# REPORTS

OF

# CASES

ARGUED AND DECIDED

IN THE

# COURT OF APPEALS

OF

# VIRGINIA.

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BY DANIEL CALL.

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VOLUME V.

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DENEALE *and others* v. MORGAN'S *ex'ors.* 1805. *April.*

If in a will made before the revolution, a general power to executors to sell lands was given; a sale by one without the consent of the rest, was void.

*Hugh West*, the father of the appellants, *Sybil*, *Jemima* and *Sarah*, wives of *William Deneale*, *Edward Adams* and *Henry Gunnell*, on the 13th day of March, 1767, made his last will and testament. By which he desires that all his just debts be paid, *and to enable this to be done*, he directs that his *executors* or a *majority* of them, if *they*, or a *majority* of them, shall think fit, do sell the whole of his real and personal estate, (excepting his dwelling plantation); and of his said will, he appointed his wife *Elizabeth*, executrix, and his brothers *George West*, *John West* and *William West*, executors, all of whom qualified. In April 1767, *Hugh West* died, and his will was presented to court, proved, and admitted to record in June 1767. In about twelve months afterwards, to wit, in the month of November 1768, *George West*, one of the executors, during the lives of his co-executors, sold the land in dispute, to a certain *Humphrey Wells*, to whom the said *George West* gave his bond, and in the obligatory part, calls himself *one* of the executors of *Hugh*, conditioned that *he*, *George West*, *his heirs and executors*, (*and not that the executors of Hugh West*,) shall make a conveyance for the land. *Humphrey Wells* obtained possession of the land, (but how, does not appear,) and sold the same to *Edward Snickers*, to whom the bond of conveyance was assigned. *Edward Snickers* assigned this bond to *Francis Willis*. The bill states that afterwards *Edward Snickers*, and the said *Francis Willis*, sold the land to *Thomas Montgomery*, to whom *Edward Snickers* conveyed the same, (this deed is not produced.) That *Thomas Montgomery* devised the said land to *James Dunlop*, (the will of *Thomas Montgomery* is not a part of the record.) That *James Dunlop* sold the land in dispute to *Daniel Morgan*, the testator of the appellees, and gave his

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bond, conditioned for the conveyance of the same; and that *William Deneale*, one of the defendants, received a part of the purchase money. The appellants brought an ejectment in the district court of Winchester for the land; a verdict and judgment were rendered in favor of the plaintiffs in the ejectment, to which judgment the appellees' testator obtained an injunction from the chancellor.

*William Deneale* and his wife, *Edward Adams* and his wife, and *Henry Gunnell* and his wife, in their joint answer, state, that they do not believe the other executors of *Hugh West*, confided the management of the estate of their testator to *George West* solely, or that they ever intended to give him the power of selling the land, but on the contrary they are satisfied, that the other executors were expressly opposed to the conduct of *George West*, respecting the land as soon as they were informed of it, and never did confirm the sale. That *Elizabeth West* took an active part in the management of the estate while she lived. That the slaves and personal estate of *Hugh West*, were sufficient to discharge all his debts. That at the time of the marriage of his daughters; slaves, stock and household furniture were divided among them as a part of *Hugh West's* estate. That the daughters were about eighteen years of age at their respective marriages. That *Elizabeth West*, as soon as she knew of the sale of the land, objected to it. That *George West* was much addicted to drinking, which was known to the other executors. That they know nothing of any part of the purchase money being paid by *Snickers* to either *George* or *William West*. That the defendant *William Deneale* has received nothing on account of the land. That *Charles Little*, executor of *George West*, put into the hands of *William Deneale* and *Henry Gunnell*, three bonds of *Wells* to *George West*, amounting to one hundred and forty-four pounds, which must be the circumstance upon which the statement in the bill, of *William Deneale* having received part of the money due for the land, is founded. They have never received any part of the purchase money. They

know nothing of any part of the supposed purchase money being applied to the purposes of the trust mentioned in the will, or to the use of the daughters of *Hugh West*.

