This view is consonant with the principle laid down and followed in the cases of *Cowper v. Godmond*,[1] *Silva v. Silva*,[2] and *Senaratna v. Jane Nona*.[3] In the last of these cases, Wood Renton J., who had taken part in the decision of *Marthelis Appu v. Jayewardene*,[4] expressed some doubt as to the accuracy of the law laid down in 1908. It was contended that the principle in *Marthelis Appu v. Jayewardene* [4] applied to this

[1] *(1833) 9 Bing. 748.*
[2] *(1913) 16 N. L. R. 303.*
[3] *(1913) 16 N. L. R. 389.*
[4] *(1908) 11 N. L. R. 272.*

1916.

SCHNEIDER A.J.

Fernando v. Fernando

case. But that case has no application here, for the obvious reason that the facts here are quite different. Here the defendant obtained all he bargained for and had no right to come to Court, because the contract was binding on him, although it did not bind the minor. In *Marthelis Appu v. Jayewardene* [1] the plaintiff did not get a conveyance in terms of the agreement upon which he had paid the money, and he had a right of action immediately the money was paid either to get such a conveyance or to be repaid the money he had paid.

Here I would pause to add a word as to the nature of a minor's contract under the Roman-Dutch law, not because it is necessary to do so for the decision of this case, but because the question was discussed at some length at the argument of this appeal. It is true that the words " null and void *ipso jure* " are used in speaking of the effect of a minor's contract. (*Sandé: Restraints upon Alienation, ch. 1, para. 79; Maasdorp: Institutes of Cape Law, vol. III., pp. 14 and 15; Van der Linden 93; Voet, 15, 1, 11, and 27, 9, 14.*) It is also true that it has been held that a minor's contract is void and not voidable, *e.g.*, in the case of *Gunasekera Hamini v. Don Baron* [2] and *Manuel Naide v. Adrian Hamy.* But the Roman-Dutch law authorities are equally clear that these same contracts, which are said to be null and void, may be ratified by the minor. *Voet, 27, 9, 14; Maasdorp: Institutes of Cape Law, vol. 1., p. 254; Sandé: Restraints upon Alienation, ch. 1, para. 84; Nathan: Common Law of South Africa, vol. 1., s. 339.*) As I read the Roman-Dutch law authorities, a minor's contract is neither void nor voidable in the sense in which those words are understood in the English law. In that law a contract is said to be void if it has no legal effect, and binds neither party; voidable if one of them may set it aside under certain conditions, but unless set aside is binding upon both parties.

According to the Roman-Dutch law, a minor's contract is such that it does not bind the minor unless he ratified it on attaining majority, while it binds the other party to it. It is therefore invalid, so far as the minor's obligation is concerned, until he ratifies it. But it is valid so far as the obligation on the part of the other party is concerned. Thus, Maasdorp (*Institutes of Cape Law, vol. III., p. 17*), speaking of the " Essentials of Contract, " states: " The contract of a minor entered into without the consent of his parents or guardians will be valid to this extent, that it will bind others to him without binding him to others.

" (1) Such a contract, also, will not be entirely devoid of effect in other ways, because, contrary to the ordinary rules with regard to suretyship, it will allow of a valid suretyship being entered into, and valid pledge and mortgages given, with regard to it, though being itself invalid.

[1] *(1908) 11 N. L. R. 272.*

[2] *(1902) 5 N. L. R. 273, 280.*

(2) It will also become valid, if it be either expressly or tacitly ratified by the minor upon coming of age, and tacit ratification will be presumed from the fact of a payment being made or accepted after attaining majority in pursuance of a contract made during minority.[1] Pereira (*The Laws of Ceylon, 1913*) puts the position correctly, at page 186, when he states that " all contracts by minors appear to be ineffectual unless ratified by means of some positive act."

There remains the question whether the first plaintiff is entitled to claim mesne profits, and if so, from what period? If the defendant was a *mala fide* possessor, she is entitled to this claim as from date of commencement of possession. (*Nathan, vol. I., p. 334; Voet, 27, 9, 10.*) The *mala* or *bona* character of the " *fides* " of a possessor turns simply upon one fact, namely, did he or did he not know of the defect in his title to possession, that is, in this case that his lessor was a minor. (*Sandé; Restraints upon Alienation, ch. 1, paras. 81 and 82.*) The Judge has held that the defendant knew of the first plaintiff's minority at the time he entered into the transaction. The first plaintiff is, therefore, entitled to claim mesne profits as from the commencement of the lease, and the defendant to claim repayment of the Rs. 1,000, with interest at 9 per cent., from the same date. Mesne profits have been agreed upon at Rs. 125 per annum. Considering that the first plaintiff had slept over her rights for nearly three and a half years before she came to Court, and that the defendant is entitled to claim interest on the sum of Rs. 1,000 at the legal rate of 9 per cent. per annum, I think that the most equitable course is to decree that the claim for mesne profits be set off against the claim for recovery of the rent for the time during which the defendant shall have had possession before the first plaintiff is restored to possession, and that the defendant be declared entitled to recover such sum out of the said sum of Rs. 1,000 as may remain unappropriated as rent in terms of the lease.

I agree in the order proposed by my brother Ennis.

Varied.

[1] *Voet, 4, 4, 44.*