EX PARTE VAN DEN HEVER.

(EASTERN CAPE DIVISION.)

1969. *March* 27; *April* 24. KANNEMEYER, J.

Minor.—Release from tutelage.—Court has power to grant such an order.

Where a minor has no parents or guardian, the Court, in its capacity as upper guardian, can, in an appropriate case, emancipate or release the minor from tutelage.
Where, in an application for an order releasing a minor from tutelage, the Court was satisfied that it was in the interests of the minor that he be authorised to carry on with his farming without being burdened by his minority.
Held, that the application should be granted.
The distinction between *venia aetatis* and release from tutelage discussed.

Application for an order releasing a minor from tutelage. The facts appear from the judgment.

J. W. Smalberger, for the applicant.

Cur. adv. vult.

Postea (April 24th).

KANNEMEYER, J.: By means of a notice of motion, applicant applies for an order:

"(*a*) releasing the minor Ignatius Michael van den Hever from tutelage and granting him full contractual capacity;
(*b*) granting alternative relief."

The following facts appear from the supporting documents. Applicant is a farmer on the farm Tweefontein, Colesberg and is testamentary executor in the estate of his mother, the late Mavis van den Hever

(born Thatcher) who died on 29th September. Applicant's father, Charles Pieter van den Hever died in 1954. From the marriage between his parents, two children were born, viz., applicant and his minor brother Ignatius Michael van den Hever. Ignatius was born on 10th March 1949 and will thus be of age on 10th March 1970.

In terms of the wills of the applicant's late father and mother, Ignatius is entitled to an undivided half share in certain farming properties, the value whereof amounts to R64,641.50. He is also entitled to the proceeds of certain urban stands, viz. R8,000, movable assets, cash and shares.

Ignatius left school after having sucessfully passed the standard VIII examination in 1966. In 1967 he completed his military training of one year. From the beginning of 1968 until 1st March 1968, Ignatius assisted

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applicant with the latter's farming operations and as from 1st March 1968 he started farming independently on the farm Oppermanskraal and Elandsgat in the district of Hanover, on an undivided share to which he was entitled as stated above. Applicant is entitled to the other half-share in these farms. Applicant farms on a farm which he bought and he and Ignatius entered into an agreement in terms of which the latter rents applicant's half-share for R3,000 per annum. The letting contract will last until 10th March, 1970 and at its expiry it is intended that Ignatius, who will then be of age, will buy applicant's half-share in the properties. Since Ignatius has no stock, applicant sold him stock, to the value of about R26,000, on credit. Ignatius possesses farm implements and vehicles to the value of R7,232. Excepting the money he owes for the stock which he bought, Ignatius' only debt is an amount of R7,000 which he borrowed from a bank and which was used as running expenses.

Applicant avers that Ignatius conducts his farming operations on a strict business basis; that he keeps proper book of all transactions and that he had already reached the age of discretion, that he shows himself to be a hardworking and responsible young man and that he is able to carry on his farming operations independently on his own account. The applicant alleges that should the cash amounts, to which Ignatius is entitled, be invested in the Guardian's Fund, the minor would suffer considerable loss as a result of the low rate of interest paid by the Fund, having regard to the current rate of interest, and that, because of his minority, he is hampered in transactions relating to his farming operations. Ignatius, in an affidavit, supports that of applicant, and alleges that, because of his minority he is hampered in carrying out his farming operations. There are also affidavits by farmers, farming in the immediate vicinity of Ignatius and who know him well, supporting the allegations regarding his responsibility and ability as a farmer. Lastly there is also an affidavit by Mr. Thatcher, Igantius' maternal

grandfather who was nominated as Ignatius' guardian in the will of his late daughter. He is 83 years old and lives some two hundred miles from the farms concerned. He alleges that it will be impractical and difficult for him to fulfil the duties of a guardian and that he is satisfied that Ignatius is responsible and independent enough to manage his farming activities with good judgment and responsibility.

The question is whether the Court has the power to release a minor from guardianship. This leads to the further question: what is the precise meaning of such an order and how does it differ from *venia aetatis*. It is beyond doubt that the Supreme Court has no power to grant *venia aetatis* to a minor: *In re Cachet,* 15 S.C. 5; *Ex parte Moolman,* 1903 T.S. 159. In the Cape Province however there is a series of decisions where "release from guardianship" was granted to minors by the Court. In *In re Cachet, supra,* the Court refused to grant *venia aetatis* but said: ".....".

