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on the first question so certified as aforesaid, that the soil and freehold of Henley or Meeting-house street, and of Battery or Water street, did not pass, under and by virtue of the term "appurtenances," used by the jury in their verdict, nor was there anything in the description of lots one and three, in the verdict of the jury, that passed the soil and freehold of the said streets to the United States. 2. On the second point, it is the opinion of this court, that the right of the plaintiffs to recover the soil and freehold of the said streets is not barred by the limitations contained in the statute of October 30th, 1781, as set forth in the record. 3. On the third point, it is the opinion of this court, that upon the discontinuance of a highway in Massachusetts by the public, the soil and freehold of such highway revert to the owner of the land taken for such highway. 4. *On the fourth question, no specific point being stated, this court can express no [*57 opinion, as it has been repeatedly ruled in this court, that the whole case cannot be brought here, under the act of congress of 1802, upon such a general question. Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court.

*The Lessee of ENOCH TUCKER and RICHARD THOMPSON, Plaintiff [*58
in error, v. ELIZA G. MORELAND.

Infancy.

B. being seised of a fee in certain real estate in the city of Washington, on the 1st of December 1831, executed a deed to R. W.; the deed recited, as the consideration, that B., with one Bing, was indebted to T. & T. in the sum of \$8238, for which a promissory note had been given, to secure the payment of which, the conveyance was made to W., in trust, to sell the property in case of the non-payment of the debt; and the same was sold, on the 7th of March 1833, for that purpose by W. as trustee, and was by him conveyed to T. & T., the purchasers; B. continued in possession of the property, until February 8th, 1833, when he conveyed it, with other property, to his mother, E. G. M., in consideration of \$1188 due to her (for which a suit had been instituted) and of other advances made to him; at the time of the sale by W., notice was given of the title of E. G. M. to the premises, and she publicly claimed the same as her absolute right. Evidence, at the trial of an ejectment brought by T. & T. against E. G. M., was given, to prove that, at the time of the execution of the deed by B. to W., B. was an *infant* under twenty-one years of age; and that at the time the deed to E. G. M. was made, he was of full age.

The decision of Lord Mansfield, in *Zouch v. Parsons*, 3 Burr. 1804, was perfectly correct; the act of the infant which was held valid by the court, was precisely such an act as the infant was bound to do, and would have been compelled to do by a court of equity.

The deed given by B. to E. G. M. was a complete disaffirmance and avoidance of his prior deed to W.; and the deed of W. to T. & T. did not convey such a title to them, as would enable them to sustain an action of ejectment for the property.

To assume, as a matter of law, that a voluntary and deliberate recognition, by a person, after his arrival at age, of an actual conveyance of his right, during his nonage, amounts to a confirmation of such conveyance; or to assume, that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it, are not maintainable; the mere recognition of the fact, that a conveyance has been made, is not, *per se*, proof of a confirmation of it.¹

¹ There is a well-recognised distinction between the nature of those acts which are necessary to avoid an infant's deed, and the character of those which are sufficient to confirm it. The authorities frequently assert

that such a deed cannot be avoided, except by some act equally solemn with the deed itself. Some assert that it cannot be done by anything short of an entry; and this, whether the deed operates by livery of seisin, or transmits the

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It is apparent, upon the English authorities, that however true it may be, that an infant may so bind himself by deed, in certain cases, as that in consequence of the solemnity of the instrument, it is voidable only, and not void; yet that the instrument, however solemn, is held to be void, if, upon its face, it be apparent that it is to the prejudice of the infant.

There is no doubt, that an infant may avoid his act, deed or contract, by different means, according to the nature of the act, or the circumstances of the case; he may sometimes avoid it, by matters *in pais*, as in case of a feoffment, by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by *59] a writ of *audita querela*, as *when he has acknowledged a recognisance, or statute-staple, or merchant; sometimes, as in the case of an alienation of his estate, by a writ of entry, *dum fuit infra etatem*, after his arrival at age.

When the act of the infant is by matter of record he must avoid it by some act of record (as, for instance, by a writ of error, or an *audita querela*), during his minority; but if the act of the infant is a matter *in pais*, it may be avoided by an act *in pais* of equal solemnity or notoriety; and this, according to some authorities, either during his nonage, or afterwards; and according to others, at all events, after his arrival of age.

The deed of B. to E. G. M., being of as high a nature as the original deed to W., was a valid disaffirmance of the first deed.

In many cases, the disaffirmance of a deed, made during infancy is a fraud upon the other party; but this has never been held to be sufficient to avoid the disaffirmance; for it would otherwise take away the very protection, which the law intends to throw around him to guard him from the effects of his folly, rashness and misconduct.

ERROR to the Circuit Court of the District of Columbia, in the county of Washington. An action of ejectment was instituted in the circuit court, for the recovery of certain real estate in the city of Washington, claimed by the plaintiffs in error, under a deed executed by Richard N. Barry, on the first day of December 1831, to Richard Wallach.

The deed recited, that Richard N. Barry and George Bing stood indebted to Tucker & Thompson, of the city of Washington, in the sum of \$3238, for which they had passed to them their joint and several promissory note, payable in six months; and to secure the payment of which note, with the interest, in twelve months, Richard N. Barry had agreed to execute the same. The deed, then, conveyed to Richard Wallach and his heirs, the property in controversy; in trust, to sell and dispose of the same, and after appropriating the proceeds of the sale to the payment of the debt and interest, and expenses of sale, to pay over the residue to the grantor. It also contained covenants on the part of Barry, to keep the buildings on the premises insured against loss by fire, and to transfer the policies to the trustee; and for further or other deeds of conveyance to the pur-

title by virtue of the statute of uses. Others hold, that it may be avoided, without a previous entry, by another deed made to a different grantee. But all the authorities recognise the doctrine, that acts which would be insufficient to avoid such a deed, may amount to an affirmation of it. *Irvine v. Irvine*, 9 Wall. 627. There is reason for this distinction between the effect of acts in avoidance, and that of acts of confirmation. An infant's deed is not void; it passes the title of the land to his grantee. Now, if the deed be avoided, the ownership

of the land is retransferred; the seisin is changed. There is fitness in a rule, that title to land shall not pass by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand, a confirmation passes no title; it effects no change of property; it disturbs no seisin. It is, therefore, itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner. *Ibid.* 628.

chasers of the premises, in order to carry the purposes of the trust into complete effect.