That as to the estate of *George West*, *Deneale*, *Adams* and *Gunnell* state, they have received not more than thirty pounds on account of their respective wives. *Jemima Adams* in her separate answer, states, that *George West drank hard*, was *often drunk*, and would *be so for twelve or fifteen days together*. That she has seen a letter from *John West*, one of the executors, to *George West*, in the following words: "Sir,—*Do you remember the last conversation we had about the Frederick land? I never will consent to the sale of it, because in time it will be of great value to the heirs.*" That her mother *Elizabeth*, was *opposed* to the sale. That *John* and *William West*, as soon as they heard of the contract made by *George West*, *disapproved* of it. *Sarah Gunnell* in her answer, states, that the other executors *disapproved of the sale*. And *Sybil Deneale* states, that *George West*, himself, said *he* never would make a deed for the land, and wished the heirs of his brother to bring a suit for the land in his lifetime. The regularity of the transfer of the title from *Wells* to the testator of the appellees, is not *admitted* or denied in the above answers. *Charles Little* states, that he hath understood, and believes, that the other executors of *Hugh West* gave up the management of their testator's estate to *George West*. This belief is founded upon the circumstance of its appearing, by the books of *George West*, that he had a principal agency in settling the accounts of *Hugh West*, and employing overseers for the estates. That *George West* was a man of honesty and integrity, and a friend to the family of *Hugh West*. That he would sometimes act imprudently, and managed his own affairs indiscreetly. That he has always understood that *Hugh West* died considerably in debt. That there were many debts due to his estate. He does not believe the amount was ever collected by the executors. He does not know that the land in dispute was sold with the

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consent of the other executors. That as executor of *George West* he got possession of all his papers. That he hath in his possession an account rendered by *Edward Snickers* to him and *William West*, by which it appears *Snickers* paid eighty pounds to *George West* on his own account, and one hundred and twenty-two pounds fifteen shillings and eleven pence, which *Snickers* informed him was on account of the land. That he believes no money ever was paid to *William West* on account of the land, because *William West* seemed to have *no knowledge* of the sale of the land, *previous* to his finding the bonds of *Wells* among *George West's* papers. That *William West* paid ninety dollars and twenty-one pistoles to Dr. *Savage*, for the estate of *Hugh West*. That *William West* took a part in the sale of *Hugh West's* books. These were the only acts of *William West* concerning *Hugh West's* estate, according to his knowledge. He does not know what instructions were given to *William Deneale* by *William West*, other than those contained in a joint letter from himself and *William West*. The contents of which letters shew the *ignorance* of *William West*, at *that time*, of the sale of the land. That *George West* left his estate to be divided among all his brothers' children, twelve in number. The daughters of *Hugh West* were entitled to three-twelfths of his estate. That their proportions of his estate have been given up to their husbands, who bought of the personal estate to more than the amount of their proportion of it. He does not state the value of *George West's* estate. As to the rest of the charges contained in the bill, he states his ignorance of them. He does not state how or from whom he understood that the other executors had given up the management of *Hugh West's* estate to *George West*.

*William Snickers*, executor of *Edward Snickers*, states in his answer, that he cannot *contradict* or *confirm* the statement made in the bill of complaint. That he was *at the time* of the transactions therein referred to, an *infant of very tender years*. That he has found among his father's papers

an account current rendered by *Hector Ross* against his father, in which is an item under the date of August 14, 1774. "To *George West* £ 30." Which sum of money, he believes, was so much money paid by *Hector Ross* to *George West*, in part payment of the land for his father. (He gives no reason for this belief, unless he means the finding the above account with this charge in it, among his father's papers, as such.) That his memory enables him to recollect that the defendant *Deneale* visited his father many years ago. That he understood the object of *Deneale's* visit was to receive the money which was due for the land.

There is no evidence in the record of the amount of the debts due from *Hugh West*, at the time of his death; or that any steps were taken before the sale of the land, to ascertain their amount. In 1782, twelve negroes and thirteen head of cattle were divided between the three daughters. Twenty years after the sale of the land, the administrators *de bonis non* of *Hugh West*, recovered a debt of £ 140. 5. $0\frac{3}{4}$. due to the estate.

