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Contracts of the Minor or His Representative Under the Louisiana Civil Code

ROBERT A. PASCAL*

The authority of the tutor to represent the minor in contract is clearly recognized. Less is known of the capacity of the minor himself to contract and of the availability of rescission for simple lesion in contracts to which a minor is a party. The texts of the Louisiana Civil Code are not without difficulty and for an interpretation of them reference will be made to the development of the minor's capacity in Roman, Spanish, and French law and to what the redactors of our codes of 1808 and 1825 probably understood to be the law prevailing in Louisiana at the time. Throughout the civil law's development the institutions of tutorship and *restitutio in integrum*, represented in our law by the doctrine of simple lesion, have defined the limits of the minor's capacity. This study, accordingly, will be an analysis of these institutions from early Roman times to the present and an appraisal of the manner in which we find them in our law insofar as they delimit the minor's contractual capacity and determine his right to relief.

ROMAN LAW TO JUSTINIAN¹

In early Roman law persons *sui juris* were considered capable of contracting if considered capable in fact.² Before the *Lex Plaetoria* of the latter part of the Third Century B. C. only two classes of

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1. Unless otherwise noted, material in this section is based on the fuller discussions in Buckland, *A Textbook of Roman Law* (2 ed. 1932) 152-159, 169-172, §§ LV, LVI, and LXII, and in Girard, *Manuel élémentaire de droit romain* (7 ed. 1924) 219-226, 238-246, Bk. II, Chap. V, Sec. I, § 3, I & II, and Sec. II, § 3, both of which give ample citations to texts.

2. At the risk of needlessly reexplaining the well known, but to insure full comprehension of what follows, the writer feels compelled to mention the independence in Roman law of what might be referred to as *capacity in fact* (though defined by law) and legal capacity in the sense of *legal personality*. The person who was legally a member of a family and not the head thereof (*pater familias*) was without legal personality because legally under the authority of another (*alieni juris*). He who was independent of a family, or the head of a family, was his own authority (*sui juris*). The person *alieni juris*, regardless of age and discretion, could have no capacity in law. The person *sui juris*, having legal personality, was capable if the law considered him capable in fact. Thus in early Roman law there was no possible capacity in the sense in which we now understand it unless the person were *sui juris*.

persons *sui juris* were considered incapable in fact. The *infantes*, or persons unable to speak, were totally incapacitated. The *impuberes*, or persons able to speak but under the age of puberty, could contract so as to bind others to them, but not so as to bind themselves, without the *auctoritas interpositio* (formal, non-representative, cooperative intervention) of their tutors. This meant, in effect, that *impuberes* could not enter into bilateral contracts, for such contracts equitably could not be enforced as to one party and not as to the other. But whether the *impuberes* acted alone or with *auctoritas*, it was the *impuberes* themselves who contracted. Tutors did not acquire the authority to represent minors until much later, first in matters under the *jus gentium*, then partially, never entirely, in matters under the *jus civilis*.³ Tutorship ended at puberty, however, for at that age the law considered the minor *sui juris* fully capable in fact, as well as in law, if not mentally deranged. Thus, in the earlier era, whatever was done by *impuberes* with the *auctoritas* of their tutors, or by the *puberes* alone, was fully valid. The immaturity of judgment of normal persons above the age of puberty simply did not receive recognition in law.

The *Lex Plaetoria* recognized the actual inability of persons above the age of puberty and under the age of twenty-five years, or *minores* as they came to be called, to care properly for their interests, affording them various remedies to avoid enforcement of or to impeach transactions in which they had been defrauded. There is some evidence that from the time of the *Lex Plaetoria* a curator, or advisor of the minor, usually was required by the party dealing with the minor as an indication of his good faith and intention to transact fairly. It is improbable that the curator was appointed for any definite time or that he enjoyed any more status than a modern witness. Sometime after the *Lex Aebutia*⁴ and before the beginning of the Empire the Praetor supplemented the *Lex Plaetoria* with a procedure which would permit a minor to be restored to his former condition if he had entered into an agreement which, though not fraudulent or unfair in itself, was disadvantageous to him or inconsistent with his best interest. The distinction between the civil action under the *Lex Plaetoria* and this, the action of *restitutio in integrum*,

3. Before this time, and outside such cases, what contracts tutors entered into on behalf of the *infans* or *impuber* did not establish jural relations between the third party and the minor. There might be action by the third party against the minor for unjustified enrichment, however, and the tutor usually could obtain satisfaction from the minor in proper cases. See Buckland, *op. cit. supra* note 1, at 155-156, § LV.

