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H. D. KANTER, Plaintiff,

v.

B. P. HOLLAND AND B. P. HOLLAND, JR., Defendants.

Record 633

FROM THE CIRCUIT COURT OF PRINCESS ANNE COUNTY.

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, Clerk.

154 Va 120

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

H. D. KANTER, Plaintiff,

vs.

B. P. HOLLAND AND B. P. HOLLAND, JR., Defendants.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, H. D. Kanter, respectfully represents that he is aggrieved by a judgment of the Circuit Court of Princess Anne County, Virginia, entered on the 7th day of August, 1928, in which the Court quashed a certain alias execution issued on a judgment entered in the said Court on the 29th day of June, 1922, in favor of your petitioner against B. P. Holland, Jr. A transcript of the record in the said action is herewith presented.

THE FACTS.

H. D. Kanter, plaintiff, instituted action against B. P. Holland and B. P. Holland, Jr., defendants, to recover damages for injuries received by him due to the negligent operation of an automobile by B. P. Holland, Jr. The trial of the case took place on June 29th, 1922, at which both defendants appeared in open court and were represented by Tazewell Taylor, counsel. B. P. Holland, Jr., who was then nineteen years of age, and was a student in law at the University of Virginia, testified in the case and through his attorney presented his defense to the jury. The jury rendered a verdict in favor of the plaintiff against the defendant B. P. Holland, Jr., for seven hundred dollars and judgment was thereupon entered by the Court. Execution forthwith issued, which was

returned "no effects". The record fails to disclose that a guardian *ad litem* was appointed for B. P. Holland, Jr., nor does the record disclose that he was an infant or pleaded infancy at the time or requested the appointment of a guardian *ad litem.* He was served with process, and pleaded to the issue.

Afterwards, on or about June 6th, 1928, an alias execution issued on the said judgment. Thereupon, B. P. Holland, Jr., by counsel, moved to quash the aforesaid alias execution on the ground that when judgment was rendered against him, he was an infant, and no guardian *ad litem* having been appointed for him, the judgment was void.

The defendant, B. P. Holland, Jr., reached his majority in 1924, but failed to take any legal steps to have the aforesaid judgment entered against him vacated, until the present motion to quash the execution.

QUESTIONS OF LAW.

1. Does the failure to appoint a guardian *ad litem,* on behalf of a defendant nineteen years of age, who is sued for tort, and appears in open court and presents his defense to the jury by able counsel, but does not request the appointment of a guardian *ad litem,* render the judgment null and void, so that it can be attacked at any time in any way?

2. Must an infant who reaches the age of twenty-one years, show cause against such a judgment, within six months after attaining his majority?

See Code Section 6305.

3. Is the failure to appoint a guardian *ad litem* in an *ex delicto* action against an infant cured by the Statute of Jeofails (Section 6331) which provides in part as follows:

"No judgment or decree shall be arrested or reversed * * * for any other defect, imperfection, or omission in the record, or for any error committed on the trial where it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached."

Your petitioner *assigns as error* the action of the Court in quashing the execution aforesaid.

THE LAW.

An infant is responsible for his torts, and he is held liable therefor "the same as an adult".

2 Addison on Torts, 587, note and cases cited.

"Infants are liable in actions arising *ex delicto.*" 2 Kent's Com. 241.

"All the cases agree that trespass lies against an infant."

This excerpt is from the leading case of *Huchting* v. *Engel,* 17 Wis. 230, cited in Chase's cases on Torts, 2nd Ed., p. 164.

"As the general rule applicable to contracts is that the infant is not liable thereon, so the general rule in the law of torts is that he is liable * * * Consequently, for every tortious act of violence or other pure tort, the infant *tort feasor* is liable in a civil action to the injured person." 14 R. C. L. 259-260.

"While in some jurisdictions it has been held that a judgment against a minor not represented is void, subject to collateral attack, without resort to an appeal or action of nullity, the weight of authority is to the effect that, where the court has otherwise jurisdiction, a judgment or decree rendered against an infant without the appointment of a guardian *ad litem,* while it may be erroneous, and subject to be reversed or set aside or to be ground for a new trial, at most is only voidable, but not absolutely void; and it may not be even necessarily erroneous and subject to reversal; the error may be amended or cured. It remains in full force and effect until it is reversed on appeal or error or set aside by direct proceedings, and is not subject to collateral attack; and this rule applies to decrees in equity as well as judgments at law." 31 C. J. 1121-2, citing numerous cases from various states.

