

Hindmarsh v. Chandler, 7 Taunt. 488, when the infant may plead anew. It is said that if several sue jointly and some are within age and some of full age and all appear by attorney, it is no error, *Com. Dig. Pleader*, 2 C. 1; and so of co-executors where one is within age, for they make but one representative, *Foxwist v. Tremaine supra*.

122 In the case of *Weems v. Mackall*, in 1731, 4 H. & McH. 484, in ejectment, there was a plea in abatement that the husband had no claim to the land in dispute except in right of his wife, and that she at the time of the demise in the declaration was under the age of twenty-one years, to which there was a demurrer and judgment thereon for the plaintiff. In *James v. Boyd*, 1 H. & G. 1, the lessor of the plaintiff had died pending the action, and his heirs at law were made parties without objection and the cause continued for several terms, during which divers proceedings took place. At the trial, the defendant proved that one of the heirs at the time she was made a party was an infant, and the Court below directed a verdict for the defendant. The Court of Appeals held, however, that this evidence did not shew she was an infant at the time of the trial, and supposing she were, it was wrong to direct the jury to find not only against her but the other lessors of the plaintiff, who were of full age. These cases are generally cited for the point, that the infancy of a lessor of the plaintiff is no objection in ejectment, and that he may prosecute such a suit by attorney. However, by the Act of 1785, ch. 80, sec. 2, incorporated, with a few alterations, in the Code, Art. 75, sec. 40,² it is provided, that if a party in any action brought to recover lands, or in which the title to land is involved, shall die, and the proper person to be made a party in his stead shall be an infant, such action shall not be tried during such infancy, unless the guardian or next friend of the infant satisfy the Court that it will be for the benefit of the infant to have the action tried during his infancy, but the cause may be continued till the infant arrives at age. And by sec. 41, (1729, ch. 24, sec. 16),³ if an infant be entitled to lands by purchase, he shall not be obliged to answer any suit or action except in cases where the heir would be bound by law to answer. In the above case of *James v. Boyd* the Court seems to have been of opinion, that if it do not appear that the infant was such *at the time of trial*, the Court cannot either abate or continue the suit. But they declined to determine whether an infant in ejectment should prosecute by next friend or attorney.

² This act was held constitutional and in force in *Tise v. Shaw*, 68 Md. 1, Alvey, J., dissenting, but it was repealed and re-enacted by the Act of 1888, ch. 116, as follows: "Where a party in any action to recover lands, or in which the title thereof is involved, shall die and the proper person to be made a party in place of the person so dying shall be an infant, such action shall not abate or be suspended until the infant or infants attain full age of twenty-one years; but the actual guardian may and shall be made a party to prosecute or defend, and if there be no actual guardian the court, on the motion of any party to the suit, shall appoint a guardian *ad litem*, and the case shall proceed as if all parties were of full age, and this section shall apply to pending cases." Code 1911, Art. 75, sec. 64.

³ Code 1911, Art. 75, sec. 65.