The defendant derived title to the same property, under a deed of indenture, executed by the same Richard N. Barry, on the 8th of February 1833, by which the premises in controversy, and *other lots of ground, were conveyed to her, she being the mother of Richard N. Barry, in [*60 consideration of the sum of \$1138.61, which he owed to the said Eliza G. Moreland, for the recovery of which she had instituted a suit in the circuit court of the United States for the district of Columbia, and of other sums of money, by her to him, from time to time, paid and advanced, a particular account of which had not been kept."

On the trial of the cause, it was admitted, that Barry was seised in fee of the premises, when he executed the deed to Richard Wallach; and that after the execution thereof, he continued in possession, until the 8th of February 1833, when the deed to the defendant was made, and which deed was duly recorded. Evidence was also given by the defendant, tending to prove, that under the deed to her, she took possession of the premises, and continued to hold possession of the same, up to the time of the trial of the cause. The plaintiffs gave evidence to the jury, to prove that Richard Wallach, the trustee mentioned in the before-mentioned deed of trust, duly advertised the sale of the lot and premises in the declaration mentioned, and sold the same to the plaintiffs, on the 23d of February 1833; and made to them a deed for the same, on the 7th day of March 1833.

The defendant gave evidence to prove that, at the time of the sale made by Richard Wallach as aforesaid, the said defendant gave public notice of her title to the said lot and premises, and there publicly claimed the same as of her absolute right. Upon which said evidence, so admitted and given, the counsel for the defendant prayed the court to instruct the jury, that if they believed the evidence, so admitted and given as aforesaid, to be true, that then they ought to find their verdict for the defendant; which instruction the court refused to give. To this refusal, the defendant excepted.

In addition to the evidence given as aforesaid, the defendant gave evidence to the jury, to prove that, at the time the said Richard Barry made and executed his deed, as hereinbefore mentioned, to Richard Wallach, of the 1st December 1831, he the said Richard Barry was an infant, under the age of twenty-one years, and that at the time he made his deed to the *defendant, of the 8th of February 1833, before mentioned, he, the [*61 said Richard Barry, was of full age, that is to say, upwards of twenty-one years of age. Whereupon, the counsel for the defendant prayed the court to instruct the jury, that if, upon the whole evidence aforesaid, so given to the jury, they should believe the facts to be as stated as aforesaid; then the deed from the said Richard Wallach to the plaintiffs, as hereinbefore mentioned, did not convey to the said plaintiffs any title which would enable them to sustain this action. Which instruction the court gave, and to which, the plaintiffs, by their counsel, excepted.

The plaintiff, further to maintain and prove the issue on his side, then gave in evidence, by competent witnesses, facts tending to prove, that the said Richard N. Barry had attained the full age of twenty-one years on the 14th day of September 1831; and that in the month of November 1831, the said defendant, who was the mother of the said Richard, did assert and

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declare, that said Richard was born on the 14th day of September 1810 ; and that she did assert to Dr. McWilliams, a competent and credible witness, who deposed to said facts, and who was the accoucheur attending on her, at the period of the birth of her said son, that such birth actually occurred on the said 14th of September 1810 ; and applied to said Dr. McWilliams to give a certificate and deposition that the said day was the true date of the said birth. The counsel of the plaintiffs requested the court to instruct the jury—

1. That if the jury shall believe from the said evidence, that the said Richard N. Barry was of full age, and above the age of twenty-one years, at the time of the execution of said deed to said Wallach; or, if the defendant shall have failed to satisfy the jury from the evidence, that said Barry was, at the said date, an infant under twenty-one years ; that then the plaintiff is entitled to recover.

2. Or, if the jury shall believe from the said evidence, that if said Richard was under age, at the time of the execution of said deed, that he did, after his arrival at age, voluntarily and deliberately recognise the same as an actual conveyance of his *right, or during a period of several months,
*62] acquiesce in the same, without objection ; that then said deed cannot now be impeached on account of the minority of the grantor.

3. That the said deed from the said Richard N. Barry to the defendant, being made to her with full notice of said previous deed to said Wallach, and including other and valuable property, is not so inconsistent with said first deed, as to amount to a disaffirmance of the same.

4. That from the relative positions of the parties to said deed to defendant, at and previous to its execution, and from the circumstances attending it, the jury may infer that the same was fraudulent and void.

5. That if the lessors of plaintiff were induced, by the acts and declarations of defendant, to give a full consideration for said deed to Wallach, and to accept such deed as a full and only security for the debt *bonâ fide* due to them, and property *bonâ fide* advanced by them, and to believe that the said security was valid and effective ; that then it is not competent for said defendant, in this action, to question or deny the title of said plaintiff under said deed ; whether the said acts and declarations were made fraudulently, and for the purpose of practising deception, or whether said defendant, from any cause, wilfully misrepresented the truth.

Whereupon, the court gave the first of the said instructions so prayed as aforesaid, and refused to give the others. To which refusal, the counsel for the plaintiff excepted.