The above citation from *Corpus Juris* refers to the cases of *Turner* v. *Barraud,* 102 Va. 324, 46 S. E. 318, and *Weaver* v. *Glenn,* 104 Va. 443, 51 S. E. 835, (both relied upon by defendant) as being the minority view and as being "both *dictum*".

These cases, however, are to be distinguished from the case at bar in that the one arose out of a sale of infants' lands and the other out of the construction of a will. Service was not had on the infants and they were of tender years and had no representation in court; and the fact that they were of tender years not only appeared upon the face of the pleadings, but the bill distinctly asserted so. This appeared to be the foundation for the court's ruling that the judgment was void in the case of *Turner* v. *Barraud, supra,* as will appear from the following quotation taken therefrom:

"While these salutary principles that a superior court is presumed to act rightly) should not be lost sight of, it must also be remembered that no judicial proceeding can deprive a man of any part of his property without giving him an opportunity to be heard, and if judgment is rendered against him without such opportunity to be heard, it is absolutely void.

In the case of *Underwood* v. *McVeigh,* 23 Gratt. 409, Judge Christian says: 'The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way. It lies at the very foundation of justice that every person who is to be affected by an adjudication should have the opportunity of being heard in defence, both in repelling the allegations of fact, and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte,* and without opportunity of defence.'"

In the case at bar the defendant was served with process and at the time of the trial was nineteen years of age and a college student. He appeared in person in open Court and was represented by able counsel. He presented his evidence and his defense before the Court and jury and received a fair and impartial trial. There can be no application in this case of the reason for the rule laid down in the case of *Turner* v. *Barraud,* where the infant never had his day in Court.

Although the Supreme Court of Virginia has never passed directly on the issue where the infant was served with process and had his day in Court, this matter was passed upon fully in the case of *Linn* v. *Collins, et al.,* 77 W. Va. 592, 87 S. E. 934; Ann. Cas. 1918C 86, where the Court held that

the failure to appoint a guardian *ad litem* was merely an irregularity in procedure and not jurisdictionally fatal to the verdict. The following is taken from the opinion of the Court:

"Coming now to appellant's assignments, he insists that the judicial sale to Hickman is absolutely void, in so far as it relates to the undivided half interest of Hiram W. Collins, because he was an infant when the suit to cancel his deed was brought, and no guardian *ad litem* was appointed for him. Wherefore, he further contends that the deed made to Sarah E. Collins, after Hiram W. Collins attained his majority, passed good title; and enables her and her husband to create a valid lien on the one-half interest in the land by executing the trust deed to F. Y. Horner, trustee for G. D. Camden. On the other hands, counsel for appellees, although admitting it was reversible error to proceed against Hiram W. Collins without the appointment of, and answer by a guardian *ad litem,* insist that the error is not jurisdictional, and does not render the decree void, but only voidable, and consequently, not subject to collateral impreachment, as attempted in this case. That decree was not appealed from and never directly assailed in any manner. The position of counsel for appellees on this point is undoubtedly correct. The court had jurisdiction of the subject-matter and of all the parties to that suit; the infant defendant was before it by process duly served on him. The bill did not aver his majority, and there was nothing in the record bringing it to the court's attention. True, the effect of Section 13 of Chapter 125, Code 1913, is to dispense with service of process upon an infant, for whom a guardian *ad litem* has been appointed. *Ferrel* v. *Ferrel,* 53 W. Va. 515, 44 S. E. 187; and *Alexander* v. *Davis,* 42 W. Va. 465, 26 S. E. 291. That it is reversible error to proceed against an infant without the appointment of, and answer by a guardian *ad litem* for him, is also settled by law. *Alexander* v. *Davis, supra;* and cases cited in 7 Encyc. Dig. 487. But this court has never decided that an infant may not be brought before the court by process and, being thus in court, that the failure to appoint a guardian *ad litem* for him is error affecting jurisdiction and rendering void the court's judgment or decree against such infant. Jurisdiction of the person of an infant can be obtained as well by due service of process, as by the appointment of a guardian *ad litem.* Such was the common law method of obtaining jurisdiction of infants, as well as adults. 22 Cyc. 673. Having thus obtained jurisdiction in this case, if the

