*Bank of the United States, Appellants, *v.* John T. Ritchie, Jr., and others, Appellees.

Bill of review.—Suits against infants.—Sales of decedents' estates.

The Bank of the United States and others, under the authority of the act of the legislature of Maryland, passed in the year 1785, entitled an act for enlarging the powers of the "high court of chancery," under which the real estates of persons, descending to minors and persons *non compos mentis*, where authorized to be sold for the debts of the ancestor, proceeded against the real estate of A. R., for debts due by him; and in 1826, the estate was sold by a decree of the circuit court of the district of Columbia, exercising chancery jurisdiction; afterwards, in 1828, some of the infant heirs of A. R., by their next friend, filed a bill of review against the administrator of A. R., the purchaser of his real estate, and others, stating various errors in the original suit and in the decree of the court, and prayed that the same should be reversed: *Held*, that a bill of review could be sustained in the case.

From the language of the fifth section of the act, some doubt was entertained, whether the act conferred a personal power on the chancellor, or was to be construed as an extension of the jurisdiction of the court; if the former, it was supposed, that a bill of review would not lie to a decree made in execution of the power. On inquiry, however, the court are satisfied, that in Maryland, the act has been construed as an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated, by the court of appeals of that state, as the exercise of other equity powers.

In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests, devolves, in a considerable degree, upon the court; they defend by guardian to be appointed by the court, who is usually the nearest relation, not concerned, in point of interest, in the matter in question. It is not error, but it is calculated to awaken attention, that, in this case, though the infants, as the record shows, had parents living, a person not appearing, from his name, or shown on the record, to be connected with them, was appointed their guardian *ad litem*.

The answer of the infant defendants, in the original proceeding, was signed by their guardian, but not sworn to; it consented to the decree for which the bill prayed; and without any other evidence, the court proceeded to decree a sale of their lands. This is entirely erroneous; the statute under which the court acted authorizes a sale of the real estate, only where the personal estate shall be insufficient for the payment of debts, when the justice of the claims shall be fully established, and when, upon consideration of all circumstances, it shall appear to the chancellor to be just and proper, that such debts should be paid by a sale of the real estate; independent of these special requisitions of the act, it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points.

The insufficiency of the personal estate of A. R. to pay his debts, was stated in the answer of his administrator, but was not proved; and was admitted in that of the guardian of the infants, but his answer was not on oath; and if it was, the court ought to have been otherwise satisfied of the fact. [*129

The justice of the claims made by the complainants in the original proceeding, was not established otherwise than by the acknowledgment of the infant defendants, in their answer, that, "according to the belief and knowledge of their guardian, they are, as alleged in said bill, respectively due." The court ought not to have acted on this admission; the infants were incapable of making it, and the acknowledgment of the guardian, not on oath, was totally insufficient; the court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just, before proceeding to sell the real estate.

There was error in the original proceedings in ordering the sale of the real estate of A. R. for the payment of his debts, before the amount of the debts was judicially ascertained by the report of an auditor.

The eighth section of the law which authorizes the sale of real estate descending to minors, enacts, "that all sales made by the authority of the chancellor, under this act, shall be notified to and confirmed by the chancellor, before any conveyance of the property shall be made." This provision was totally disregarded; the sale was never confirmed by the court; yet the conveyance was made. It is a fatal error in the decree, that it directs the conveyance to be made on the payment of the purchase-money, without directing that the sale shall first "be notified to, and approved by," the court.

The conveyances of the real estate, made under the original proceeding, were properly set aside by the decree of the court below; the relief would be very imperfect, if, on the reversal of a decree, the party could, under no circumstances, be restored to the property which had been improperly and irregularly taken from him.

Appeal from the Circuit Court of the District of Columbia, and county of Washington.