4. Circa 140 B. C., authorizing the use of a *formula* instead of a *legis actio*.

is most important. The former was available only if advantage had been taken of the minor; the latter was available although no advantage had been taken of him if the agreement were one which he would not have entered into except for his lack of judgment or *inconsulta facilitas*. The test of the civil action was a species of fraud; that of the praetorian remedy the disadvantage to the minor. The one presupposed fault on the part of the party transacting with the minor; the other sought primarily to determine whether the minor would have entered into the contract if he had had more mature judgment.⁵ Here, too, the *curator* was usually employed to give proof of adequate consideration for the minor's best interests, but the mere presence of the *curator* was not a bar to restitution in a proper case.

Much change was brought about by the imperial law. Curatorship became a permanent, though not compulsory, institution.⁶ In the administration of the minor's property the *consensus* of the curator became in all things like the *auctoritas* of the tutor except that it remained informal. The minor under curatorship, when acting without *consensus*, was assimilated to the *impuber* under tutorship, capable of obliging others toward him, but not himself toward others. For such minors *restitutio in integrum* became obsolete. Minors *sui juris* without curators, of course, retained capacity to obligate themselves and the privilege of the remedies available under *restitutio in integrum*.

In the later law two major developments occurred. The tutor and curator acquired capacity to represent the minor, though the minor *impuber* or *puber* retained the capacity to act with *auctoritas* or *consensus*, and the application of the *restitutio in integrum* was extended to include the acts of the tutor or curator on behalf of the minor. But throughout this development the minor *puber* without

5. The idea of the praetorian *restitutio* must be distinguished from that of *lesion in jus civilis*. Lesion was objective inequality of prestations in a commutative contract (i.e., one the essence of which is the exchange of values). Thus lesion had no direct relation to capacity (though lesion insufficient to permit recovery under the action for lesion, or arising in a contract to which the doctrine of lesion was not applied, might be the grounds for *restitutio*). The *restitutio*, on the other hand, was available to give relief against any obligation, even one incurred in a commutative contract where the prestations were equal in value, if, for example, the minor would have no use for that received in the bargain, or otherwise would have been better off had he not contracted.

6. Attributable to this history, no doubt, is Art. 360, La. Civil Code of 1825 (in part): "The tutor is appointed to the minor whether he be willing or not; but the curator *ad bona* cannot be appointed to the curator against his will, the judge being bound to appoint the person mentioned to him by the minor, if such person has, in every other respect, the necessary qualifications."

a curator could obligate himself and, in proper cases, could avail himself of *restitutio in integrum*; and even though the tutor or curator could represent the minor, it seems the minor himself always could act with *auctoritas* or *consensus*. Thus at no time in Roman law was the personality of the minor *impuber* or *puber* so absorbed in that of his tutor or curator as to exclude the possibility of his acting for himself with *auctoritas* or *consensus*.

SPANISH LAW⁷

Apparently the provisions of Las Siete Partidas on the capacity of the minor and his right to *restitutio in integrum* remained the law of Spain until the promulgation of the Spanish Civil Code of 1889 and therefore must have been the law of Louisiana at the time of its transfer to the United States. The major features of the Spanish law seem clear. The cooperative *auctoritas interpositio* of the tutor at Roman law had given way to full representation of the minor in all juridical acts. The minor under curatorship could obligate himself if he acted with the assistance or consent (the words being used interchangeably) of his curator, but curatorship was not compulsory and the minor without a curator could act alone to obligate himself. But even though the act by or for the minor were valid in law, the minor might avail himself of *restitutio in integrum* if he had suffered simple lesion or other detriment in the transaction. If the act were invalid, resort to *restitutio in integrum* was unnecessary.