The court having refused the 2d, 3d, 4th and 5th instructions prayed by the plaintiff, and the counsel, in opening his case to the jury, contending, that the questions presented by the said instructions were open to the consideration of the jury, the counsel for the defendant thereupon prayed the court to instruct the jury, that if, from the evidence so as aforesaid given to the jury, and stated in their prayers for the said instructions, they should be of opinion, that the said Richard was under the age of twenty-one years, at the time he made his deed, as aforesaid, to the said Richard Wallach, under whom the plaintiffs claim their title in this case ; and that at the time
*63] he made his deed, as hereinbefore mentioned, to the *defendant, he was of full age, that such last-mentioned deed was a disaffirmance of

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his preceding deed to him, the said Richard Wallach ; and that, in such case, the jury ought to find their verdict for the defendant ; and that the evidence upon which the 2d, 3d, 4th and 5th instructions were prayed by the plaintiff as aforesaid, which evidence is set forth in the instructions so prayed, is not competent in law to authorize the jury to find a verdict for the plaintiff, upon any of the grounds, or for any of the reasons, set forth in the said prayers ; or to authorize them to find a verdict for the plaintiff, if they should be of opinion, that the said Richard Barry was under the age of twenty-one years, at the time he made his deed, as aforesaid, to the said Richard Wallach. Which instruction the court gave, as prayed ; and the counsel for the plaintiffs excepted thereto. The plaintiffs prosecuted this writ of error.

The case was argued by *Coxe*, for the plaintiff in error ; and by *Swann* and *Bradley*, for the defendant.

For the *plaintiffs*, it was contended, that the circuit court erred in giving the instructions prayed by the defendant, and in refusing the instructions prayed by the plaintiff. That the deed of an infant is not void, but merely voidable. That there was competent and sufficient evidence before the jury, from which they might infer, that if the grantor, Richard N. Barry, was, in fact, an infant, at the date of the deed to Richard Wallach, he had affirmed the deed, after he came of age. If the grantor, Richard N. Barry, was, at the date of the deed to Richard Wallach, an infant, the defendant was guilty of a fraud ; of which he could not avail himself to defeat the recovery of the plaintiffs in this action. The circuit court erred in considering the acts of an infant, which are voidable by him, on attaining full age, absolutely void in themselves. The acts of an infant are voidable, not void ; cited, 3 Burr. 1794 ; s. c. 1 W. Bl. 575.

If an infant does an act which is voidable, he cannot recall it, without repaying the consideration he received for the first conveyance. He can only reinstate himself, by reinstating the person from whom he claims what he had conveyed to him, in all he *had obtained from him. The disposition of court to restrain the power of infants within this rule, has [*64 been manifested by the latter decisions of courts, in which such questions have been decided. The protection of infants which courts have given, is a shield of defence, and is not to be used as a weapon to injure others ; cited, 7 Cow. 179, 181 ; 15 Mass. 359 ; 13 Ibid. 37 ; 2 Evans's Pothier, note 26.

But whatever may be the power of Barry over the deed executed to Mr. Wallach, the defendant cannot avail herself of the infancy of her son, to sustain a title derived from him, against one held under the deed of trust. She had excluded herself from denying the full age of her son, by asserting that it existed, before he made the deed of trust, and procuring it to be admitted by the orphans' court, when Barry claimed, and, under the authority of that court, obtained the possession of his property, as being of full age. The plaintiff had a right to submit these facts, and to have the benefit of them before the jury ; and this was denied to him by the circuit court.

Bradley and *Swann*, for the defendant, denied that the case of *Zouch v. Parsons* (3 Burr. 1794) sustained the principle claimed under it by the plaintiffs' counsel. That case had no application to such a conveyance as

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was made to Mr. Wallach; which was a deed creating a trust, with covenants, into which an infant cannot enter. The authority of the case of *Zouch v. Parsons* has been questioned and denied (2 Preston on Conveyancing, 24).

But if the deed to Mr. Wallach was only voidable, full evidence of its disaffirmance is given, by the execution of the deed to the defendant; which contains a covenant of warranty, as well as a covenant of title. He was in possession, when he executed this conveyance. To show how a deed given by an infant can be avoided, when he attains full age: cited, 14 Johns. 124. In all cases of affirmance of his acts while an infant, on his attaining full age, his affirmance must be express: cited, 1 Johns. Cas. 127. The cases show that a deed of bargain and sale given by an infant, may be disaffirmed by a deed of bargain and sale, when *he attains full age. *65] In the case before the court, more has been done: a deed has been executed, with covenants of warranty and title; the grantee has had possession ever since the conveyance.

The charge of fraud could not be sustained. At the time of the application to the orphans' court, a mistake was made as to the age of Richard N. Barry, which was afterwards discovered. But the plaintiffs cannot avail themselves of those circumstances. The validity of the deed of trust depended on the age of the grantor; and this was the question properly before the court and jury. The deed to the defendant was given for a fair and valuable consideration, and it is a valid deed; if, when the prior deed was executed, the grantor was an infant. To this extent, and no more, were the instructions of the circuit court given; and they are sustained by the soundest principles of law.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the county of Washington, and district of Columbia. The original action was an ejectment brought by the plaintiff in error, against the defendant in error; and both parties claimed title under Richard N. Barry. At the trial of the cause, upon the general issue, it was admitted, that Richard N. Barry, being seised in fee of the premises sued for, on the first day of December 1831, executed a deed thereof to Richard Wallach. The deed, after reciting that Barry and one Bing were indebted to Tucker & Thompson in the sum of \$3238, for which they had given their promissory note, payable in six months after date, to secure which the conveyance was to be made, conveyed the premises to Wallach, in trust to sell the same, in case the debt should remain unpaid, ten days after the first day of December then next. The same were accordingly sold by Wallach, for default of payment of the note, on the 23d of February 1833, and were bought at the sale by Tucker & Thompson, who received a deed of the same, on the 7th of March of the same year. It was admitted, that after the execution of the deed of Barry to Wallach, the former continued in possession of the premises, until the 8th of February 1833, when he *executed a deed, including the same and other parcels of land, to *66] his mother, Eliza G. Moreland, the defendant, in consideration (as recited in the deed) of the sum of \$1138.61, which he owed his mother; for the recovery of which she had instituted a suit against him, and of other sums advanced him, a particular account of which had not been kept, and

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of the further sum of five dollars. At the time of the sale of Wallach, the defendant gave public notice of her title to the premises, and she publicly claimed the same as her absolute right. The defendant further gave evidence at the trial, to prove, that at the time of the execution of the deed by Barry to Wallach, he, Barry, was an infant, under twenty-one years of age ; and at the time of the execution of the deed to the defendant, he was of the full age of twenty one years.