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In *Ex parte Louw,* 1920 C.P.D. 7, the summary reads: ".....".
The application was for *venia aetatis* but the order of the Court sanctioned the release of funds from the Guardian's Fund and states: ".....".

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In *Ex parte van Schalkwyk,* 1927 C.P.D. 268, the application was for release from tutelage. The Master reported: ".....".
and the Court made an order in accordance with the Master's report.

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Ex parte Smit, 1929 (1) P.H., F.40, was also an application for *venia aetatis* but the Court made an order: ".....".
Ex parte Curling, 1952 (1) P.H., M.13 a similar order was made. In *Ex parte Velkes,* 1963 (3) S.A. 584 (C) a Court, for the first time doubted a Court's capacity to grant such an order, but already in 1937 Prof. Coertze said in the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at p. 194:

"If the Cape Court has decided that it has no authority to grant *venia aetatis,* then it also has no authority to hasten majority 'by discharging the minor from tutelage' because *venia aetatis* is just an official hastening of majority in which that Court co-operates. Where the Cape Court thus gets that authority must still be discovered."

De Wet & Yeats, *Kontrakte en Handelsreg,* 3rd ed., p. 57, state that: "although the Cape Court nowhere states what this discharge from tutelage means precisely, it can hardly mean anything else than that the minor now gets the same status as someone who has been granted *venia aetatis*".

Lee, *Introduction to Roman Dutch Law,* 5th ed., p. 44, is of the opinion that discharge from tutelage: "....."
But he does not explain what the difference is. If there is no difference

between *venia aetatis* and discharge from tutelage then the Court cannot circumvent its lack of authority to grant *venia aetatis* by granting the same status under a different name.

The judgment in *Cachet's* case, *supra,* is very short, but I am convinced that DE VILLIERS, C.J., and BUCHANAN and MAASDORP, JJ., would never have granted: "....."
immediately after having refused to grant *venia aetatis* unless they were satisfied that there actually was a difference between the two.

In my opinion there is a difference. *Venia aetatis* is a hastening of majority which can include the right to dispose of or mortgage fixed property while discharge from tutelage is nothing more than emancipation, and emancipation never gives a minor the right to dispose of or mortgage property. He remains a minor. There is uncertainty as to whether a person to whom *venia aetatis* has been granted can marry without the consent of his parents, but it is clear that an emancipated

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minor must have the consent of his parents or the Court. *Venia aetatis* is a concession by the authorities, emancipation is the result of either express or implied consent by the minor's parents. I can find no indication that *venia aetatis* is revocable, but emancipation is subject to parental consent and that is revocable: *Ex parte Keeve,* (1928) 12 P.H., M.51; Spiro, *Law of Parent and Child,* 2nd ed., p. 162, *Lee, op. cit.,* p. 39. We speak of tacit release from authority (handligting) but it can also be express. The use of the word tacit is probably to emphasise the difference between the modern release from authority which takes place informally by either express or implied parental consent on the one hand, and the old-fashioned procedure where the father of the minor made a declaration of emancipation before the Court. In the latter case it was not the Court which granted release from authority; it was still the father, but he did it *coram legi loco* for the purposes of publication. See 44 S.A.L.J. p. 316. Consequently where a minor has no parents or guardian the Court as upper guardian, can, in my opinion emancipate or release minors from tutelage. This, in my humble opinion, is what the Court did in *Cachet's* case, and what I am asked to do in this case. I am convinced that it will be in the minor's interests if he were authorised to carry on his farming without being hampered by his minority, and that I should grant an appropriate order. I am not prepared to do more than release him from tutelage. He also asks that "full contractual capacity" be granted him, but to do this would be to enable him, for instance, to sell or dispose of fixed property.

In his report the Master suggests that applicant be released from complying with sec. 54 (2) of Act 24 of 1913 and be empowered to pay to the minor the cash to which he is entitled in terms of his late mother's will.

It is ordered:

1. That the minor Ignatius Michael van den Hever be released from tutelage.
2. That the executor in the estate of the late Mavis van den Hever (born Thatcher) be empowered to pay any cash amount to which Ignatius Michael van den Hever is entitled from the above estate, directly to Ignatius Michael van den Hever.

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