1916.

Present: Ennis J. and De Sampayo J.

SILVA v. MOHAMADU.

405—D. C. Kegalla, 4,161.

Sale by minor is voidable and not void—Ratification—Emancipation of minor by trade after death of parents.

A minor may emancipate himself by trade even after the death of his parents.

A sale of land by a minor is not void, but only voidable at his instance.

An action by a person to have a deed of sale executed by him during his minority set aside should be brought within three years of his attaining the age of majority.

A sale of land by a person after attaining majority, without having got a previous deed executed by him during his minority in favour of another set aside, passes no title to the purchaser.

THE facts are set out in the judgment.

E. W. Jayawardene (with him *Samarawickreme* and *Cooray*), for appellant.

Bawa, K.C. (with him *A. St. V. Jayawardene*), for respondents.

Cur. adv. vult.

December 15, 1916. ENNIS J.—

In this action the plaintiff sued to be declared entitled to certain shares in certain lands, for the ejectment of the defendant, and for quiet possession.

[1] (1910) 2 C. L. R. 209. [2] (1914) 17 N. L. R. 257.

The facts are as follows:—The lands originally belonged to Don Carolis and his wife, Elo de Alwis, who died in 1890 and 1898, respectively, leaving two sons, Peris and Warlianu. Peris died in 1906; Warlianu became the sole owner. Warlianu was born on January 1, 1887, and was, therefore, in his twentieth year, and still a minor when he became sole owner of the shares. On his brother's death Warlianu appears to have taken over his brother's share in a business, and continued to trade in partnership with one Pedru. He appears to have conducted the business in Pedru's boutique, publicly and openly selling the goods and giving credit to customers. People dealing there considered him a partner, and imagined him to be of full age. He obtained business credit with the defendant, and on November 26, 1906, he conveyed by document No. 5,322 D (3) to the defendant the shares in the land now claimed by the plaintiff, for the sum of Rs. 2,000; Rs. 700 of this was paid in cash before the notary, the balance represented the previous indebtedness of Warlianu incurred in the course of the trade. On the same date Warlianu bought land from Pedru and paid Rs. 1,000 in cash for it. Warlianu clearly benefited to the full extent of the consideration. Rs. 2,000 given by the defendant for the land conveyed on D 3. The defendant remained in possession and developed the land. On June 11, 1915, Warlianu conveyed (P 5) the same land to the plaintiff Sardiel Silva. With regard to this transaction, Warlianu in his evidence says, " plaintiff elected to buy this land from me though he knew I had sold it to the defendant. " The learned Judge dismissed the plaintiff's action, holding that Warlianu, although a minor, was emancipated at the time he executed the document D 3. The plaintiff now appeals.

The point for determination on this appeal is, whether the document D 3 is invalid by reason of Warlianu's minority at the time of its execution? It has been urged that Warlianu could not be held to be emancipated at the time, because emancipation is an act proceeding from the parents, and they were both then dead.

It was conceded that had they, or either of them, been alive at the time an emancipation might have been presumed from the circumstances that Warlianu was separated from his parents and living separately and independent of them. In my opinion the fact that the parents were dead makes no difference. I am unable to see why a youth who has run away from parental authority and lived independently should be in a better position than one who has had the misfortune to lose his parents and been compelled by circumstances to live independently. The presumption in the first case is in the nature of a fiction, and I see no reason why the fiction should not be extended a little further in the second, and the presumption be made as if the parents were alive.

There is, however, another reason which would, in my opinion, entitle the respondent to succeed. The Roman-Dutch jurists

enunciate, as a general rule, that contracts by minors are " *ipso jure* void." They then proceed to specialize, and say when such contracts are " void *ab inito* " and when they can be ratified. In the case of *Fernando v. Fernando*,[1] I expressed the opinion that the distinction between " void " and " voidable " made by latter-day jurists was not clear in the Roman-Dutch text books. That opinion is strengthened by a case now cited, *Breytenback v. Frankel and another*.[2] In the argument in that case Lord de Villiers C.J. suggested that there was no word for " voidable " in those times.