FRENCH LAW

Unlike the Spanish law, French law departed substantially from the Roman pattern. First, French law extended tutorship throughout the full period of minority, never accepting the curatorship of adult minors. According to Brissaud,⁸ during the period of usufructuary tutorship the minor enjoyed scarcely any more capacity than a person *alieni juris*. The minor was absolutely incapable of acting for himself and, because the tutor was the real party at interest, *restitutio in integrum* had fallen into disuse. By the time

7. The material in this section is based on 4 Sanchez Roman, *Estudios de derecho civil [español]* (2 ed. 1899) 187-189, c. X. no 10; 5 id. at 1275-1283, c. XXXI, Art. I, especially nos. 4, 9, 12; and the following texts of Las Siete Partidas: 5.11.4.5; 5.16.1.13, 21; 6.19.1-9.

8. Brissaud, *A History of French Private Law*, translated from second French edition by Howell (1912) 3 Continental Legal History Series 254-256, § 205.

of Beaumanoir, however, the increasing recognition of the interests of the minor had led to an acceptance of the capacity of the minor to act in his own behalf and, as might be expected, to the privilege of *restitutio in integrum* for simple lesion, whether the transaction complained of had been entered into by the minor or by his tutor. The maxim "*minor restituitur non tamquam minor, sed tamquam laesus*" became the guiding principle. The defense of nullity was available only in certain specific cases in which some formality required by law, such as judicial authorization in the sale of immovables, was missing. On the other hand, from the seventeenth century at least, the minor engaged in trade or business was reputed a major for all acts connected with such activity and in such instances *restitutio in integrum* was denied him.

The proposed draft of the French Civil Code prepared by the government commission (Projet du Gouvernement) declared the contracts of minors under the age of puberty absolutely null, but those of minors above the age of puberty subject to attack only for causes specified by law.¹⁰ From a reading of the Projet, however, it appears that contracts entered into by minors, but otherwise valid, were enforceable subject to rescission for simple lesion.¹¹ And even here there was the old exception: the minor who was a merchant, banker, or artisan could not plead lesion in contracts made in pursuance of his business or art.¹²

The French Civil Code as finally adopted fails to distinguish between minors over and under the age of puberty, but otherwise enacts in substance the provisions of the Projet on the capacity of the minor. Thus Article 1124 declares the minor incapable of contracting, but Article 1125 denies him relief except in cases specified by law, and the only relief against contracts regular in form except for the minority of the party is rescission for lesion.¹³ French doctrine has interpreted the articles to mean that the minor does have

9. Ibid. On the French law of the seventeenth and eighteenth centuries see Domat, *Les lois civiles dans leur ordre naturel*, 2.1. prol.; 2.1.2.9; 4.6.2; Pothier, *Traité des obligations*, 2.1.3.5; 2.1.4; *Traité des personnes*, 1.6.4.1; 1.6.4.3.2.

10. Projet du Gouvernement, 3.2.22. "22: *Les engagements contractés par les impubères, sont radicalement nuls.* (Engagements contracted by minors under the age of puberty are absolutely null).

"*Ceux contractés par les mineurs . . . ne peuvent être attaqués que par eux dans les cas prévus par la loi.*" (Those contracted by minors . . . may be attacked by the minors themselves alone and only in the cases foreseen by the law.)

11. Projet du Gouvernement, 3.2.196-201.

12. Projet du Gouvernement, 3.2.200.

13. Arts. 1305-1309, French Civil Code.

actual capacity to contract and that his contracts are valid, but that he may obtain relief if he suffers even simple lesion.¹⁴

LOUISIANA

There can be no doubt that at the time of the transfer of Louisiana to the United States the law of Louisiana on the subject was that of Spain. The Digest or Civil Code of 1808,¹⁵ however, adopted the French Civil Code articles on the subject almost verbatim. Articles 24, 25, and 205-209 of the title "Of contracts and of conventional obligations in general" are identical, for our purposes, with Articles 1124, 1125, and 1305-1309 of the French Civil Code. If it is valid to look to the legislative history of acts adopted from a foreign body of law to determine their meaning in our own, there can be no doubt that in 1808 the capacity of the minor and his right to relief against his contracts in Louisiana were the same as in France. But the articles of the Digest or Code of 1808 were not given that interpretation.