The appellees filed their bill of complaint in the circuit court, in the nature of a bill of review, against the appellants, in which they set forth, that in the year 1825, the appellants filed their bill against the complainants and others, as heirs-at-law of Abner Ritchie, deceased, under the act of assembly of Maryland of 1785, ch. 72, § 5, alleging themselves to be the creditors of said Abner Ritchie in the several sums of money mentioned in said bill; that John T. Ritchie, son of said Abner, and one of said defendants, had obtained letters of administration upon the estate of said Abner; that complainants had frequently applied to him for the payment of their debts, which he refused; saying, that he had not assets of the said estate to pay them, or any part thereof, and that said *Abner had died without leaving personal estate to discharge the debts due by him; that said Abner died possessed of real estate described in an exhibit filed therewith, and that the defendants were the heirs-at-law of the said Abner, and prayed process, &c., against them. The bill of review proceeded to aver, that said process did accordingly issue, and that before said these complainants appeared to the same, an order was obtained by the solicitor for the then complainants, appointing Thomas Turner guardian, to appear and answer for them; that this order was obtained without their knowledge or approbation, and without it having been made to appear, that the said parties were infants, and without it appearing by the terms of the said order, that Turner was appointed guardian for these parties; that said Turner did, however, appear for them as their guardian, and filed an answer for these complainants, admitting the truth of all the allegations in the bill; that said bill was not on the oath of said pretended guardian, as was usual. They further stated, that John T. Ritchie, sen., filed his answer to said bill, and alleging, that he himself was a large creditor of deceased, suggested a reference of the various claims to an auditor. That in the year 1826, B. L. Lear, solicitor for said complainants, and T. Swann, also solicitor of said court, misled by some person or persons, entered into an agreement to set the cause for hearing, and did consent that a decree should pass, and which was passed by said court, decreeing that said real estate should be sold, and that trustees should convey the same, and that these parties, on their arrival at age, should release to the purchasers all their title to the same. That said sale was accordingly made, and said T. Ritchie, sen., became the purchaser, and had received a conveyance. The parties averred, that Mr. Swann had no authority to appear for them, or to enter into any consent or agreement on their behalf, or that any decree should be entered against them; and that said proceedings were had without their knowledge or assent, and had never been acquiesced in; that their friends and natural guardians were overlooked and unconsulted. That they were aggrieved by said decree, and ought not to be bound thereby; that they ought not to convey their estate as by the decree is directed; that said decree was erroneous, and ought to be reversed; and assigned several errors:

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*1. There was no allegation in the bill or evidence filed in the case, that Abner Ritchie died without leaving personal estate sufficient to pay his debts. 2. That there was no allegation or evidence that his real estate descended to a minor. 3. That said decree was made without any legal or sufficient answer by the complainants, and without the several matters contained in the bill being taken *pro confesso* against them. 4. That there was neither allegation nor proof, that either of said defendants was a minor, and incapable of answering without a guardian. 5. That the court appointed a guardian *ad litem*, without naming the infant defendants, or causing them to be brought into court to have a guardian appointed, and without any averment or proof that either of them was a minor. 6. That the order appointing a guardian was vague, uncertain and void. 7. That the answer of Turner, professing to be a guardian, &c., not being under oath, was insufficient and void. 8. That said decree purported to be by consent, whereas, it appeared, that the complainants never appeared to said suit, in person or by guardian, and therefore, never could have assented, and could not, as minors, be bound by the consent of an attorney. 9. That there was not sufficient matter alleged in the bill to sustain the decree, if the parties had been competent to assent, and had assented. 10. Because the decree, contrary to right and equity, and the uniform rule and practice of the court, directed the trustee to convey, without a ratification of his sale. 11. Because the decree was an absolute one, without giving complainants a day after they should arrive at age, to show cause against the decree. The bill then averred the death of Henry Carbery, one of the complainants in the first bill, about three years before the filing of said bill, and prayed a review and reversal, &c.

Several of the defendants appeared, and disclaiming any interest, &c., assented to the review and reversal. John T. Ritchie answered, averring the correctness of the proceeding, and prayed a confirmation of what had been done. *The Bank of the United States, and Union Bank of [*132
Georgetown, answering, admitted that the original bill was filed as stated, and required proof of the further allegation of the complainants; they averred the sufficiency and correctness of the former proceedings, and denied that there was any sufficient cause for a review, &c.

The circuit court decreed a reversal of the original decree, and annulled all the proceedings had under it, declaring the parties to be restored to their original rights. The proceedings in the former case constituted the only evidence in the case of the review.

For the appellants, it was contended: 1. That no decree could be set aside or reversed on a bill of review, for any reason not appearing on the face of the decree itself, whereas, most of the objections here urged, were *dehors* the decree. 2. Because such of the reasons as were alleged to appear on the face of the decree itself, were wholly insufficient. 3. Because a bill of review will lie only where the original decree, of which complaint is made, has been fully executed by the party complainant; whereas, the contrary is apparent on the face of the bill of review. 4. Because the decree of reversal transcended the power of the court, and extended further than the court had jurisdiction to decree. 5. Because it was in other respects inequitable and illegal.

The case was argued by *Coxe*, for the appellants ; and by *Marbury*, for the appellees.