court's attention had been called to the fact of infancy, it would have been its duty to appoint a guardian *ad litem.* The failure to appoint such guardian was reversible error, but not such as showed want of jurisdiction in the court. It was error in procedure only. Former decisions on this point have been rendered in cases where the attack upon the erroneous judgment or decree was direct, and not collateral, as in this case, and hence, the exact question involved here does not appear to have been squarely presented for decision. But the opinions in none of our decisions, bearing on the question, appear to treat such error as jurisdictional. *Hull* v. *Hull,* 26 W. Va. 1; *Eakin* v. *Hawkins,* 52 W. Va. 124, 43 S. E. 211; *Hays* v. *Camden,* 38 W. Va. 109, 18 S. E. 461; *Chapman* v. *Branch,* 72 W. Va. 54, 78 S. E. 235; and *Alexander* v. *Davis,* 42 W. Va. 465, 26 S. E. 291. While the statute dispenses with the necessity of serving an infant with process, for whom a guardian *ad litem* is appointed, it does not deprive the court of the power to obtain jurisdiction of the person of an infant by the service process, as at the common law. Having thus secured jurisdiction of Hiram W. Collins, the failure to discover that he was an infant and appoint a guardian *ad litem* for him, is error in procedure only, and makes the decree voidable but not void. Our conclusion harmonizes with the decision on this point in other jurisdictions. 26 Cyc. 641; and numerous cases cited in Note 87 at page 643. *Manfull* v. *Graham,* 55 Neb. 645, 76 N. W. 19, 70 Am. St. Rep. 412; and notes at page 416. It, therefore, follows that the decree cannot be collaterally impeached in this suit. For this universally recognized proposition we need cite no authorities."

Some of the cases carry the doctrine even further than *Linn* v. *Collins, supra,* that is, where infants who were apparently adults appeared in the case, employed counsel, and made their defense without making any request for the appointment of a guardian *ad litem,* and their minority was not disclosed to the Court, it was held that the failure to appoint a guardian *ad litem* was not even ground for a new trial. 31 C. J. 1122, and note; *Holloway* v. *McIntosh,* 7 Kan. A. 34, 51 P. 963; *DePriest* v. *State,* 68 Ind. 569; *Black* v. *State,* 58 Ind. 589.

The following is taken from 14 R. C. L. 286:

"The appointment of a guardian *ad litem* for an infant defendant, like the appearance of a next friend for an infant

plaintiff, is matter of procedure and not of jurisdiction. That either plaintiff or defendant was without such representative makes the judgment erroneous, but not void. It can be overthrown by writ of error *coram nobis,* or by motion in the same court, or by proper appellate proceedings; but, it is generally held that the validity of the judgment cannot be attacked for this reason in collateral action, in which the judgment comes only incidentally in issue."

See also note to the text citing numerous cases in support of the above statement of law.

With regard to the second query, must an infant show cause against such a judgment within six months after attaining his majority, Section 6305 of the Code of Virginia, provides as follows:

"It shall not be necessary to insert in any decree or order a provision allowing an infant to show cause against it within a certain time after he attains the age of twenty-one years. But in any case in which, but for the section, such provision would have been proper, the infant may, within six months after attaining the age of twenty-one years, show such cause in like manner as if the decree or order contained such provision. This right of an infant shall not be affected by section sixty-two hundred and ninety-six."

The question arising here is commented upon by the Court in *Alexander* v. *Davis,* 42 W. Va. 465, 26 S. E. 291, in which under a similar section to that of the Virginia Code, the Court says that the time limit in which the judgment of the Court can be attacked is within six months after infant reaches the age of twenty-one years.