Upon this state of the evidence, the counsel for the defendant prayed the court to instruct the jury, that if, upon the whole evidence given as aforesaid to the jury, they should believe the facts to be as stated as aforesaid, then the deed from the said Wallach to the plaintiffs did not convey to the plaintiffs any title, which would enable them to sustain the action. This instruction the court gave ; and this constitutes the exception now relied on by the plaintiff in error, in his first bill of exceptions.

Some criticism has been made upon the language in which this instruction is couched. But, in substance, it raises the question, which has been so fully argued at the bar, as to the validity of the plaintiffs' title to recover, if Barry was an infant at the time of the execution of his deed to Wallach. If that deed was originally void, by reason of Barry's infancy, then the plaintiff, who must recover upon the strength of his own title, fails in that title. If, on the other hand, that deed was voidable only, and not void, and yet it has been avoided by the subsequent conveyance to the defendant, by Barry, then the same conclusion follows. And these, accordingly, are the considerations which are presented under the present instruction.

In regard to the point, whether the deed of lands by an infant is void or voidable at the common law, no inconsiderable diversity of opinion is to be found in the authorities. That *some deeds or instruments, under seal, of an infant, are void, and others voidable, and others valid [*67 and absolutely obligatory, is not doubted. Thus, a single bill, under seal, given by an infant for necessities, is absolutely binding upon him ; a bond, with a penalty, for necessities, is void, as apparently to his prejudice ; and a lease reserving rent, is voidable only.(a) The difficulty is in ascertaining the true principle, upon which these distinctions depend. Lord MANSFIELD, in *Zouch v. Parsons* (3 Burr. 1804), said, that it was not settled, what is the true ground, upon which an infant's deed is voidable only ; whether the solemnity of the instrument is sufficient, or it depends upon the semblance of benefit, from the matter of the deed, upon the face of it. Lord MANSFIELD, upon a full examination of the authorities, on this occasion, came to the conclusion (in which the other judges of the court of king's bench concurred), that it was the solemnity of the instrument, and delivery by the infant himself, and not the semblance of benefit to him, that constituted the true line of distinction between void and voidable deeds of the infant ; but he admitted, that there were respectable sayings the other way. The point was held by the court, not necessary to the determination of that case ; because, in that case, the circumstances showed that there was a semblance of benefit sufficient to make the deed voidable only, upon the matter of the conveyance. There can be little doubt, that the decision in *Zouch v.*

(a) See *Russel v. Lee*, 1 Lev. 86 ; *Fisher v. Mowbray*, 8 East 330 ; *Baylis v. Dinley*, 3 M. & Selw. 470 ; Co. Litt. 172.

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Parsons was perfectly correct ; for it was the case of an infant mortgagee, releasing, by a lease and release, his title to the premises, upon the payment of the mortgage-money, by a second mortgagee, with the consent of the mortgagor. It was precisely such an act as the infant was bound to do ; and would have been compelled to do, by a court of equity, as a trustee of the mortgagor. And certainly, it was for his interest to do, what a court of equity would by a suit have compelled him to do. (a)

*68] Upon this occasion, Lord MANSFIELD and the court approved of *the law as laid down by Perkins (§ 12), that "all such gifts, grants or deeds, made by infants, which do not take effect by delivery of his hand, are void. But all gifts, grants or deeds, made by infants, by matter of deed, or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate." And in Lord MANSFIELD'S view, the words "which do take effect," are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power, and convey no interest. (b) So that, according to Lord MANSFIELD'S opinion, there is no difference between a feoffment and any deeds which convey an interest. In each case, if the infant makes no feoffment, or delivers no deed in person, it takes effect by such delivery of his hand, and is voidable only. But if either act be done, by a letter of attorney from the infant, it is void, for it does not take effect by a delivery of his hand.

There are other authorities, however, which are at variance with this doctrine of Lord MANSFIELD, and which put a different interpretation upon the language of Perkins. According to the latter, the semblance of benefit to the infant, or not, is the true ground of holding his deed voidable or void. That it makes no difference, whether the deed be delivered by his own hand or not ; but whether it be for his benefit or not. If the former, then it is voidable ; if the latter, then it is void. And that Perkins, in the passage above stated, in speaking of gifts and grants taking effect by the delivery of the infant's hand, did not refer to the delivery of the deed, but to the delivery of the thing granted ; as, for instance, in the case of a feoffment, to a delivery of seisin by the infant personally ; and in case of chattels, by a delivery of the same by his own hand. This is the sense in which the doctrine of Perkins is laid down in Sheppard's Touchstone 232. Of this latter opinion, also, are some other highly respectable text-writers ; (c) and perhaps, the weight of *authority, antecedent to the decision in *Zouch v. Parsons*, inclined in the same way. Lord Chief Justice EYRE, in *Keane v. Boycott* (2 H. Bl. 515), alluded to this distinction, in the following terms: After having corrected the generality of some expressions in Litt. § 259, he added, "We have seen, that some contracts of infants, even by deed, shall

(a) See ——— *v. Handcock*, 17 Ves. 383 ; 1 Fonbl. Eq. b. 1, ch. 2, § 5, and notes. Co. Litt. 172 a ; Com. Dig. Infant, B. 5.

(b) See *Saunderson v. Marr*, 1 H. Bl. 75.