The Code of 1808 purported to be, as its official name signified, a *digest* of the Spanish laws in force, and its provisions were regarded as declaratory of the old law except where certainly inconsistent or contrary thereto. Thus in 1820 Moreau Lislet, one of the drafters of the Digest or Code of 1808, and Carleton were able to consider the Laws of Las Siete Partidas on the subject in force as the law of the state.¹⁶

The extent to which this view of the actual law prevailed is evident in the opinion of Justice Porter in the case of *Southworth v. Bowie*, decided in 1823:

"It appears to have been a question of great difficulty with the commentators in the civil law, whether a minor under the age of puberty could enter into any obligation, either civil or natural, and the provisions found in the Digest, in which the

14. 2 Planiol, *Traité élémentaire de droit civil* (11 ed. 1939) 412-413, no 1088; 1 Colin et Capitant, *Cours élémentaire de droit civil français* (8 ed. 1934) 577-578, no 555.

15. A Digest of the Civil Laws now in Force in the Territory of Orleans with alterations and amendments adapted to its present system of government (1808). This digest is commonly referred to as the "Civil Code of 1808."

16. By Act of March 3, 1819, the legislature authorized Moreau Lislet and Carleton to translate and publish "all such parts of the laws of the Partidas as are considered to have the force of law in this State." The work appeared in 1820 under the title, "The Laws of Las Siete Partidas which are still in force in the State of Louisiana." The translation contains most of 5.11.4 & 5, on the capacity of the minor, and 6.19, on *restitutio in integrum*.

advocates of the different doctrines on this subject, found their opinion, cannot perhaps be reconciled—See Dig. liv. 2, tit. 14, l. 28, *ibid.*: liv. 12, tit. 6, l. 41: liv. 35, tit. 2, l. 21: liv. 45, l. 127: liv. 46, tit. 2, liv. 1, sec. 1: liv. 46, tit. 3, law 95, no. 2. It does not, however, appear to us to have been doubted that the minor above the age of puberty was capable of contracting an obligation which bound him, if it turned to his profit, and on this head it is unnecessary to refer to the opinion of jurists, as we have positive law: By the 4th law of the 11th title of the 5th Partida, it is expressly declared that, the promise of the minor above fourteen years of age is binding, if that promise is advantageous to him. Our Code does not seem to have introduced any change on this point; on the contrary, by giving persons of that age the right to rescind their contract, it would seem to recognize their existence—Civ. Code, 302, art. 214-212, Febr. Par. 1, cap. 4, sec. 1, no. 3; Par. 3, tit. 18, law 59.”¹⁷

On the other hand only two years later Justice Martin interpreted the law in quite a different manner, seizing upon Article 24 of the title on obligations:

“We think the district judge acted correctly . . . He was incapable of binding himself by a contract, being a minor. Civil Code, Art. 14 [24].”¹⁸

Suffice it to say that the state’s legislation on the subject was not given consistent interpretation and application.

The Civil Code of 1825 revised the articles on the capacity of the minor and his right to plead simple lesion. Those articles were reenacted in the Revised Civil Code of 1870¹⁹ and remain substantially the same today.²⁰ Article 1785 [1778]²¹ is the general article

17. *Southworth v. Bowie*, 1 Mart. (N. S.) 537, 539-540 (La. 1823).

18. *Guirot v. Guirot’s Syndics*, 3 Mart. (N. S.) 400, 402 (La. 1825).

19. The Digest or Code of 1808 and the Civil Code of 1825 provided for representative tutorship for the minor under puberty and for assistorial curatorship of minors above that age. Thus whereas the tutor represented the minor in all civil acts, the curator only assisted him. Digest or Civil Code of 1808, 1.7.1.78-82; La. Civil Code of 1825, Arts. 263, 357-361. Accordingly, in 1825 the articles about to be discussed contained references to both the tutors and curators of minors. Curatorship of minors was abolished and tutorship extended throughout minority by Act 36 of 1828 and Act [p. 48] of 1830, § 9, and hence references to curators were deleted in the revision of 1870.

20. Art. 1782, La. Civil Code of 1870, was amended by Act 45 of 1924 so as to delete the second sentence thereof. As originally enacted in 1870 the article read:

“All persons have the capacity to contract, except those whose incapacity is specially declared by law. These are persons of insane mind, those who are interdicted, minors and married women.”