The Roman-Dutch law prohibited contracts by minors, to ensure the protection of minors. But it did not make the prohibition absolute in every case. The defect of status could be cured in the case of contracts affecting movable property by the consent of the guardian, and in the case of contracts affecting land by the consent of the Court. After the minor attained majority the defect could be cured by his ratification, express or implied, and after five years a ratification was implied whenever the contracts were for the benefit of the minor (*Sande on Restraints 43; 44*). Emancipation also did away with many of the disabilities of a minor in the way of contract. Whenever minor obtained a benefit from the contract there was no complete prohibition, and whether or not he obtained a benefit was a question of fact. In two cases only, viz., donation and suretyship, it was held that absence of any benefit by a junior was manifest, and the contract was declared to be void *ab inito*, the prohibition in such cases being regarded as absolute. In the case of a loan there was some doubt, which had the effect of throwing the onus of proof on the minor to show that he had received no benefit. In every case, except gift or suretyship, the contract was in fact " voidable " and not " void, " but as there was no word for " voidable," the idea was expressed by using the word " void " with illustrations showing that the contract could be made void at a future time at the option of the minor.

The continued use of the word " void " to express both ideas has given rise to much confusion. Where the contract was void *ab initio* the proper Roman-Dutch action was the action " *rei vindicatio*." as the *dominium* had not passed, but where the contract was voidable only, the Roman-Dutch action was " *restitutio in integrum*." In Ceylon there is no distinction between the two actions, the prayer generally combining both, by asking that the deed be set aside or declared null and void, and by asking for a declaration of title and recovery of possession.

With regard to the application of Roman-Dutch law in Ceylon, Walter Pereira in his *Laws of Ceylon* (*2nd edition, pp. 184-196*) discusses the Ceylon cases on the question whether or not a minor's contract is absolutely void; he has come to the conclusion that the balance of authority in Ceylon is that contracts by minors are

[1] *(1916) 19 N. L. R. 193.*
[2] *South African L. R., 1913, App. Div. 390.*

ineffectual unless ratified by some positive act; but this disregards the fact that in Roman-Dutch law we find it expressly stated (*Sande 44*) that ratification may be presumed after a lapse of five years. In the case of *Ramen Chetty v. Silva*,[1] the Roman-Dutch law of ratification by minors is in force in Ceylon, and, inasmuch as under the Roman-Dutch law a ratification could be implied, this seems to me to afford an effectual solution of the question as to when a minor's contract is voidable and not void. I have not set out references to the Roman-Dutch authorities, as they are all to be found in the judgment of Lord de Villiers in the South African case I have cited.

In the present case I am of opinion that the learned District Judge was right in holding that Warlianu, by reason of emancipation, could enter into a valid contract; and if not, that the contract in this case has been ratified by implication, over five years (see the case of *Silindu v. Duraya* [2]) having elapsed without any steps having been taken to set aside the contract.

I would dismiss the appeal, with costs.

DE SAMPAYO J.—

The question of tacit emancipation is not an easy one. Under the Roman-Dutch law, when the parents are alive a minor child is under their natural guardianship, which extends not only to the maintenance and education of the minor, but also to the administration of his property. In such a case the emancipation which arises from the fact of the minor taking up his abode elsewhere and carrying on an independent trade or business is no doubt referable to the express or tacit consent of the parents. To argue, as Mr. Jayawardene for the appellant did, that this emancipation is the act of the parents, and therefore, when the parents are dead is impossible, appears to me to go a little too far. Natural guardianship is dissolved by the death of the parents (*Voet 1, 7, 9*), and the minor passes into the guardianship, if any, of some one appointed by Court. If no such guardian is appointed by Court, it is difficult to see any logical ground for thinking that a minor may not emancipate himself under the same circumstance and by the same means as when the parents are alive. When a minor, by the death of his parents, is thrown upon his own resources, there appears to me to be greater reason for giving him liberty to enter into contracts and administer his property, subject to the same conditions as in the case of tacit emancipation during the lifetime of his parents. I cannot find any express authority against this conclusion, and if reason is to be taken as a guide, I think contractual capacity should be attributed to a minor in that position. If this is right, then the facts of this case are sufficient to support Warlianu's deed of 1906 in favour of the defendant.