The deposition of *Thomas West* proves that *John West*, one of the executors, *disapproved* of the sale. The depositions of *John Gunnell* and *John Moss*, prove, that both *John* and *William West*, at *different times acted as executors*, and *sold* a part of the personal estate. *Charles Little's* deposition was taken by the testator of the appellees, after he had filed his answer, without dismissing his bill against him. He proves by his deposition that *William West* was *entirely ignorant* of the sale *until after* the death of *George West;* and when he was informed of it, *he declared, he would not confirm the sale.* That *William West* acted in selling the property of *Hugh West*, and paid debts due from the estate. That *William West* wrote to *John West*, one of the executors, about the sale of the books. He proves that *John West* endorsed on an order upon *Hector Ross*, "a good order," which was sent in payment of money due from *E. Snickers*. It appears that the whole amount of the purchase money was one hundred and forty-

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four pounds. That *Snickers* paid two hundred and six pounds fifteen shillings and eleven pence more than the purchase money. He also proves a letter from *George West* to *John West*, in which he encloses him *Wells's* bonds to settle with him. In this letter, *George West* states, that *Snickers* was indebted to the estate of *H. West*, by account. This letter and bond were found after *George West's* death, *among his* papers, from which circumstances the inference is, that the letter and bond were never sent to, or received by, *John West*. He also refers to a paper marked No. 7, which he states *he has* in *William West's* handwriting; in which, *William West* states, that it being inconvenient for him and *John West* to act, they had given up the management of *Hugh West's* estate to *George West*. Neither the original, nor a copy of this paper is annexed to the deposition, nor made a part of the record.

*Snickers* was security for *Wells* in his bonds. The deposition of *Charles Little* was read as evidence without the voluntary consent of the appellants or their counsel. The court of chancery perpetuated the injunction, and ordered the defendants to convey: who appealed to the court of appeals, insisting:

1st. That the executors, supposing they had all concurred in the sale, had no power to sell the land, unless the personal estate proved insufficient for the payment of the debts due from the estate of their testator.

2d. That the appellees, whose testator claimed under the executors, are bound to shew that the personal estate was insufficient to pay the debts; which they have not done.

3d. That a majority of the executors did not at any time consent to, or concur in the sale, and a majority only could sell. *Co. Litt.* 181, *b. Hawkins, Co. Litt.* 113, 167, 168, 399.

4th. That the bond given by *George West* to *Wells*, for the conveyance of the land, is not obligatory on the other executors, the condition of it being that *he*, George West, *his heirs, executors, &c. shall make a good and sufficient*

*conveyance of the land, &c.*, without undertaking that the other executors shall make any conveyance.

5th. Admitting the other executors had the power to authorize *George West* to sell the land, yet they could not give him this authority in any other manner, than by giving him a *written power* of attorney, *signed, sealed and acknowledged* before *three witnesses.*

6th. That supposing *William* and *John West*, had agreed that *George West* should sell the land; yet they had no authority to transfer the power given them to sell to another person; because their testator had vested a personal confidence in *all* of them, which could not be delegated. 1 *Bac. Ab.* 203, *old edit.* 9 *Co. Rep.* 75, *b.* and 76, *a.*

7th. That *Daniel Morgan* has not shewn a transfer of *Wells's* title to himself.

8th. That *Charles Little*, whose deposition has been read by the chancellor, is an incompetent witness; because he is a defendant in the cause; and because as executor of *George West*, he is interested in preventing a suit being brought against himself on *George West's* bond, conditioned to make a conveyance of the land. 1 *Morg. Essays*, 279, 281.

9th. That there is an appearance of fraud in the original transaction, and that the subsequent claimants seem from their conduct to have been apprised of it.

10th. That the answer of one defendant is no evidence against the other defendants.

The counsel for the appellants contended, That the executors could not sell, unless the personal estate had failed: For the second clause, devising the lands to the children, qualifies the first; and proves that it could only be done, if absolutely necessary; but that there was no proof of any such necessity; and, if it had existed, the plaintiffs ought to have shewn it; whereas the testimony proved the contrary, and shewed clearly that there were assets enough without. That it was no objection to say, that the executors would be impeded by this construction; for a bill in