The date of the act indicates the amendment probably was enacted to remove

on the capacity of the minor. It unequivocally states the minor may contract with the "intervention" of the tutor, thereby implying his incapacity to act without such intervention:

"Minors emancipated may contract in the cases already provided by law, and when not emancipated, their contracts are valid, if made with the intervention of their tutors, and with the assent of a family meeting, in the cases where by law it is required. . . .

"In all other cases, the minor is incapacitated from contracting, but his contracts may be rendered valid by ratification, either expressed or implied, in the manner and on the terms stated in this title under the head: Of Nullity or Rescission of Agreements."

The above interpretation of Article 1785 [1788] seems confirmed by Articles 1866 [1860] and 1867 [1861], in a section on lesion not in the Code of 1808:

Article 1866 [1860]: "Lesion needs not be alleged to invalidate such contracts as are made by minors, either without the intervention of their tutors, or with such intervention, but unattended by the forms prescribed by law. Such contracts, being void by law, may be declared so, either in a suit for nullity or on exception, without any other proof than that of the minority of the party and the want of formality in the act."

Article 1867 [1861]: "But in contracts made with minors, when duly authorized, and when all the forms of law have been pursued, on alleging and proving even simple lesion, they will be relieved with the exception of the cases provided for in the two next articles."

Thereafter follow Articles 1868 [1862] and 1869 [1863] announcing that minors are in the same position as majors with regard to alienations or partitions of minors' property made with adherence to all formalities required by law and that no lesion whatsoever can be pleaded in the case of judicial sales.²²

the reference to the incapacity of the married woman and it is probably that the legislature considered the entire deleted sentence superfluous, its subject matter being covered in other articles of the civil code.

21. Hereafter the articles shall be cited by their numbers in the Revised Civil Code of 1870 and [in brackets] the Civil Code of 1825.

22. Art. 1868, La. Civil Code of 1870:

"When all the formalities required by law for the alienation or the partition of the property of minors, or persons interdicted, have been

Obviously the scheme of the French law was abandoned in 1825.²³ Arguing from the above articles, it seems clear that the action of nullity is the proper remedy if the minor has acted without the "intervention" (Article 1866 [1860]) or "authorization" (Article 1867 [1861]) of his tutor; but if such "intervention" or "authorization" is present the only remedy is rescission for simple lesion. The problem now is to determine what is meant by "intervention" or "authorization."

Article 337 [327] declares that the tutor represents the minor in all civil acts and Article 360 of the Code of 1825 very clearly stated that the tutor stipulated for the minor in every contract.²⁴ If these articles are interpreted strictly, Articles 1866 [1860] and 1867 [1861] cannot be given any effect without admitting that simple lesion can be pleaded against the tutor's contracts. Such action is not allowed

fulfilled, the acts made for those purposes shall have the same force, as if they had been executed by persons of full age and sound mind."

Art. 1869, La. Civil Code of 1870:

"No lesion whatever, even in the case of minors, can invalidate judicial sales, or sales of an insolvent's property made by syndics or other trustees. Sales of property belonging to successions or minors, directed or authorized by courts, are judicial sales under this provision."

23. In the Digest or Civil Code of 1808 the only articles on lesion were those in the section "Of the action of nullity or of rescission of agreements," 3.3.204-214, corresponding to Articles 1304-1314 of the French Civil Code. The *Projet* of the Louisiana Civil Code of 1825 shows beyond doubt that the redactors had planned to transfer the substance of the articles on lesion to the new section, "Of Lesion." See *Projet of the Civil Code of 1825*, pp. 246-249 [Reprinted, 1 La. Legal Archives (1937) 246-249]. Unfortunately, both groups of articles were retained in the code. The original group, taken from the Civil Code of 1808, is to be found under the section on nullity and rescission of agreements as Articles 2222 [2219]-2231 [2228]. The newer group is now in the section "Of Lesion," Articles 1860 [1854]-1880 [1874] of the Civil Code. That the redactors probably intended to delete Articles 2222 [2219]-2231 [2228] seems evident from the notations in the draft under some of the proposed articles to the effect that such proposed articles were the same as, or amendments or modifications of, the older group. The following table indicates the similarity of the articles in the two sections mentioned. The asterisks mark articles mentioned in the *projet* as amendments or modifications of the corresponding articles in the section on nullity and rescission.