"Defendant, Mrs. E. E. Davis, the grantee in the deed sought to be vacated and set aside, as not being the deed of James T. Alexander, deceased, is named in the caption of bill as E. E. Davis; in the body of the bill, as the named daughter of defendant Adam Grandstaff. At that stage I suppose it would be assumed that she was an adult; but in the progress of the cause it soon appears, from the evidence, that she is but 17 years of age, and the wife of one Charles S. Davis. She filed her sworn answer as an adult on the 12th day of May, 1893. No guardian *ad litem* was ever appointed for her, nor did any one, as such guardian file or adopt any answer for her, although the record on which the

cause was heard showed that she was an infant; and therefore none of the depositions could be read against her, nor for her. But she has no ground of complaint against a decree in her favor. In this condition of the pleadings, the court below could have entered against her no decree that would not have been voidable, and she could, at any time within six months after she had attained the age of 21 years, have shown that fact alone as good cause against such decree. Section 7, C. 132, Code."

For these reasons and other errors apparent on the record, your petitioner prays that a writ of error and *supersedeas* to the said judgment be awarded him, and that the said judgment be reviewed and reversed, and that a final judgment be entered in favor of your petitioner, or that such relief may be awarded as to your Honorable Court may seem proper.

H. D. KANTER.

By HARRY H. KANTER, Counsel.

As counsel practicing in the Supreme Court of Appeals of Virginia, I hereby certify that, in my opinion, the decision and judgment complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals.

JAMES E. HEATH,
Attorney practicing in the Supreme Court
of Appeals of Virginia.

Received November 21, 1928.

Writ of error allowed; *supersedeas* awarded. Bond $300.

ROBERT R. PRENTIS.

Received November 22, 1928.

H. S. J.

VIRGINIA:

In the Circuit Court of Princess Anne County, on Tuesday, the 7th day of August, 1928, the following motions to quash were received, and duly docketed. Which said motions are in the following words and figures, to-wit:

Filed Aug. 7.

page 2 } MOTION TO QUASH.

H. D. Kanter, Plaintiff,
v.
B. P. Holland and B. P. Holland, Jr., Defendants.

Now comes B. P. Holland, Jr., one of the defendants is this cause, and moves the court to quash an execution issued against him on the 6th day of July, 1928, for the following reasons:

1. That the said execution is void.

2. That the said execution is irregular.

3. That the said execution is irregularly issued.

4. That the judgment entered against this defendant on the 29th day of June, 1922, upon which this execution is issued, is null and of no effect, for the reason that the said defendant was an infant under the age of twenty-one years, to-wit, that he was nineteen years of age when said judgment was entered against him, and that no guardian *ad litem* was appointed to represent his interests, as required by law, and that consequently the said execution is null, void and of no effect.

5. That said judgment is void because process was not served on this defendant, as required by law, and hence said execution is void.

B. P. HOLLAND, JR., Defendant.

M. EARL WOODHOUSE, Counsel.

Filed Aug. 7.

page 3 } ON MOTION TO QUASH EXECUTION.

H. D. Kanter
vs.
B. P. Holland and B. P. Holland, Jr.

It is stipulated between counsel:

1. At the time of trial that B. P. Holland, Jr., was an infant under the age of 21 years.

2. That the records fail to disclose that a guardian *ad litem* was appointed for the infant defendant.

4. That defendant testified at the time of the trial that he was 19 years old.

M. EARL WOODHOUSE,
Counsel for Plaintiff.

.....
Counsel for Defendant.

FI. FA.

page 4 } Commonwealth of Virginia:

To the Sheriff of Princess Anne County, Greeting:

WE COMMAND YOU, that of the Goods and Chattels of B. P. Holland, Jr., late in your bailiwick, you cause to be made the sum of Seven Hundred Dollars.....cents ($700.00) with interest thereon, to be computed after the rate of six per centum per annum from the 29th day of June, 1922, till payment, which H. D. Kanter, Plaintiff, lately in our Circuit Court of Princess Anne County, has recovered against the said Defendant, as well for.....certain..... as for the interest thereon..... also $27.51 which to said Plaintiff H. D. Kanter in the same court were adjudged for his costs in that behalf expended whereof the said Defendant B. P. Holland, Jr., convict as appears to us of record; and how you shall have executed this writ, make known at the Clerk's office of our said Circuit Court of Princess Anne County, at Rules to be holden for the said Court, on the first Monday in September, 1928, and have then and there this writ.