Coxe, for the appellants.—The appellees filed their bill of review in the circuit court, for the purpose of reversing a decree of that court, passed several years since. Various grounds of reversal are assigned, as well in the proceedings, as in the decree ; and many allegations are introduced, which are wholly irrelevant in a bill of review, and which are unsupported by any testimony. They would, in an English court of chancery, be deemed
*133] scandalous and impertinent. *The circuit court reversed they former decree, and from this judgement the parties aggrieved have entered this appeal. It will be contended:—

That among all the grounds assigned for the reversal of the original decree, none are to be regarded, excepting those which point out error on the face of the decree itself. Error in the proceedings, in the want of conformity of the decree to the evidence, ought to be taken advantage of, either by petition for a rehearing, or by appeal ; and where the original proceedings are infected with fraud, an original bill lies to vacate them on that ground. But the peculiar and appropriate object of a bill of review is, to obtain a reversal for some defect, apparent on the face of the decree, or for some cause arising or discovered since the date of the decree.

It is urged, however, that the chancery practice of Maryland varies essentially from that of England ; it not being customary here to introduce into the decree, the matters upon which it is based. Certainly, a somewhat looser practice has prevailed, than is known in the English courts ; but the legal result contended for, cannot flow from it. The character of the bill of review is still the same ; and there is no precedent or *dictum* by any Maryland chancellor sustaining the ground relied upon.

The party aggrieved is not without remedy ; he has his appeal, he may have a rehearing ; but it is no legitimate conclusion, from the fact that we have introduced a looser practice, that the whole nature, object and design of the bill of review, shall, therefore, be changed. The case 1 Har. & Gill 393, 424, shows, that in Maryland, the English rule still prevails. This view of the character of this proceeding, dispenses with the necessity for examining in detail, the reasons assigned for a reversal of the original decree, or for showing upon what slender foundation, either of fact or law, they rest.

The last four are all that purport to come within the legitimate scope of a bill or review. 8. The decree purports to be by consent ; whereas, it appears that these complaints never appeared to the suit. Here again, we are required to examine the previous prodeedings, to determine the validity of the objection. The proceedings show that Mr. Turner, a highly
*134] respectable *gentleman, acted as guardian ; that Mr. Swann acted as counsel. In this summary way, the validity of their authority and acts cannot be questioned. 9. That there is not sufficient matter alleged in the bill to sustain the decree. Here again, we are driven to the previous proceedings, which cannot be done on a bill of review. 10. Because the decree directs the trustee to convey, without a previous ratification of his proceedings. This may be unusual ; but it is neither contrary to equity or justice ; it is a matter clearly within the discretion of the court. 12 Johns.

521, 528. The act of 1785, ch. 72, § 8, is merely directory to the chancellor, and may be waived by consent. 11. Because the decree does not, on its face, give complainants a day in court. In general, it may be admitted, that this should constitute part of the decree ; but that rule never has prevailed, when the decree directs a sale. *Booth* v. *Rich*, 1 Vern. 295. If there be any error in this, it is one of mere surplusage, directing the infant to convey, when he comes of age, which may be erased from the decree, as superfluous. Even according to the strictest rules of the English chancery, this being a decree for a sale, it was not necessary to give the infants a day in court. This, however, is a statutory proceeding under the laws of Maryland. The act of 1785, ch. 72, § 8, confers the general authority, but gives no day in court to infants. The act of 1799, ch. 78, § 4, gives a day to infants, against whom such decree may be had, if they are non-residents.

This decree having been obtained by consent, cannot be made the subject of a review. 12 Johns. 521 ; Ambl. 229, 534, 535 ; 1 Harr. Ch. 142, 143. The facts must be admitted, as stated in the decree.

Marbury, for the appellees.—The object of this appeal is, to reverse a decree of the circuit court, on a bill of review, filed by the appellees, to annul a preceding decree of that court, directing the sale of the real estate of Abner Ritchie, the father of the appellees, who are minors, on an alleged deficiency of his personal assets—a proceeding authorized by an act of assembly of Maryland, passed *in the year 1785, ch. 72, and now in force in this district. The bill embodies the exceptions to the original decree, [*135 some of which appear on its face ; others are *dehors* the decree, and can be detected only by reference to the pleadings in the original cause.