Arts. under "Nullity & Rescission"			Arts. under "Lesion"		
CC 1870	CC 1825	CC 1808	CC 1870	CC 1825	
2222	—	2219	—	3.3.205	_____ { 1864 — 1858
2223	—	2220	—	3.3.206	_____ { 1865 — 1859
2224	—	2221	—	3.3.207	_____ { 1871 — 1865
2225	—	2222	—	3.3.208	_____ { 1872 — 1866*
2226	—	2223	—	3.3.209	_____ { 1873 — 1867*
2227	—	2224	—	3.3.210	_____ { 1874 — 1868*
2228	—	2225	—	3.3.211	_____ { 1875 — 1869
2229	—	2226	—	3.3.212	_____ { 1793 — 1787
2230	—	2227	—	3.3.213	_____ { 1860 — 1854
					_____ { 1861 — 1855
					_____ { 1862 — 1856
2231	—	2228	—	3.3.24	_____ { 1868 — 1862*

24. Art. 360, La. Civil Code of 1825:

in modern French law,²⁵ but there the capacity of the minor is admitted²⁶ and lesion may be pleaded in such contracts as he enters into alone. On the other hand, late Roman, Spanish, and ancient French law, as explained above, allowed restitution in such cases. Then again, even if the capacity of the minor to act personally with the *assistance* of his tutor is admitted, it would seem unreasonable to distinguish between such an act and one entered into by the tutor in a representative capacity for the purpose of allowing or disallowing an action for lesion. Certainly late Roman, Spanish, and ancient French law made no distinction here. Giving "intervention" and "authorization" a lesser meaning would not be justifiable historically, and, of course, recognition of the minor's capacity to act without assistance would be clearly contrary to Articles 1785 [1778], 1866 [1860], and 1867 [1861].

Whether or not the minor should be recognized as capable of acting personally with formal assistance is open to discussion. As mentioned before,²⁷ until 1830 our law provided for representative tutorship and assistorial curatorship. At this time the minor under curatorship undoubtedly could act personally with assistance. It could be argued that the abolition of curatorship and the extension of tutorship throughout minority did not deprive the minor of any of his then recognized capacity. It could also be contended that in extending the duration of tutorship the capacity of the minor above the age of puberty was curtailed. Article 1785 [1778], however, lists as an *exception* to the rule the capacity of the minor to enter into a prenuptial contract with the consent of his parent or tutor.²⁸ If this sentence is to be taken literally, the conclusion must be that ordinarily mere assistance of the tutor is insufficient and representation by the tutor is required. Whatever view is taken, however, it seems certain that simple lesion can be pleaded against the contracts of tutors in their representative capacity; and if the minor may act

"The curator ad bona differs from the tutor in no respect except the following:"

"3. The tutor stipulates in every contract, in the name of the minor, and without his presence, and appears for the minor in every case when his own interest is not in opposition to that of the minor; whilst the curator ad bona only assists the minor in every contract in which he is concerned, and does not appear for him in courts of justice, this being the particular duty of the curator ad litem."

25. 2 Planiol, op. cit. supra note 14, at 442, n^o 1083; 1 Colin et Capitant, op. cit. supra note 14, at 582-583, n^o 558, 2^o.

26. Supra note 14 and text thereto.

27. Supra note 19.

28. Art. 1785, La. Civil Code of 1870, par. 4:

"His stipulations in a marriage contract, if made with the consent of those whose authority is in such case required by law, are also valid."

with the assistance of his tutor, simple lesion may be pleaded against such acts. Both cases, of course, would be subject to the limitations mentioned in Articles 1868 [1862] and 1869 [1863]²⁹ of the civil code.

There are a few cases in which the capacity of the minor to contract without assistance should be recognized. The general article on the minor's capacity, Article 1785 [1778]³⁰ gives capacity to a minor to enter into a contract "or quasi contract" for necessaries for his support and education if he has no tutor or one who neglects to supply him with such. It also allows him to accept the contract of mandate "under the restrictions and modifications contained in the title on that subject." Before discussing the meaning of this provision, however, it is advisable to consider another possibility, that of the minor's authority to contract for the purposes of his art, trade, or business when so engaged—if, indeed, he may be so engaged while yet unemancipated.

