REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. II.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

RICHMOND: CHAS. H. WYNNE, PRINTER.

ALLEN *v.* MINOR.

Thursday, October 17, 1799.

If an infant becomes security in a twelve months' replevy bond, a Court of Equity will grant a perpetual injunction, even against an assignee without notice.

For the infant in such case, having no day in the Court of Law, the application to the Court of Equity is regular.*

Allen brought a bill in the High Court of Chancery, to be relieved against a twelve months' replevy bond, and stated that upon the 29th of October, 1788, he became security for Joseph Watson and Daniel Hawes in a twelve months' bond to Payne, who was assignee of Durracott, administrator of Coles. That at the time of entering into the said bond, [71] the plaintiff was an infant under the age of twenty-one years, to wit, only eighteen or nineteen years of age; and therefore, that the said bond was void as to him. That Payne had assigned the bond to Minor, who had sued execution on it.

The answer of Minor states, that he, as attorney for Payne, obtained the judgment on which the said twelve months' bond was given; that the right to the same soon after devolved on Middleton and Craughton, and Payne having removed out of the State, the defendant, as his attorney, assigned the bond to a third person; who re-assigned to him, in order to enable the defendant to make the necessary affidavit for obtaining the execution. That he knows nothing of the plaintiff, and, therefore, cannot say whether he be of full age or not.

The infancy of the plaintiff, at the time of giving the bond, was proved. The Court of Chancery dismissed the bill with costs, and the plaintiff appealed to this Court.

DUVAL, for the appellant.

The plaintiff was an infant at the time of executing the bond, and, therefore, was not bound by it, unless some fraud

* So, judgment having been entered against one as appearance bail, who denies that he ever executed the bail bond; he may have relief in equity, though he did not plead *non est factum* at law, after being informed that his name was signed to the bond. *Spotswood* v. *Higginbotham*, 6 Mun. 313.

The *replevy bond* above mentioned was under the act of 1787, 12 Hen. Stat. at Large. 458-'9, § 3, 4, providing, that if property taken in execution could not be sold for at least three-fourths of its value, as judged by certain valuers whom every county court should appoint, the sheriff should restore it to the debtor, on his giving a bond with sufficient sureties to pay the debt and costs in twelve months. The bond was to be delivered to the creditor; and if not paid at the end of twelve months, then, upon his lodging it in the clerk's office, with an affidavit of the *non*-payment, the clerk was to issue execution, indorsed "no security is to be taken on this execution."

had appeared; and there is no proof of any. It will be no excuse that the sheriff did not know his age, because it was his duty to have enquired and informed himself. At all events, his ignorance will not be allowed to prejudice the infant. The appellant came rightly into the Court of Equity for relief; for, the twelve months having elapsed, the plaintiff could have sued execution on his own affidavit, without application to the Court, and, therefore, a bill in equity was his only relief.

APPELLEE'S counsel.

Although an infant is not generally bound by his acts under age, yet he is, in all cases of fraud and deception; for his age should be considered as a shield for his defence, and not as a sword for destruction; therefore, although he may, by this plea, protect himself from injury, yet he cannot use it for the [72] purposes of injustice towards others. His obtruding himself, in the present case, upon the public officer, as a person of competency to contract, in order to hinder justice and procure a restitution of the property to the prejudice of others, was a fraud and deception, which render him liable on the bond; especially to innocent assignees and others unacquainted with his age, and who, therefore, are in no fault.

Cur. adv. vult.

PENDLETON, President. Delivered the resolution of the Court.

That as the plaintiff had no day in the Court of Law, his application to a Court of Equity was perfectly regular;* and, the jurisdiction being admitted, there could be no question upon the merits: which clearly entitled the plaintiff to relief. That, therefore, the decree was to be reversed and a perpetual injunction awarded.

[* And see *Spotswood* v *Higgenbotham*, 6 Munf. 313.]