It has been objected by the counsel for the appellants, that on a bill of review, filed for error in the decree, nothing but the decree can be read, and no objection can be taken, unless the error appear in the body of the decree ; that it is not allowable to look into the pleadings or the evidence, except so far as the decree may recite them. There can be no doubt, that such is the rule in the English court of chancery, founded upon an early ordinance, established with reference to the mode of preparing the decree in that country. If, however, the rule be rigidly applied to the practice of the courts in the United States, it will amount to an abolition, in those courts, of the mode of relief by bill of review, except in cases where there has been newly-discovered evidence. In the English courts, the substance of the pleadings, and such facts as the court allows to have been proved, are recited in the decree, as the basis of the court's judgment ; but in our courts, the decree contains no such recital ; it is a simple declaration of the court's judgment or order in the case, referring to the proceedings—it is only by reference to those proceedings, that any error, which may exist in the decree, can be detected and exposed.

The new practice, which is believed to be universal in this country, in framing the decree, requires a corresponding change in the rule relating to bills of review, by which the plaintiff should be permitted to look into the proceedings, and not be confined to the face of the decree ; and it is believed, that it was with reference to this diversity, that the court of appeals of Maryland, in delivering their opinion in the case of *Hollingsworth* v. *Mc-*

Donald, 2 Har. & Johns. 237, which was on a bill of review, say, "nothing appears on the face of the proceeding, to show error in the decree." There are several English cases to justify the adoption of such new rule; viz., that the plaintiff, in a bill of review, should not be concluded by the omission of
*136] the officer, whose duty it *was to prepare the decree, to make the proper recitals. 1 Vern. 214–16; 2 Cas. Chan. 161.

A doubt has been suggested, whether a bill of review can be maintained when the plaintiff has the right of appeal, and the period within which such appeal should be taken, has been limited by law. This suggestion is founded upon the idea, that the law limiting the appeal, is a virtual repeal of the remedy by bill of review. This remedy, by review in the court where the error was made, has its origin in an ancient ordinance or rule of practice—has become the law of the court and of the land, to which suitors may, of right, resort; and ought not to be put aside, or repealed by implication; but if consistent with subsequent enactments, should be allowed to remain. Hitherto, it has been considered as existing, notwithstanding the limitation of the period of appeal in Maryland. 2 Har. & Johns. 237; 1 Gill & Johns. 398; 10 Wheat. 149. The rule which requires the performance of the decree by the plaintiff, before filing his bill of review, will always effectually prevent a resort to this remedy, merely for delay.

There would seem to be nothing in the objection, that as the statute which confers on the court jurisdiction in the original case, is silent as to this remedy, that, therefore, there can be no review by the court of its decree; the statute places the subject within the control of the court, to be dealt with according to its usages and practice; not so with the bankrupt laws, which have been referred to; they prescribe the mode of proceeding, and exclude the idea of the application of the ordinary practice of the chancery court in their administration.

There is one other preliminary objection. It is said, that as the original decree was made by consent of the appellees, and so indorsed by their attorney, that they are estopped thereby; and cannot object, even if errors be apparent on the face of the decree. The defendants in the original cause, the appellees in this, were minors—as such, they could not appear and defend the cause by an attorney. An infant can appear by guardian only, who is appointed by the court. Coop. Eq. Pl. 109. The answer of an infant by his guardian, and the admissions contained in it, are not binding on him. Coop. Eq. Pl. 324. Lord HARDWICKE held, that an infant could admit
*137] nothing. 2 *Atk. 377. The court will not conclude an infant, or make an absolute decree against him, though by his own consent, or the consent of his parents, except in some special cases. 7 Johns. 581, 593; Cur. Canc. 466; 1 Desauss. 158.

If it were admitted, that an unexceptionable decree, whether made on proof in the cause, or by consent of parties, being the act of a competent tribunal, would be binding as well on an infant as an adult; it would not then follow, that an erroneous decree would bind an infant, though made by the consent of an attorney appearing on the record for him. It must be conceded, that an erroneous decree, made on the proof in a cause, may be reversed for error appearing on its face; as, where an absolute decree is made against an infant defendant. So, such erroneous decree, taken by

consent of the infant, his guardian or attorney, is reversible in like manner; for an infant is not within the maxim, "*consensus tollit errorum.*"

Again, it is objected, that the original decree in this cause has not been performed, and that a bill of review will not lie, until the decree has been performed. The rule is admitted ; but there is an exception, which embraces the case of the appellees. By the original degree, they are required to do nothing, except "to convey, as they severally come to the age of twenty-one years, their interest and estate in the property, decreed to be sold, to the purchasers at the trustee's sale." When the act required to be done by a decree, will, if performed, extinguish the party's rights at common law, as making an assurance, releasing or cancelling a bond ; performance is not required, but such party may proceed with his bill of review, and leave the decree unperformed. Coop. Eq. Pl. 90.[1]

These preliminary objections being answered, the several errors assigned in the bill of review are to be considered. The fifth section of the act of 1785, ch. 72, authorizes the chancellor to decree the sale of real estate, which descends, or is devised, to a minor, if the intestate or devisor should not leave personal estate sufficient to pay his debts, after such minor has been summoned, and hath appeared. The first and second objections refer to the bill, in which there is no allegation that the intestate died without leaving personal estate to pay his debts, or that his land descended to a minor. The declaration of the administrator, mentioned in the bill, is not the *averment of the complainants, and the want of such averment is not [*138 helped by the subsequent interrogatories. Coop. Eq. Pl. 12, 13.