Article 1873 [1867] states "A minor who is a banker, factor, trader, or artisan, is not relievable against lesion in contracts made for the purpose of his trade, or business." At first blush it would seem reasonable to conclude the article implies capacity in the minor to engage in such trade or business without the assistance of anyone. Such had been the rule in France since the seventeenth century³¹ and it is the rule there today. The French Code of Commerce³² requires that a parent or the family council previously authorize such activity, but emancipation is not necessary. As early as 1827,

29. *Supra* note 22.

30. Art. 1785, La. Civil Code of 1870:

"Minors emancipated may contract in the cases already provided by law, and when not emancipated, their contracts are valid, if made with the intervention of their tutors, and with the assent of a family meeting, in the cases where by law it is required.

"When the minor has no tutor or one who neglects to supply him with necessaries for his support or education, a contract or quasi contract for providing him with what is necessary for those purposes, is valid.

"A minor is also capable of accepting the contract of mandate, under the restrictions and modifications contained in the title on the subject.

"His stipulations in a marriage contract, if made with the consent of those whose authority is in such case required by law, are also valid.

"The obligation arising from an offense or quasi offense, is also binding on the minor.

"In all other cases, the minor is incapacitated from contracting, but his contracts may be rendered valid by ratification, either expressed or implied, in the manner and on the terms stated in this title under the head: Of Nullity or Rescission of Agreements."

31. *Supra* p. 386 et seq.

32. Art. 2, French Code of Commerce. See also 2 Planiol, *op. cit.* *supra* note 14, at 412, n^o 1082.

however, Justice Martin rendered an opinion to the effect that the article is applicable only to *emancipated* minors.³³

“Our civil code does not recognize any binding power in the contracts of minors, engaged in trade, except after their emancipation, art. 379, 1775, 1778, 1867 & 2222.³⁴ It would be absurd to imagine, that minors of any age, under twenty-one should be bound by mercantile contracts. The law does not withhold the protection it owes to persons of tender age, till they have reached their eighteenth year, and in the judgment of their father, or a family meeting, or the case of an orphan, the individual has, by emancipation, been declared to possess sufficient discretion, to be trusted with the management of mercantile concerns.”

Possibly Justice Martin relied heavily on Articles 376 [379] and 1785 [1778] in reaching his decision. The former states the emancipated minor is reputed of age for all acts relating to such trade. From this it could be argued that the unemancipated minor is not given capacity to engage in trade, for to allow him to do so and to deny him relief for lesion would in effect be treating him as a major. Nor does the latter article, Article 1785 [1778], appear to grant the minor such capacity.³⁵

Such an interpretation, however, does not seem necessary. Article 376 [379] probably is a declaration prohibiting the emancipated minor who is engaged in trade from claiming the benefits of such articles as 371 [374] and 372 [375], which limit his liability to one year's revenue and permit him to plead simple lesion to all acts exceeding those of simple administration.³⁶ More significantly, the

33. *Babcock v. Penniman*, 5 Mart. (N. S.) 651, 653 (La. 1827).

34. The numbers of these articles in the La. Civil Code of 1870 are 376, 1982, 1785, 1873, and 2225.

35. See *supra* note 30.

36. Art. 371, La. Civil Code of 1870:

“He cannot bind himself legally by promise or obligation for any sum exceeding the amount of one year of his revenue.”

Art. 372, La. Civil Code of 1870:

“The minor who is emancipated has no right to claim a restitution on the plea of simple lesion against acts of simple administration.

“He has no right either to claim a restitution for simple lesion against obligations or promises which do not exceed the amount of one year of his revenue.