[1] *(1912) 15 N. L. R. 286.*

[2] *A. C. R. 150.*

1916.

DE SAMPAYO J.

Silva v. Mohamadu

It is more satisfactory, however, to consider the matter apart from any question of emancipation. Warlianu did not take any legal steps, when he came of age, to have his deed of sale set aside or declared void. He did not repudiate it in any way, but in 1915, seven years after he attained majority, he purported to sell the property again to the plaintiff. It is contended on behalf of the plaintiff that it was not necessary for Warlianu to take any such legal proceedings, inasmuch as his sale during minority was absolutely void and not merely voidable. The local decisions on the effect of a minor's conveyance are conflicting. In *Siriwardene v. Banda* [1] it was held by Burnside C.J. and Withers J. that a minor's deed was not void, but only voidable by express repudiation after attaining majority, and that a second deed conveying the same interest did not amount to such repudiation. An opinion to the same effect was expressed by a Full Bench, consisting of Burnside C.J. and Clarence and Dias JJ., in *Selohamy v. Rapiel.*[2] These decisions were commented on, and the Roman-Dutch authorities as to the validity of contracts made by minors were considered in *Goonesekera Hamine v. Don Baron,*[3] and it was there held by Bonser C.J. and Wendt J. that at all events a donation by a minor under the Roman-Dutch law was null and void, inasmuch as a donation was by no means to the minor's benefit. The question of a sale of land by a minor came up for consideration in *Andris Appu v. Abanchi Appu,*[4] and the judgment of Middleton J., concurred in by Moncreiff A.C.J., was that a sale by a minor was not only voidable, but absolutely void. In that case, however, the previous decisions of the Supreme Court do not appear to have been cited or considered. The opinion of Middleton J. was founded solely on *Van Leeuwen's Comm. 1, 16, 9,*[5] where it is stated that immovable property of a minor "cannot be sold otherwise than with the consent of the Court." The passage in *Van Leeuwen*, however, has reference only to the authority of guardians to deal with the property of their wards, so that it does not appear to be a relevant authority on the precise point now under consideration. Moreover, the very question is what exactly is meant by "cannot be sold," and what is the consequence of a sale by a minor notwithstanding such disability. The same view as in *Andris Appu v. Abanchi Appu* [4] was taken by Hutchinson C.J. and Middleton J. in *Manuel Naide v. Adrian Hamy.*[6] But where a minor had represented himself to be of full age, a sale by him, though without the sanction of Court, was held not to be void by the same learned Judges in *Wijesooriya v. Ibrahinsa.*[7] A similar point arose in *Sinno Appu v. Podi Nona,*[8] and was decided in the same way by Lascelles C.J. The next reported case is that of

[1] *(1892) 2 C. L. R. 99.*
[2] *(1889) 1 S. C. R. 73.*
[3] *(1902) 2 Br. 402.*
[4] *(1902) 3 Br. 12.*
[5] *Kotze's Trans., vol. I., p. 135.*
[6] *(1909) 12 N. L. R. 259.*
[7] *(1910) 13 N. L. R. 195.*
[8] *(1912) 15 N. L. R. 241.*

Saibo v. Perera,[1] where Shaw J. and myself followed the cases which held that a minor's deed was void and not voidable only. Lastly comes *Fernando v. Fernando*,[2] in which my brothers Ennis and Schneider decided that a minor's deed was not absolutely void, and might be ratified by the minor when he attained majority.