The 3d, 4th, 5th, 6th and 7th assignments of error, also refer to the proceedings, and being taken together, amount to this : 1st. That there was an illegal appointment of a guardian. 2d. That the infant's answer by the guardian, if duly appointed, was void. The appointment of a guardian in the case was illegal, because the infants were not before the court ; they had not been summoned as the law required. The appearance of an attorney, in their names, was illegal and void. Minors should be brought before the court, to have a guardian assigned ; or a commission should issue to some fit person, to assign a guardian for them. Coop. Eq. Pl. 109 ; 1 Harr. Ch. 474. The guardian's answer was void, because not sworn to by him. 1 Harr. Ch. 474, 477 ; 7 Johns. 581.

The 8th, 10th and 11th assignments of error refer to matter appearing on the face of the decree itself.

8. That the decree was taken by consent of an attorney ; whereas, the act of assembly, giving jurisdiction in the case, requires, "that the justice of the creditor's claim should be fully established ;" "that the court should inquire into all the circumstances," "so that it should appear to the chancellor, to be just and proper to decree a sale of the land," descended or devised to the minor. This was omitted ; the decree was made without reference or inquiry, to know whether it would be just and proper, and for the benefit of the infants, that such decree should be made. 3 Johns. Ch. 361.

10. The eighth section of the act of 1785 requires, "that all sales, made by authority of the chancellor, under this act, shall be notified to, and confirmed by the chancellor, before any conveyance of the property shall be

[1] And see Livingston *v.* Hubbs, 3 Johns. Ch. 124.

made." The decree directs the trustee to convey the property to the purchaser, on the payment of the purchase-money, without waiting for the ratification of the court; and thus violates the provisions of the statute, for which it may be reversed on a bill of review. Cur. Canc. 384; Coop. Eq. Pl. 90.

11. The decree requires the infant defendants, as they severally come to the age of twenty-one years, to convey *the property decreed to be *139] sold, to the purchasers at the trustee's sale, and there is no saving clause in their favor. If there be an absolute decree against a minor, and no day given him, it is reversible on a bill of review. 3 Johns. Ch. 368; 2 Madd. Ch. Pl. 538. It has been insisted, that the omission in the decree, to give a day to the minor, is, in this case, no error, because it is a decree for the sale of land for the payment of debts: to which it is answered, that when the infant is decreed to join in the conveyance, even in a sale under a mortgage, he is entitled to a day. The court will not direct an infant to part with his inheritance, without a day being reserved to him in the decree. 3 Johns. Ch. 361; 1 Ball & Beat. 551; 3 Pow. on Mort. 985, note *z*.

The circuit court, in their decree on the bill of review, not only reverse the original decree, but vacate the sale made under it, and the deed from the trustee to the purchaser, and from such purchaser to others, who are all parties in the original cause, and in this case. This has been objected to, but is according to the authorities. The court may proceed to restore the plaintiffs to the situation in which they would have been, had the decree never passed. 2 Madd. Ch. Pl. 542; 1 Hen. & Munf. 350.

Coxe, in reply, contended, that the cases cited from Vernon's reports, and the chancery cases referred to by the counsel for the appellees, did not warrant the conclusion, that there had been a change of the practice in framing the decrees of a court of chancery. The case cited from Mason's reports, did not call for a decision as to the mode of framing the decree. The general rules upon the matter are fully recognised, in relation to bills of review, in those cases. The appellees might have presented a petition for a rehearing of the case; but having adopted a bill of review, they must submit to the established rules of practice, in reference to such a proceeding. 1 Har. & Gill 423. The English rule has been fully adopted in the courts of Maryland. A bill of review is not a favorite in courts of equity: and the original proceeding in this case being on a statute; and no *bill *140] of review having been given by the statute, no right to such a practice is to be derived by implication.