(c) See Preston on Conveyancing 248-50 ; Com. Dig. Infant, C. 2 ; Shep. Touch. 232, and Acherly's note ; Bac. Abr. Infancy, I. 3 ; English Law Journal for 1804, p. 145 ; 8 Amer. Jurist 327. But see 1 Powell on Mort., by Coventry, note to p. 208 ; *Zouch v. Parsons*, 1 W. Bl. 575, Ellsley's notes, *h* and *v* ; Co. Litt. 51 *b*, Harg. note, 331 ; *Holmes v. Blogg*, 8 Taunt. 508 ; 1 Fonbl. Eq. b. 1, ch. 11, § 3, and notes *y*, *z*, *a*, *b*.

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bind them; some are merely void, namely, such as the court can pronounce to be to their prejudice; others, and the most numerous class, of a mere uncertain nature as to benefit or prejudice, are voidable only; and it is in the election of the infant to affirm them or not. In Roll. Abr. tit. Enfants (1 Roll. Abr. 728), and in Com. Dig., under the same title, instances are put of the three different kinds, of good, void and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, Comyn states it as a rule, that the infant cannot plead *non est factum*, but must plead his infancy. It is his deed; but this is a mode of disaffirming it. He, indeed, states the rule generally; but I limit it to that case, in order to reconcile the doctrine of void and voidable contracts." A doctrine of the same sort was held by the court, in *Thompson v. Leach*, 3 Mod. 310; in *Fisher v. Mowbray*, 8 East 330; and *Baylis v. Dinely*, 3 M. & Selw. 477. In the last two cases, the court held, that an infant cannot bind himself in a bond with a penalty, and especially to pay interest. In the case of *Baylis v. Dinely*, Lord ELLENBOROUGH said, "In the case of the infant lessor, that being a lease, rendering rent, imported, on the face of it, a benefit to the infant; and his accepting the rent, at full age, was conclusive that it was for his benefit. But how do these authorities affect a case like the present, where it is clear, upon the face of the instrument, that it is to the prejudice of the infant, for it is an obligation with a penalty, and for the payment of interest? Is there any authority to show, that if, upon looking to the instrument, the court can clearly pronounce, that it is to the infant's prejudice, they will, nevertheless, suffer it to be set up by matter *ex post facto*, after full age?" And then, after commenting on *Keane v. Boycott*, and *Fisher v. Mowbray*, he added, "In *Zouch v. Parsons*, where this subject was much considered, I find nothing which tends to show that an infant may bind himself to his prejudice. It is the privilege of the infant, that he shall not; and we should be breaking down the protection [*70 which the law has cast around him, if we were to give effect to a confirmation by parol, of a deed like this, made during his infancy."

It is apparent, then, upon the English authorities, that however true it may be, that an infant may so far bind himself by deed, in certain cases, as that in consequence of the solemnity of the instrument, it is voidable only, and not void; yet that the instrument, however solemn, is held to be void, if, upon its face, it is apparent, that it is to the prejudice of the infant. This distinction, if admitted, would go far to reconcile all the cases; for it would decide, that a deed, by virtue of its solemnity, should be voidable only, unless it appeared on its face, to be to his prejudice, in which case, it would be void. (a)

The same question has undergone no inconsiderable discussion in the American courts. In *Oliver v. Houdlet*, 13 Mass. 239, the court seemed to think the true rule to be, that those acts of an infant are void, which not only apparently, but necessarily, operate to his prejudice. In *Whitney v. Dutch*, 14 Mass. 462, the same court said, that whenever the act done may be for the benefit of the infant, it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it. And they added, that this was the only clear and definite proposition, which can

(a) See Bac. Abr., Infancy and Age, I. 3, I. 7.

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be extracted from the authorities. (a) In *Conroe v. Birdsall*, 1 Johns. Cas. 127, the court approved of the doctrine of Perkins, § 12, as it was interpreted and adopted in *Zouch v. Parsons*, and in the late case of *Roof v. Stafford*, 7 Cow. 180-81, the same doctrine was fully recognised. But in an intermediate case, *Jackson v. Burchin*, 14 Johns. 126, the court doubted, whether a bargain and sale of lands, by an infant, was a valid deed to pass the land, as it would make him stand seised to the use of another. And that doubt was well warranted by what is laid down in 2 Inst. 673, where it is said, that if an infant bargain and sell lands, which are in the realty, by deed indented and enrolled, he may avoid it, when he will, for the deed was of no effect to raise a use.

*71] The result of the American decisions has been correctly stated by Mr. Chancellor Kent, in his learned commentaries (2 Com. Lect. 31), to be, that they are in favor of construing the acts and contracts of infants, generally, to be voidable only, and not void, and subject to their election, when, they become of age, either to affirm or disallow them; and that the doctrine of *Zouch v. Parsons* has been recognised and adopted as law. It may be added, that they seem generally to hold, that the deed of an infant, conveying lands, is voidable only, and not void; unless, perhaps, the deed should manifestly appear, on the face of it, to be to the prejudice of the infant; and this, upon the nature and solemnity, as well as the operation of the instrument.

It is not, however, necessary for us, in this case, to decide, whether the present deed, either from its being a deed of bargain and sale, or from its nature, as creating a trust for a sale of the estate, or from the other circumstances of the case, is to be deemed void, or voidable only. For if it be voidable only, and has been avoided by the infant, then the same result will follow, that the plaintiff's title is gone.

Let us, then, proceed to the consideration of the other point, whether, supposing the deed to Wallach to be voidable only, it has been avoided by the subsequent deed of Barry to Mrs. Moreland. There is no doubt, that an infant may avoid his act, deed or contract, by different means, according to the nature of the act, and the circumstances of the case. He may sometimes avoid it by matter *in pais*, as in case of a feoffment, by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of *audita querela*, as when he has acknowledged a recognisance or statute-staple or merchant; (b) sometimes, as in the case of an alienation of his estate during his nonage, by a writ of entry, *dum fuit infrà ætatem*, after his arrival of age. The general result seems to be, that where the act
*72] of the infant is by matter of record, he must avoid it by some act of record (as for instance, by a writ of error, or an *audita querela*) during his minority. But if the act of the infant is a matter *in pais*, it may be avoided by an act *in pais*, of equal solemnity or notoriety; and this, accord-

(a) See *Boston Bank v. Chamberlain*, 15 Mass. 220.