Witness, J. F. WOODHOUSE, Clerk of our said Court, at his office, the 6th day of July, 1928, in the 153rd year of the Commonwealth.

J. F. WOODHOUSE, Clerk.

page 5 } On this day, to-wit:

Tuesday, the 7th day of August, 1928.

This day came B. P. Holland, Jr., one of the defendants herein, and moved to quash an execution issued against him

on the 6th day of July, 1928, and upon the agreed statement of facts, and was argued by counsel; and it appearing that the defendant B. P. Holland, Jr., was under the age of twenty-one years, to-wit, that he was nineteen years of age, on the 29th day of June, 1922, and that no guardian *ad litem* was appointed to represent his interest, it is ordered that the alias execution issued on said judgment on the 6th day of July, 1928, be and the same is hereby quashed, and the plaintiff having indicated his intention of applying to the Supreme Court of Appeals for a writ of error and *supersedeas* it is ordered that the execution of this order is suspended for a period of sixty days from the entry hereof upon the execution by the plaintiff of a bond, with surety deemed sufficient by the Clerk of this Court, in the penalty of $200.00.

page 6 } And on this day, to-wit:

On the 7th day of September, 1928.

This day came the plaintiff and filed his certificate of exception number one in this proceeding, and the same are accordingly filed.

page 7 } CERTIFICATE OF EXCEPTION NUMBER ONE.

This is to certify that upon the trial of this case, held on the 29th day of June, 1922, the defendant, B. P. Holland, Jr., who was then nineteen years of age, appeared in open court represented by counsel, and presented his defense to the jury. The records of the case fail to disclose that a guardian *ad litem* was appointed for him. After the evidence had been heard and the instructions had been granted and the jury had heard the argument of counsel, the jury retired to their room to consult of their verdict. After some time, they returned and rendered a verdict in favor of the plaintiff, H. D. Kanter, against the defendant, B. P. Holland, Jr., in the sum of seven hundred ($700.00) dollars; and thereupon, judgment was entered in favor of the said plaintiff against the defendant, B. P. Holland, Jr., in the sum of seven hundred ($700.00) dollars, with interest thereon from the 29th day of June, 1922, until paid.

Afterwards, to-wit, on the 11th day of August, 1922, an execution issued on the said judgment which was returned marked, "no effects".

Afterwards, to-wit: on the 6th day of July, 1928, an alias execution issued on the aforesaid judgment, whereupon the defendant B. P. Holland, Jr., moved to quash the aforesaid alias execution for the reason that the judgment upon which this execution was issued was obtained against him when he was an infant under the age of twenty-one years, to-wit, when he was nineteen years of age; that no guardian *ad litem* had been appointed to represent his interest in the aforesaid case, and that therefore, the judgment rendered against him is null and void, and the execution based on such judgment is null, void and of no effect.

Upon the hearing of the motion to quash the aforesaid execution, the defendant testified as to his age at the time of trial; and the motion was argued by counsel; and
page 8 } on the 6th day of August, 1928, an order was entered by the aforesaid court sustaining the motion of the defendant to quash the execution; to which action of the court, the plaintiff duly excepted.

Teste: This 7th day of September, 1928.

B. D. WHITE, Judge. (Seal.)

page 9 } Virginia:

In the Clerk's Office of the Circuit Court of Princess Anne County.

I, J. F. Woodhouse, Clerk of the Circuit Court of the County of Princess Anne, Virginia, do hereby certify that the foregoing and annexed is a full transcript of the record of the case of H. D. Kanter vs. B. P. Holland, Jr., as shown by the records of said Court and Office. I further certify that the same was not made up and completed and delivered until the defendant had received due notice thereof of the intention of the plaintiff to apply to the Supreme Court of Appeals for writ of error and *supersedeas* to the judgment aforesaid.

Given under my hand this 19th day of September, 1928.

J. F. WOODHOUSE, Clerk.

Fee $4.00.

A Copy—Teste:

H. STEWART JONES, C. C.

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