The statute, in conferring a new right and remedy, must be strictly pursued. It takes away the rights of infants. To allow infants a day in court, after coming of age, would be defeating the whole object of the act. Its object was, to enforce the payment of debts out of the lands of the debtors; necessarily affecting the rights of infants.

The court, in reversing the original decree, has exceeded its powers, by reinstating the parties in their original rights. This may be the general rule, and proper in some cases; but such a rule cannot apply in such a case as this. John T. Ritchie, the elder, had conveyed the property to a purchaser, at a sale made by trustees; and subsequent purchasers cannot be ousted of their titles. The parties to be reinstated, must be those only,

who were the parties to the original bill. The reversal must be restricted to the mere reversal of the original decree; and whatever had been done, under that decree, so far as strangers to the proceeding had derived rights under the sale as *bonâ fide* purchasers, must remain.

MARSHALL, Ch. J., delivered the opinion of the court.—This is an appeal from a decree pronounced by the United States court for the district of Columbia, sitting in chancery, for the county of Washington.

The Bank of the United States and others, alleging themselves to be creditors of Abner Ritchie, deceased, instituted this suit in chancery against John T. Ritchie, administrator, and one of the heirs of the said Abner, and against John T. Ritchie, jun., and others, who were the infant heirs of the said Abner, praying that his real estate may be subjected to the payment of the debts due to them, and that so much of the said estate might be sold as would satisfy their claims. The bill charges, that Abner Ritchie died, possessed of a considerable estate, not having left personal estate sufficient to pay his debts.

The *subpœna* was returned, executed on John T. Ritchie, the other defendants not found. On being called, they appeared by attorney, whereupon, on motion of the plaintiffs, *Thomas Turner was appointed guardian to appear and answer for the infant defendants. The infant defendants answer, that, according to the belief and knowledge of their guardian, the said claims are, as alleged in said bill of complaint, due and owing to the several complainants; and that Abner Ritchie did die, leaving personal property insufficient for the payment of his debts, having, as is alleged, real property, &c.; and that they have no objection to the sale of a part thereof, sufficient to pay his debts. The answer is not sworn to by the guardian. [*141

The answer of John T. Ritchie, administrator, and one of the heirs of Abner Ritchie, admits that his intestate died considerably indebted; suggests that the claims of the complainants should be referred to an auditor, alleges that he is himself a creditor, and that the personal assets of his testator are insufficient for the payment of his debts. He is willing that the real estate should be sold, and the proceeds applied to the payment of debts.

The cause came on to be heard by consent, and on the 21st day of June 1826, the court, also by consent of parties, decreed that the real estate of Abner Ritchie, deceased, or such part thereof as may be necessary for the purpose, be sold for the payment of the debts due to the complainants, and of such other creditors as should come in, &c., within the time prescribed in the decree. A trustee was appointed to make the sale, who, after giving bond with surety, and advertising the real property left by the said Abner, or so much thereof as might be deemed sufficient to satisfy his debts, at least three weeks, should proceed to sell the same to the highest bidder; one-fourth of the purchase-money to be paid in cash, and the residue in four equal instalments, at six, twelve, eighteen and twenty-four months; for which the trustee is to take the notes of the purchaser, the property to stand as security for the payment of the purchase-money. And upon payment of said notes and interest, the said trustee, and the heirs of Abner Ritchie, as they respectively attain the age of twenty-one years, shall convey in fee.

The trustee was directed to report his proceedings to the court, at the succeeding term, and to pay into court the net proceeds of the first payment, and on payment of the balance, was to convey. The court appointed
*142] Joseph Forrest to report on such claims on the estate of Abner *Ritchie, as should be proved to him before the first Monday in the succeeding November, and the administrator of Abner Ritchie was directed to exhibit to him the settlement of his administration account with the orphans' court.

On the 28th of March 1828, the trustee reported, that after giving bond, and advertising as required by the decree, he had, on the 17th day of July 1826, sold the property at public sale, to John T. Ritchie, the highest bidder, for the sum of $2715. That Mr. Ritchie, having produced satisfactory evidence of his having paid all the debts, and becoming the only creditor to an amount exceeding the amount of sales, he had made to him a deed conveying the property. On the 10th of June 1828, the auditor made his report, in which he disallows several claims to a large amount, made by John T. Ritchie, against the estate of Abner Ritchie.