(b) See Com. Dig., *Infant*, B. 1, 2, C. 2, 3, 4, 5, 8, 9, 11; 2 Inst. 673; 2 Kent Com. Lect. 31; Bac. Abr., *Infancy and Age*, I. 5, I. 7.

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ing to some authorities, either during his nonage or afterwards; and according to others, at all events, after his arrival of age. (a) In Co. Litt. 380 b, it is said, "Herein a diversity is to be observed between matters of record done or suffered by an infant, and matters *in fait*; for matters *in fait*, he shall avoid, either within age or at full age, as hath been said; but matters of record, as statutes-merchant, and of the staple, recognisance acknowledged by him, or a fine levied by him, recovery against him, &c., must be avoided by him, viz., statutes, &c., by *audita querela*; and the fine and recovery, by a writ of error, during his minority, and the like." In short, the nature of the original act or conveyance generally governs, as to the nature of the act required to be done in the disaffirmance of it. If the latter be of as high and solemn a nature as the former, it amounts to a valid avoidance of it. We do not mean to say, that in all cases, the act of disaffirmance should be of the same, or of as high and solemn a nature as the original act; for a deed may be avoided by a plea. But we mean only to say, that if the act of disaffirmance be of as high and solemn a nature, there is no ground to impeach its sufficiency. Lord ELLENBOROUGH in *Baylis v. Dinely* (3 Maule & Selw. 481-2), held a parol confirmation of a bond given by an infant, after he came of age, to be invalid; insisting, that it should be by something amounting to an estoppel in law, of as high authority as the deed itself; but that the same deed might be avoided by the plea of infancy. There are cases, however, in which a confirmation may be good, without being by deed; as, in case of a lease by an infant, and his receiving rent after he came of age. (b)

The question, then, is, whether, in the present case, the deed to Mrs. Moreland, being of as high and solemn a nature as the original deed to Wallach, is not a valid disaffirmance of it. We think it is. If it was a voidable conveyance, which had passed *the seisin and possession to Wallach, and he had remained in possession, it might, like a feoff- [*73 ment, have been avoided by an entry by the infant, after he came of age. (c) But in point of fact, Barry remained in possession; and therefore, he could not enter upon himself. And when he conveyed to Mrs. Moreland, being in possession, he must be deemed to assert his original interest in the land, and to pass it in the same manner as if he had entered upon the land and delivered the deed thereon, if the same had been in an adverse possession.

The cases of *Jackson v. Carpenter* (11 Johns. 539), and *Jackson v. Burchin* (14 Ibid. 124), are directly in point, and proceed upon principles, which are in perfect coincidence with the common law, and are entirely satisfactory. Indeed, they go farther than the circumstances of the present case require; for they dispense with an entry, where the possession was out of the party, when he made the second deed. In *Jackson v. Burchin*, the court said, that it would seem, not only upon principle, but authority, that the infant can manifest his dissent in the same way and manner by which he first assented to convey. If he has given livery of seisin, he must

(a) See Bac. Abr., Infancy and Age, I. 3, I. 5, I. 7; *Zouch v. Parsons*, 3 Burr. 1794; *Roof v. Stafford*, 7 Cow. 179, 183; Com. Dig., Infant, C. 9, C. 4, C. 11.

(b) See Bac. Abr., Infancy and Age, I. 8.

(c) See *Inhabitants of Worcester v. Eaton*, 13 Mass. 375; *Whitney v. Dutch*, 14 Id. 462

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do an act of equal notoriety, to disaffirm the first act ; he must enter on the land, and make known his dissent. If he has conveyed by bargain and sale, then a second deed of bargain and sale will be equally solemn and notorious, in disaffirmance of the first. (a) We know of no authority or principle, which contradicts this doctrine. It seems founded in good sense, and follows out the principle of notoriety of disaffirmance, in the case of a feoffment, by an entry ; that is, by an act of equal notoriety and solemnity with the original act. The case of *Frost v. Wolveston* (1 Str. 94) seems to have proceeded on this principle.

Upon these grounds, we are of opinion, that the deed of Barry to Mrs. Moreland was a complete disaffirmance and avoidance of his prior deed to Wallach ; and consequently, the instruction given by the circuit court was *74] unexceptionable. To give effect to *such disaffirmance, it was not necessary, that the infant should first place the other party *in statu quo*.

The second bill of exceptions, taken by the plaintiff, turns upon the instructions asked upon the evidence stated therein, and scarcely admits of abbreviation. It is as follows :

“The plaintiff, further to maintain and prove the issue on his side, then gave in evidence, by competent witnesses, facts tending to prove, that the said Richard N. Barry had attained the full age of twenty-one years on the 14th day of September 1831 ; and that in the month of November 1831, the said defendant, who was the mother of the said Richard, did assert and declare, that said Richard was born on the 14th day of September 1810 ; and that she did assert to Dr. McWilliams, a competent and credible witness, who deposed to said facts, and who was the accoucheur attending on her at the period of the birth of her said son, that such birth actually occurred on the said 14th of September 1810, and applied to said Dr. McWilliams to give a certificate and deposition that the said day was the true date of the birth ; and thereupon, the counsel for the plaintiff requested the court to instruct the jury.

“1. That, if the said jury shall believe, from the said evidence, that the said Richard N. Barry was of full age, and above the age of twenty-one years, at the time of the execution of said deed to Wallach, or if the defendant shall have failed to satisfy the jury, from the evidence, that said Barry was, at the said date, an infant under twenty-one years, that then the plaintiff is entitled to recover.

“2. Or, if the jury shall believe, from the said evidence, that if said Richard was under age, at the time of the execution of said deed, that he did after his arrival at age, voluntarily and deliberately recognise the same as an actual conveyance of his right, or during a period of several months, acquiesce in the same, without objection, that then the said deed cannot now be impeached, on account of the minority of the grantor.