“If, however, he has contracted in the same year, towards one or more creditors, several obligations, each of which does not exceed the amount of one year of his revenue, but which together exceed that amount, these obligations may be reduced according to the discretion of the judge, whose duty it shall be in such case, to take into consideration

English text of Article 1785 [1778] carries an error in translation which may have hidden the true meaning of the article on the present point of inquiry. Article 1785 [1778], paragraph five, reads:

“The obligation arising from an offense or quasi offense, is also binding on the minor.”³⁷

The French text in the Code of 1825, however, reads:

“*Les obligations, qui résultent d'un emploi ou d'une charge, ont aussi leur effet contre le mineur.*”³⁸

Accepting the translation suggested in the Compiled Edition of the Civil Codes,³⁹ the English text of the article should read:

“The obligation arising from an occupation or employment is also binding on the minor.”

It may be that the French text of Article 1785 [1778] was incorrectly translated in the Civil Code of 1825 and so carried into the Civil Code of 1870 through inadvertence. If so, it seems that the inference in Article 1873 [1867] should be given effect and the capacity of the minor to engage in trade or business recognized. And his capacity in this respect being recognized, the action for simple lesion would have to be denied him, under the clear provision of Article 1873 [1867], in contracts relating to his trade or business.

The last exception to be considered is that previously mentioned, the capacity of the minor to accept the contract of mandate. Article 1785 [1778] declares “A minor is also capable of accepting the contract of mandate, under the restrictions and modifications contained in the title on that subject.” Article 3001 [2970], in the title “Of Mandate,” reads:

“Women and emancipated minors may be appointed attorneys; but, in the case of a minor, the person appointing him has

the estate of the minor, the probity or dishonesty of the persons who have dealt with him, and the utility and inutility of the expenses.”

Arts. 373 [376], 374 [377], and 375 [378], La. Civil Code, relating to the alienation of immovables, donations, and pleading capacity, also may be affected by Article 376 [379].

37. The fact this sentence does not relate to contracts is not in itself necessarily an indication of a mistranslation. Similar provisions are found under the chapters on lesion and on the nullity and rescission of agreements. Articles 1874 [1868] and 2227 [2224], La. Civil Code. This reference to restitution in the cases of offenses and quasi offenses is indicative of the derivation of the doctrine of rescission for simple lesion from the broader *restitutio in integrum*.

38. The texts as enacted were the same as in the *Projet* of the Civil Code of 1825 [Reprinted, 1 La. Legal Archives (1937) 230].

39. 3 La. Legal Archives (1940-1942), Art. 1785.

no action against him except according to the general rules relative to the obligations of minors; and in the case of a married woman, who has accepted the power without authority from her husband, she can only be sued in the manner specified under the title: *Of Marriage Contract, and the Respective Rights of the Parties in Relation to their Property.*"

It could very well be questioned whether the second clause in the quoted article refers to emancipated minors only, all minors, or unemancipated minors only.

Article 1990 of the French Civil Code, which is identical with Article 3001 [2970], is interpreted to mean that any minor may act as a mandatary so as actually to represent another in a juridical act, but can be held responsible *under the contract of mandate* only to the extent he might be held in any other contract.⁴⁰ In other words, any minor may bind his principal and the third party with whom he deals on behalf of the principal, but the quality in which the minor acts must be considered in determining his liability for failure to perform or for other breach of the contract of mandate.

Applying the French understanding of the article to our Louisiana law, the unemancipated minor might not be held—except for an unjustified personal enrichment—unless his acceptance of the contract of mandate was in the course of his trade or business. Because he there has capacity (if the argument before made is accepted) and because he may not plead simple lesion in such a case, he would be bound under the contract of mandate to the same extent as a major. The emancipated minor, of course, would be limited in liability to his capacity to contract as declared by the civil code.

The French interpretation of the article is reasonable and coincides with our practice. The everyday example of the minor being authorized to purchase food, clothing, or other items in the name of his parents is sufficient evidence of this. The jurisprudence has accepted this interpretation, the court of appeal going so far in one case as to consider the minor his tutor's agent in purchasing an automobile with the minor's funds!⁴¹ To restrict the application of Article 3001 [2970] to emancipated minors obviously would result in considerable inconvenience. It would also appear to be contrary to the organization of Article 1785 [1778], which contains a reference to "cases already provided by law" when speaking of the contracts of emancipated minors.

40. 2 Planiol, *op. cit. supra* note 14, at 789, no 2240.

41. *Stakes v. Jones*, 125 So. 197 (La. App. 1919).