In this state of local decisions I think it is open for us, now that the whole question is raised again, to consider it anew. Happily the task of searching for and discussing the original Roman-Dutch authorities is rendered unnecessary by the South African case of *Breytenback v. Frankel*,[3] which was cited by Mr. A. St. V. Jayawardene for the respondent. This was a case decided by a Bench of five Judges, including the learned jurists Lord de Villiers and Maarsdorp C.J. All the authorities were cited and considered, and the chief judgments were delivered by Lord de Villiers and Solomon J. The case related to a long lease of a minor's property granted by the father and natural guardian of the minor without obtaining the consent of the Court, but the law as to the effect of a deed by the minor himself was fully considered. It was pointed out in the course of the argument that in the language of the Roman-Dutch writers there were no words exactly equivalent to the English words "void" and "voidable," and in reference to the argument that what was prohibited was void. Lord de Villiers said that that was not always so, and instanced the case of the marriage of minors without the consent of parents or guardians. It was admitted by counsel for the appellant in that case, and it is undoubtedly the law, that a minor might ratify his own act or that of his guardian, and it necessarily followed that the act itself could not be wholly and absolutely void as if it had never been done. The result of the whole case was to show that a dealing by a minor with his property was not *ipso jure* void, but only voidable at his instance. There are no doubt some transactions by minors which are void *ab initio*, such as donations, but Lord de Villiers held that in all cases, whether the act was void or voidable, it was necessary for the minor to relieve himself by obtaining *restitutio in integrum;* while Solomon J. drew a distinction, and considered that *restitutio* was relevant in the case of alienation by the minor himself, but that where the alienation was by the guardian without the authority of Court, inasmuch as the title was still in the minor, the proper remedy was a vindicatory action by the minor or a cessionary from him. It appears that, even in the case of void contracts, the universal practice in Holland was to apply for *restitutio*, and, as Lord de Villiers observed in the course of the argument, what was the universal practice in Holland must be taken to be law with us. Thus it appears that the Roman-Dutch law is quite in accord with the general principle that a person

[1] *(1915) 4 Bal. Notes of Cases 67.*
[2] *(1917) 19 N. L. R. 193.*
[3] *(1913) S. L. R. App. Div. 390.*

1916.

DE SAMPAYO J.

Silva v. Mohamadu

cannot be judge in his own cause, and that where he wishes to get rid of the effect of his own act he must seek the assistance of the Court.

In this case, since the sale to the defendant was by Warlianu himself, it was necessary for him, before he sold to the plaintiff, to have got the deed in favour of the defendant out of the way by means of *restitutio in integrum* or some equivalent legal proceeding, and he should have claimed that remedy within a certain limited time after he came of age. Under the Roman-Dutch law the period of limitation appears to be four years. (*Voet 4, 1, 16, Van der Keessel Thes. 900.*) But with us the period is regulated by the Ordinance No. 22 of 1871, and it was held in *Silindu v. Dureya* [1] that the application for restitution should, under section 11 of that Ordinance, be made within three years of the attainment of majority. Warlianu made no such application at any time. Connected with this is the allied question of ratification, which may be either express or tacit. According to *Sande on Restraints 1, 6, 18 (Webber's trans. 44)*, a void alienation may be tacitly confirmed, if the minor has raised no protest within five years after coming of age: " For then an alienation void *per se* will be confirmed by an implied ratification as it were, whether the alienation has been made by the minor himself or by his tutor of curator." See also *Ramen Chetty v. Silva*,[2] as to the application to Ceylon of the Roman-Dutch doctrine of ratification. I do not know whether the period of five years is still necessary, but, assuming it to be so, I need only point out that Warlianu made no protest whatever at any time, but only sold the land a second time to the plaintiff, ignoring the first sale to the defendant, some seven years after he attained majority.

In my opinion the judgment of the District Judge in favour of the defendant is right, and I agree that this appeal should be dismissed, with costs.

Appeal dismissed.

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[1] *(1907) 1 A. C. R. 150.*

[2] *(1912) 15 N. L. R. 286.*