“3. That the said deed from the said Richard N. Barry to the defendant, being made to her, with full notice of said previous deed to said Wallach, and including other and valuable property, is not so inconsistent with said first deed as to amount to a disaffirmance of the same.

*75] “4. *That, from the relative position of parties to said deed to

(a) See the same point, 2 Kent's Com. Lect. 81.

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defendant, at and previous to its execution, and from the circumstances attending it, the jury may infer that the same was fraudulent and void.

"5. That, if the lessors of the plaintiff were induced, by the acts and declarations of said defendant to give a full consideration for said deed to Wallach, and to accept said deed as a full and only security for the debt *bonâ fide* due to them, and property *bonâ fide* advanced by them, and to believe that the said security was valid and effective, that then it is not competent for said defendant, in this action, to question or deny the title of said plaintiff, under said deed, whether the said acts and declarations were made fraudulently, and for the purpose of practicing deception, or whether said defendant, from any cause, wilfully misrepresented the truth. Whereupon, the court gave the first of the said instructions so prayed as aforesaid, and refused to give the others. To which refusal, the counsel for the plaintiff excepted."

The first instruction, being given by the court, is, of course, excluded from our consideration on the present writ of error. The second instruction is objectionable, on several accounts. In the first place, it assumes, as matter of law, that a voluntary and deliberate recognition by a person, after his arrival at age, of an actual conveyance of his right, during his nonage, amounts to a confirmation of such conveyance. In the next place, that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it. In our judgment, neither proposition is maintainable. The mere recognition of the fact, that a conveyance has been made, is not, *per se*, proof of a confirmation of it. Lord ELLENBOROUGH, in *Baylis v. Dinely* (3 M. & Selw. 482), was of opinion, that an act of as high a solemnity as the original act was necessary to a confirmation. "We cannot (said he) surrender the interests of the infant into such hands as he may chance to get. It appears to me, that we should be doing so in this case (that of a deed), unless we required the act after full age to be of as great a solemnity as the original instrument." Without undertaking to apply this doctrine to its full extent, and admitting that acts **in pais* may amount to a confirmation of a deed, still we are of opinion, that these acts should be of such a solemn and unequivocal nature [*76 as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable ;(a) *à fortiori*, mere acquiescence, uncoupled with any acts demonstrative of an attempt to confirm it, would be insufficient for the purpose. In *Jackson v. Carpenter* (11 Johns. 542-3), the court held, that an acquiescence by the grantor in a conveyance made during his infancy, for eleven years after he came of age, did not amount to a confirmation of that conveyance ; that some positive act was necessary, evincing his assent to the conveyance. In *Curtin v. Patton* (11 Serg. & Rawle 311), the court held, that to constitute a confirmation of a conveyance or contract by an infant, after he arrives of age, there must be some distinct act, by which he either receives a benefit from the contract, after he arrives at age, or does some act of express ratification. There is much good sense in these decisions, and they are indispensable to a just support of the rights of infants, according to the common law. Besides, in the present case, as Barry was in possession

(a) See *Boston Bank v. Chamberlain*, 15 Mass. 220.

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of the premises during the whole period, until the execution of his deed to Mrs. Moreland, there was no evidence to justify the jury in drawing any inference of any intentional acquiescence in the validity of the deed to Wallach.

The third instruction is, for the reasons already stated, unmaintainable. The deed to Mrs. Moreland contains a conveyance of the very land in controversy, with a warranty of the title against all persons claiming under him (Barry), and a covenant, that he had good right and title to convey the same and therefore, is a positive disaffirmance of the former deed.

The fourth instruction proceeds upon the supposition, that if the deed to Mrs. Moreland was fraudulent between the parties to it, it was utterly void, and not merely voidable. But it is clear, that between the parties, it would be binding, and available; however, as to the persons whom it was intended to defraud, it might be voidable. Even, if it was made for the very purpose of defeating the conveyance to Wallach, and was a mere **contrivance* for this purpose, still it was an act competent to be done by Barry, and amounted to a disaffirmance of the conveyance to Wallach. In many cases, the disaffirmance of a deed made during infancy is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw round him, to guard him from the effects of his folly, rashness and misconduct. In *Saunderson v. Marr* (1 H. Bl. 75), it was held, that a warrant of attorney, given by an infant, although there appeared circumstances of fraud on his part, was utterly void, even though the application was made to the equity side of the court, to set aside a judgment founded on it. So, in *Conroe v. Birdsall* (1 Johns. Cas. 127), a bond made by an infant, who declared at the time, that he was of age, was held void, notwithstanding his fraudulent declaration; for the court said, that a different decision would endanger all the rights of infants. A similar doctrine was held by the court in *Curtin v. Patton* (11 Serg. & Rawle 309-10). Indeed, the same doctrine is to be found affirmed more than a century and a half ago, in *Johnson v. Pie* (1 Lev. 169; s. c. 1 Sid. 258; 1 Keb. 995, 913.(a))

But what are the facts, on which the instruction relies as proof of the deed to Mrs. Moreland being fraudulent and void? They are "the relative positions of the parties to said deed, at and previous to its execution;" that is to say, the relation of mother and son; and the fact that she had then instituted a suit against him, and arrested him, and held him to bail, as stated in the evidence; and "from the circumstances attending the execution of it," that is to say, that Mrs. Moreland was informed by Barry, before his deed to her, that he had so conveyed the said property to Wallach, and that subsequently, and with such knowledge, she prevailed on Barry to execute to her the same conveyance. Now, certainly, these facts alone, could not justly authorize a conclusion, that the conveyance to Mrs. Moreland was fraudulent and void; for she might be a *bond fide* creditor to her son. And the consideration averred in that conveyance showed her to be a creditor, if it was truly stated (and there *was no evidence to contradict it); and if she was a creditor, then she had a legal

(a) See Bac. Abr. Infancy and Age, H; 2 Kent Com. Lect. 31.

