

Orphans Court on the 9th of October, 1848, being the same day on which the executor passed his account. And the assignment by Williamson as executor and devisee to Miller and Mayhew, bears date on the 1st of February, 1849; and it becomes material to consider, whether, at the time of the assignment they were aware of the existence of the release: because if they were, it must strike the mind as unjust, to permit Mrs. Williamson to say, that she executed the paper without receiving the consideration. I now put out of view the objection, that Miller and Mayhew are precluded from setting up any title, to the proceeds of the mortgaged property, other than that which Williamson did, and could transfer to them, as executor and devisee: and assume that if they knew when they made the loan to Williamson, Sutton & Co., of the existence of the release, and had no reason to doubt that the executor had, in fact, paid the money to her, that they ought not to be deprived of the benefit of the security.

Looking to the parol evidence in the case, I strongly incline to think, that when they made the advance, they did not know of the existence of the release. And in addition to the parol evidence, the papers upon their face, lead to the same conclusion. In the assignment, the executor does not profess to pass any title which he may have acquired as purchaser, or in consequence of having paid the money to the residuary legatee. He assigns as executor and devisee, and it must be supposed, he intended to transfer no title, but such as belonged to him in those capacities. And in the petition filed by the assignees on the 30th of May, 1850, sixteen months subsequently, they claim to be paid out of the proceeds of sales, allowed Williamson as executor and devisee in virtue of an assignment made to them by him, as executor and devisee, and in no other capacity or right. It was not until the 16th of October following, when they filed their answer to the petition of Mrs. Williamson, that they took the ground, that Williamson, the executor, had become the owner of the mortgaged debt, by having settled his account in the Orphans Court and paid over and distributed the entire estate, among the parties entitled, and had taken a release.