In 1828, some of the infant heirs of Abner Ritchie, by their next friend, filed their bill of review against the complainants in the original suit, and against John T. Ritchie, the administrator of Abner Ritchie, and the purchaser of his real estate, and against such of the other defendants as do not become plaintiffs; in which they state the proceedings in the original suit, and assign various errors in the decree; for which, and for other errors therein, they pray that the same may be reviewed and reversed, that the deed made by the trustee to the defendant John T. Ritchie, and all deeds made by him to the other defendants, may be declared void, and that the sales made by the trustee may be set aside. The infant defendants answer by their guardian, and admit the allegations of the bill. The other defendants also answer, and insist on the original decree.

The cause came on to be heard, in May term 1830, by consent, when the court, being of opinion, that there was manifest error in the original proceedings, and on the face of the decree, did adjudge, order and decree, that the same should be reversed and annulled, and that all proceedings of the trustee therein named, and all sales and deeds made by him by virtue thereof, to the defendant John T. Ritchie, or any other person, and all deeds made by the said John T. Ritchie of the said real estate, to either of the
*143] other defendants, or for their use, *so far as respects the interest of any of the heirs of Abner Ritchie, except the said John T. Ritchie, senior, should be utterly null and void, and that the complainants be restored to their original estates. From this decree, the defendants appealed to this court.

A doubt has been suggested, whether a bill of review could be sustained in this case. The parties proceeded under an act of the legislature of Maryland, passed in the year 1785, ch. 72, entitled, "an act for enlarging the power of the high court of chancery." The fifth section enacts, "that if any person hath died, or shall hereafter die, without leaving personal estate sufficient to discharge the debts by him or her due, and shall leave real estate, which descends to a minor, or person being idiot, lunatic or *non compos mentis*, or shall devise real estate to a minor, or person being idiot, lunatic or *non compos mentis*, or who shall afterwards become *non compos*

mentis, the chancellor shall have full power and authority, upon application of any creditor of any deceased person, after summoning such minor, and his appearance by guardian, to be appointed as aforesaid, and hearing as aforesaid, or after summoning the person being idiot, lunatic or *non compos mentis*, and his appearance by trustee, trustees or committee, to be appointed as aforesaid, and hearing as aforesaid, and the justice of the claim of such creditor is fully established; if, upon consideration of all circumstances, it shall appear to the chancellor to be just and proper that such debts should be paid by a sale of such real estate, to order the whole, or part, of the real estate so descending or devised, to be sold, for the payment of the debts due by the deceased."

From the language of this section, some doubt was entertained, whether the act conferred a personal power on the chancellor, or was to be construed as an extension of the jurisdiction of the court. If the former, it was supposed, that a bill of review would not lie to a decree made in execution of the power. On inquiry, however, we are satisfied, that in Maryland, the act has been construed as an enlargement of jurisdiction, and that decrees for selling the lands of minors and lunatics, in the cases prescribed by it, have been treated, by the court of appeals of that state, as the exercise of other equity powers.

*We proceed then to examine the original decree, and the errors assigned in it. In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court. 4 Har. & Johns. 126, 270, 548; 5 Ibid. 459; 5 Har. & Gill 504; Coop. Eq. Pl. 28. They defend by guardian, to be appointed by the court, who is usually the nearest relation, not concerned, in point of interest, in the matter in question. (Coop. Eq. Pl. 29.) It is not error, but it is calculated to awaken attention that, in this case, though the infants, as the record shows, had parents living; a person not appearing from his name, or shown on the record to be connected with them, was appointed their guardian *ad litem*. He was appointed, on the motion of the counsel for the plaintiffs, without bringing the minors into court, or issuing a commission for the purpose of making the appointment. This is contrary to the most approved usage (Coop. Eq. Pl. 109), and is certainly a mark of inexcusable inattention. The adversary counsel is not the person to name the guardian to defend the infants. [*144

The answer of the infant defendants is signed by their guardian, but not sworn to. It consents to the decree for which the bill prays, and, without any other evidence, the court proceeds to decree a sale of their lands. This is, we think, entirely erroneous. The statute under which the court acted, authorizes a sale of the real estate, only where the personal estate shall be insufficient for the payment of debts, when the justice of the claims shall be fully established, and when, upon consideration of all circumstances, it shall appear to the chancellor, to be just and proper that such debts should be paid, by a sale of the real estate. Independent of these special requisitions of the act, it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points. The sufficiency of the personal estate of Abner Ritchie to pay his debts, is stated in the answer of his administrator; but is not proved, and is admitted in that of the guardian

of the *infants, but his answer is not on oath ; and if it was, the court ought to have been otherwise satisfied of the fact.