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equity might have been filed, and a sale, if found necessary, decreed. That one executor only could not sell; and, upon that ground, the sale was clearly void, both by the principles of the common law, *Harg. Co. Litt.* 113, and the practice of the country, which is to file a bill in chancery to compel a sale. That the power was given to all, or a majority of all, of the executors, and not to a majority of those who acted only. But in fact they were all acting executors; for they all qualified, and must have sued and been sued together. That *George West* alone made the sale and gave the bond; and he meant to do it as an individual, and not as executor; for he binds himself and his heirs only, and relied upon his being able to procure the assent of the other executors; who were not present, and knew nothing of the sale. That the deposition of *Little*, if rightly understood, proves that *William West* knew nothing of the sale; and did no act shewing his concurrence; so that it was quite immaterial what *John* and *George* might have done, even if *John* had assented, (which is not proved, but the contrary;) for they did not form a majority of the whole executors. That the letter of *George West* was found among his own papers, as well as *Snickers's* bond: and, therefore, no inference was to be drawn from them. That the appellants could not be called upon to prove any thing, but the appellees were bound to shew an authorized and legal sale. That it was not enough to prove that *George West* generally administered the personal estate; as he had complete power over that; but with regard to the land, he had only a power in conjunction with others. That the bond of *Deneale* and others to *William West*, did not prove the power of *George West*; because it was written after the declarations of dissent to the sale. Besides, the other executors could not have delegated a general power to *George West*, with respect to the land. That *Morgan* did not shew a right to *Wells's* title, whatever it may be. That *Little* was not a competent witness; because he was liable to costs.

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The counsel for the appellees contended, That the subsequent clause did not affect the purchaser; for the will left it entirely in the discretion of the executors to sell, or not, without regard to the state of the assets; and a contrary construction would greatly impede the sale. 2 *Wms.* 148. That a purchaser has nothing to do with the state of accounts; for he cannot know them. That there was no rule of law, or practice of the country, which required a bill in chancery. Nor ought there to be; for the devisees have their remedy against the executors. Besides, there was no proof that the sale was unnecessary; and therefore, the necessity would be presumed. That a majority of the executors might sell, *Harg. Co. Litt.* 113; and a majority certainly assented. But *Little's* deposition expressly proves that all of them concurred; for it proves a general authority, which went to the land, as well as to every thing else: and must have been so intended; for otherwise the authority would have been nugatory; because he had general authority over the personal estate without it. Besides the great length of time which elapsed before the title was stirred, proves a conviction of the regularity of the transaction. That there was no proof of a dissent; which fortifies the presumption, that they were satisfied with the sale. That *John West's* assent was proved by *Ross's* acceptance for *Snickers*, on account of *Wells's* debt for the land. That the essence of the contract of *George West* was, that he sold as executor; for he styles himself executor in the body of the instrument, and purports to sell it under that authority: of course, the form is nothing. That if a man sells as attorney, and the principal receives the money, equity will not require proof of the letter of attorney; and the same doctrine applies to the present case: For the other executors received part of the purchase money, which ratified the sale. That assent ought the rather to be presumed from the length of time, and the consequent probable loss of testimony. That *Little* was a competent witness, for his being defendant is no objection, as he might be examined

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by special commission; and it was agreed that it should be read as if a commission had issued: he was not interested. 1 *Term Rep.* 27. 7 *Term Rep.* 62.

TUCKER, Judge. *Hugh West*, in the year 1767, made his will as follows, "I desire that all my just debts be paid; and, in order to enable my executors to do so, I hereby order that they, my said executors, or the survivor or survivors of them, or a majority of them then living, (if they shall think fit,) do sell and dispose of my whole estate real and personal, my dwelling plantation and adjacent lands excepted, to any person they think proper; and that they pass any deeds or writings to convey the absolute property to the purchaser." Then having devised the lands whereon he lived, one moiety to the child of which he supposed his wife to be pregnant, if a son, and the other moiety equally to be divided among his daughters; but if the child should prove to be a daughter, the whole between them as co-heirs, in fee simple, he proceeds thus: "Item, my will is, that if my executors shall not find it necessary to sell and dispose of my lands, already mentioned to be sold, that then the said land be equally divided among all my children, born or unborn, to them and their heirs forever." And appointed his wife, *Elizabeth*, and his brothers *John*, *George* and *William*, his executors; all of whom qualified as such.