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right to sue her son, and there was no fraud in prevailing on him to give a deed to satisfy that debt. It is probable, that the instruction was designed to cover all the other facts stated in the bill of exceptions, though, in its actual terms, it does not seem to comprehend them. But if it did, we are of opinion, that the jury would not have been justified in inferring, that the deed was fraudulent and void. In the first place, the proceedings in the orphans' court may, for aught that appears, have been in good faith; and under an innocent mistake of a year of the actual age of Barry. In the next place, if not so, still the mother and the son were not estopped in any other proceeding, to set up the nonage of Barry, whatever might have been the case as to the parties and property involved in that proceeding. In the next place, there is not the slightest proof, that these proceedings had, at the time, any reference to, or intended operation upon, the subsequent deed made to Wallach; or that Mrs. Moreland was party to, or assisted in, the negotiations or declarations on which the deed to Wallach was founded. Certainly, without some proofs of this sort, it would be going too far to assert, that the jury might infer, that the deed to Mrs. Moreland was fraudulent. Fraud is not presumed, either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.

The fifth instruction was properly refused by the court, for the plain reason, that there was no evidence in the case of any acts or declarations by Mrs. Moreland to the effect therein stated. It was, therefore, the common case of an instruction asked upon a mere hypothetical statement, *ultra* the evidence.

The third bill of exceptions is as follows: "The court having refused the 2d, 3d, 4th and 5th instructions prayed by the plaintiffs, and the counsel, in opening his case to the jury, contending that the questions presented by the said instructions were open to the consideration of the jury, the counsel for the defendant thereupon prayed the court to instruct the jury, that if, from the evidence so as aforesaid given to the jury, and stated in the prayers for the said instructions, they should be of opinion, that the said Richard was under *the age of twenty-one years, at the time he [79 made his deed as aforesaid to the said Richard Wallach, under whom the plaintiffs claim their title in this case, and that at the time he made his deed as hereinbefore mentioned to the defendant, he was of full age, that such last-mentioned deed was a disaffirmance of his preceding deed to him, the said Richard Wallach, and that in that case, the jury ought to find their verdict for the defendant, and that the evidence upon which the 2d, 3d, 4th and 5th instructions were prayed by the plaintiff as aforesaid, which evidence is set forth in the instructions so prayed, is not competent in law to authorize the jury to find a verdict for the plaintiff, upon any of the grounds, or for any of the reasons set forth in the said prayers, or to authorize them to find a verdict for the plaintiff, if they should be of opinion, that the said Richard Barry was under the age of twenty-one years, at the time he made his deed as aforesaid to the said Richard Wallach. Which instruction the court gave, as prayed, and the counsel for the plaintiff excepted thereto."

It is unnecessary to do more than to state, that this bill of exceptions is completely disposed of by the considerations already mentioned. It contains no more than the converse of the propositions stated in the second bill of

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exceptions, and the re-assertion of the instructions given by the court in the first bill of exceptions. Upon the whole, it is the opinion of the court, that the judgment of the circuit court ought to be affirmed, with costs.

Judgment affirmed.

*80] WILLIAM H. TRACY and JOHN B. BALESTIER, Plaintiffs in error,
v. SAMUEL SWARTWOUT.

Responsibilities of public officers.

Certain casks of syrop of sugar-cane were imported into the port of New York, and the agent of the importers offered to enter them, and bond the duties, at the rate of fifteen per cent. *ad valorem*; but the collector, acting in entire good faith, under instructions of the secretary of the treasury, refused to allow the syrop to be entered, unless the bonds were given at the rate of three cents per pound; the consignee refused to give the bonds for the higher duty, and the syrop remained in the possession of the collector for a long time, by which its value was greatly deteriorated. On the trial of the cause, evidence was offered, and rejected by the court, to show that the importer was not able to give bonds for the higher duty; but this inability was not made known to the collector, at the time they offered to make the entry. The treasury department became afterwards satisfied that the legal rate of duties was fifteen per cent. *ad valorem*, and on payment of the duty at that rate, the syrop was delivered to the owner. An action was instituted against the collector, to recover damages for the loss sustained by the deterioration of the syrop, and a verdict in conformity with the charge of the court, was given, for nominal damages only.

The circuit court properly rejected the evidence of the plaintiffs' inability to give the bond demanded by the collector; the fact of inability ought to have been made known to the collector, at the time the bond was required.

The secretary of the treasury is bound by the law; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law; yet, neither he nor those who act under him, can dispense with, or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress.

Where a ministerial officer acts in good faith, he is not liable to exemplary damages for an injury done; but he can claim no further exemption, where his acts are clearly against law.¹ The collector has a right to hold possession of imported goods, until the duties are paid, or secured to be paid, as the law requires; but, if he retain possession of the goods, and refuse to deliver them, after the duties have been paid, or bond given or tendered for the proper rate of duties, he is liable for the damages which may be sustained by this refusal.

A court may not only present the facts proved in their charge to the jury, but give their opinion, as to those facts, for the consideration of the jury; but, as the jurors are the triers of facts, such an expression of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgment; they should be made distinctly to understand, that the instruction was not given as a point of law, by which they were to be governed; but as a mere opinion, as to the facts, and to which they should give no more weight than it was entitled to.

The correctness of every charge must depend upon the phraseology used by the court; and, of course, but little aid, from adjudicated cases, can be expected in a case like the present.

¹ In *Amy v. The Supervisors*, 11 Wall. 138, the court say, "the rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages, to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty, and honest

intentions, will not excuse the offender." *s. p.* *Boyden v. Burke*, 14 How. 575. A public officer, sued for an illegal act, cannot justify under the instructions of the head of an executive department. *United States v. Kendall*, 5 Cr. C. C. 163; *s. c.* 12 Pet. 524; *Lennig v. Maxwell*, 3 Bl. C. C. 126; *Munsell v. Maxwell*, Id. 364.