The justice of the claims made by the complainants, is not established otherwise, than by the acknowledgment of the infant defendants in their answer, that, "according to the belief and knowledge of their guardian, they are, as alleged in said bill, respectively due." The court ought not to have acted on this admission. The infants were incapable of making it, and the acknowledgment of the guardian, not on oath, was totally insufficient. The court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just, before proceeding to sell the real estate. Without knowing judicially that any debts existed, or the amount really due, or the value of the real estate, the court directed, "that the real estate of the said Ritchie, or such part thereof as may be necessary for the purpose, be sold, for the payment of debts of said Ritchie to complainants, and to such other creditors of said Ritchie, as shall come in and bear their proper proportions of the costs and expenses of this suit, and shall exhibit their claims, with the proper proof thereof, to the auditor hereinafter appointed, &c." The decree does not postpone the sale until the claims should be exhibited to the auditor ; and, consequently, so far as other creditors were concerned, leaves the trustee without information as to the quantity of property it would be his duty to sell. He accordingly sold the whole estate.

The eighth section of the law, which authorizes the sale of real estate descending to minors, enacts, "that all sales made by the authority of the chancellor, under this act, shall be notified to, and confirmed by the chancellor, before any conveyance of the property shall be made." This provision is totally disregarded. The sale was never confirmed by the court ; yet the conveyance has been made. It is a fatal error in the decree, that it directs the conveyance to be made on the payment of the purchase-money, without directing that the sale shall first "be notified to, and approved by," the court.

These are radical errors, apparent on the face of the decree, which show that the interests of the infants have not been protected as is required by
*146] law and usage ; and that great *injustice may have been done them. The decree, therefore, ought to have been reversed.

The appellants contend, that, even admitting the propriety of reversing the original decree, the circuit court ought to have stopped at that point, and not to have set aside the conveyance which were made under its authority. All the persons affected by the decree now under consideration, were parties when it was made. The bill of review prays for the relief which the court granted, and states all the facts which entitled them to that relief. The power of the court was, we think, competent to grant it, if it was required by the principles of equity and justice. The relief might be very imperfect, if, on the reversal of a decree, the party could, under no circumstances, be restored to the property which had been improperly and irregularly taken from him. Cooper, in his Equity Pleading, page 95, says, "the bill may pray, simply that the decree may be reviewed and altered, or reversed in the point complained of, if it has not been carried into execution ; but if the decree has been carried into execution, the bill should also pray the further decree of the court, to put the party complaining of the former decree into

the situation in which he would have been, if that decree had not been executed." "A supplemental bill may likewise be added, if any event has happened which requires it." In addition to these general principles which sustain the rule laid down by Cooper, circumstances exist, which require, in an eminent degree, its application to this particular case. The decree itself was disregarded by the trustee, in executing the conveyance. It directed him to receive one-fourth of the purchase-money in cash, and the residue in four equal instalments. The first payment is to be brought into court, and he is to make the conveyance, on receiving the last. He is not authorized to pay the money to the creditors. The court has not intrusted to him the right of deciding on the debts, and disposing of the purchase-money. He is only to receive it before he conveys; and, consequently, should hold it subject to the order of the court. It does not appear, that he has ever received a cent. He undertakes to settle the account of Mr. Ritchie, the purchaser, and to convey the property to him, in violation of the decree; *on being satisfied by him that he had paid all the debts, and was himself [*147
a creditor to an amount exceeding the purchase-money. He had no right to be satisfied of these facts. The court had not empowered him to inquire into or decide on them. He has transcended his powers; and with the knowledge of the purchaser, and in combination with him, has executed to him a deed which the law did not authorize. The whole proceeding was irregular, and ought to be set aside. The plaintiffs in the original suit will then be at liberty to prosecute their claims according to law. The court is of opinion, that there is no error in the decree of the circuit court, and that it be affirmed with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Thomas Jackson *et al.*, Appellants, *v.* William E. Ashton. [*148

Averment of citizenship.

The caption of the bill was in the following terms, "Thomas Jackson, a citizen of the state of Virginia, William Goodwin Jackson and Maria Congreve Jackson, citizens of Virginia, infants, by their father and next friend, the said Thomas Jackson *v.* The Reverend William E. Ashton, a citizen of the state of Pennsylvania: In equity." In the body of the bill, it was stated that "the defendant is of Philadelphia."

The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings; the bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case.

The only difficulty which could arise to the dismissal of the bill, presents itself upon the statement, "that the defendant is of Philadelphia;" if this were a new question, the court might decide otherwise; but the decisions of the court, in cases which have heretofore been before it, have been express upon the point.

Appeal from the Circuit Court for the Eastern District of Pennsylvania.