November 1, 1768, *George West*, one of the executors, without the assent or concurrence of the other executors, or any of them, as far as appears by the record, sold a tract of land in Frederick county to *Humphrey Wells*; and gave his bond, with condition to be void, if he should, within a reasonable time, make a good, effectual conveyance of the land, in law and equity, to the said *Wells*, &c. agreeable to the last will and testament of his testator. In this bond he styles himself *one* of the executors of *Hugh West*. This bond was assigned to *Snickers*, with a direction to make the conveyance to him: and, having passed through several hands, was, at last, assigned in like manner to *Morgan*.

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*Hugh West* left three daughters, (but no son,) all infants, and now married to the other appellants. In the year 1797, they brought an ejectment for the land sold by *George West* (who never executed any conveyance for it) in Winchester district court, and obtained a verdict and judgment for the same against *Morgan*, the tenant in possession. *Morgan* hereupon filed a bill in the high court of chancery, against the appellants, praying an injunction; which was granted; afterwards perpetuated; and a conveyance of the land decreed to be made by the appellants to the plaintiffs in the suit in chancery. From which decree the defendants in equity have appealed to this court.

I shall pass over the two first points made by the appellants' counsel in this case; and proceed to consider the third, namely, That a majority of the executors did not, at any time, consent to, or concur in, the sale; and that a majority only could sell.

In the case of personal estate, a sale by one executor alone is sufficient, without the concurrence, or assent, of the rest. For each executor has the entire control of the personal estate of his testator, and may release, or pay a debt, or transfer any part of the testator's property, without the concurrence of the other executors. 2 *Ves.* 267, 268. But it has been decided in this court, that a purchaser of lands from an executor, is bound to look for, and to understand the extent of that power, and, consequently, the principle, *caveat emptor*, strictly applies in such a case. *Brock & al.* v. *Philips*, 2 Wash. 70. For, if a man purchases under a will by which a trust is created, he must, at his peril, take notice of the operation of the law upon it. 2 *Fonbl. Eq.* 152. Which brings us to consider what the law, in such cases, was at the time of the testator's decease.

By the common law, if one executor refused to sell, the others could not. *Co. Litt.* 113, *a.* "But," says lord *Coke*, "now by the statute 20 *Hen.* 8, (which being a statute of a general nature, was certainly in force in Virginia, at the time of the testator's death, *Ord. Convention, May* 1776, *ch.* 5,)

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it is provided, that where lands are willed to be sold by executors, though part of them refuse, yet the residue may sell." These, however, are not the words of the statute; nor is the passage to be understood as authorizing the construction, that, if a part of those who qualify refuse to sell, the others may sell; but that if part of those named as executors in the will, refuse the executorship, those who accept the office may sell. Which is evidently the true meaning of the statute, as will appear upon examination. The case, then, as between those who do qualify, seems to be left as at common law: and this will reconcile what is there said by lord *Coke*, with what he says in page 181, *b.*; that if a man devise that his two executors shall sell the land, if one of them die, the survivor shall not sell it. Now, the reason is much stronger why one executor should not sell in the lifetime of the other, without his concurrence. For one might covenant with *A.*, and the other with *B.*, for the lands; and, if they need not join in the conveyance, two opposite titles might be created at the same instant, by different conveyances to different persons, neither of which could claim a preference over the other, the separate conveyance of each executor being equally available to pass the lands; an absurdity which it is presumed has no foundation, or countenance, in the law. Again, in *Co. Litt.* 236, *a.*, it is said, that where a man deviseth that his executor shall sell the land, there the land shall descend, in the mean time, to the heir; and, until the sale be made, the heir may enter and take the profits. And, probably upon this ground, it seems to have been agreed in this court, that, if the heir be one of the executors, his conveyance, without the concurrence of any of the rest, would operate as an estoppel against him as heir, *Shaw* v. *Clements*, 1 Call, 438; but the converse of the case, that the sale had been made by another executor, without the consent of the heir, if there were but two, or of a majority, if there were more, would not hold good. For the heir had a present interest, which he might well part with by the conveyance, as well as a power, in common

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with the other executors, under the will. Whereas the executors, where lands are devised to be sold by them, have a bare power, and not a profit, *Co. Litt.* 236, *a.*; for no interest passes by such a devise, according to the opinion of chief justice *Roll. Ibid. Harg. note* 1. If a sale of lands by one executor, where there are more, be valid; as, suppose the testator makes his heir, his widow and a stranger his executors, with power to sell his lands, if necessary for the payment of his debts, (as in this case,) and the stranger were to sell without the consent either of the heir, or the widow, although no necessity existed for doing so; in this case the heir might be disinherited, and the widow deforced of her dower, by the act of the stranger having no interest in the lands, and whose power under the will was only equal with the power of the heir and the widow respectively; which is an inconvenience which the law will no more tolerate, than the absurdity of different conveyances, by different executors, to different persons. I hold it, therefore, to be incontrovertible, that where there are more executors than one, who qualify under the will, either the whole, or at least a majority of them, must join in the sale of lands devised to be sold. *Pow. Dev.* 292, 300.

But, if this were not the case, generally, yet it seems to have been expressly the intention of the testator in this case, that a majority at least of his executors should concur in the sale of his lands; for words cannot make his intention clearer than he has expressed it in his will: and, evidently, it was his intention, that they should be governed herein by the necessity of doing so, for the payment of his debts; of which not one only, but all were to judge.

Upon these grounds, I am of opinion, that the sale of the lands in question, if made by *George West* alone, without the concurrence, assent, or approbation of a majority of the executors of *Hugh West*, then living, or a majority of the survivors of them, was void, both at law and in equity. Such concurrence, assent, or approbation, may, however, in my opinion, be either express, implied, antecedent, contempo-

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rary or future. For any subsequent act, by any other of the executors, which might be interpreted into a ratification or confirmation of the sale made by *George West*, would, in my opinion, be equally available, as if his consent had been formally given before the sale; or as if he had joined, at the time, in making the sale. As if it had appeared, that either of them did actually receive the purchase money, or bring a suit upon the bonds given by *Wells* and *Snickers* for the recovery of it. These acts would, in my opinion, be equally as available, as if they had joined *George West* in the bond for making a conveyance. But such concurrence, or approbation ought not to be inferred from doubtful circumstances, not manifesting a deliberate intention to confirm, or ratify, his act.

Having minutely examined the evidence with a view to this point, I find nothing but slight presumptions, inferrable from trivial and equivocal circumstances, only, in favour of the assent, either of *John* or *William West*, to the act of *George:* which presumptions are strongly rebutted, not only by other circumstances of equal, or greater weight, but by the positive disapprobation of both those executors, proved to have been expressed, at different times, in the most unequivocal manner. And of the assent of the widow, the fourth executor, there is not even the most distant ground of presumption.

But length of time, and the variety of hands through which these lands may have passed, may be considered as creating an equity in favour of the appellees.

The appellants being infants of very tender years, when the sale was made; and the ignorance under which *William West* is proved to have remained as to the transaction, until the death of *George* in the year 1786; and the want of the title papers; which it is in proof the appellants were not possessed of until many years after; in my opinion, are circumstances amply sufficient to rebut all equity against them, arising merely from length of time. And it being in proof, and so alledged, if I mistake not, in the bill, that

*Morgan* took an assignment of *George West's* bond to *Humphrey Wells* to make him a title, in which he styles himself one of the executors, not sole executor, of *Hugh West*, this circumstance alone was sufficient notice to him, to put him upon further enquiry as to the power that *George West* alone had to sell the lands; it being a general rule, that whatever is sufficient to put a party upon an enquiry is good notice in equity. 2 *Fonbl. Eq.* 151, *note.* 1 *Atk.* 490. *Ambl.* 13. 2 *Ves.* 440. And this being the case, he comes within the rule laid down in this court in the case of *Brock* v. *Philips*, that a purchaser of lands from an executor is bound to look for, and to understand, the extent of that power; and consequently that the principle, *caveat emptor*, strictly applies to the testator of the appellees in this case.

It being in proof, however, that *George West* received £84 of *Snickers*, that sum ought to be refunded to his executors; but I think without interest; for it was little more than half the price agreed on for the lands, and not a twentieth part of their present value. The rents and profits, therefore, may be set against the interest; and the appellants enjoined from bringing any suit for mesne profits, under the circumstances of this case. And as the appellants are legatees and devisees under the will of *George West*, they ought to give security to pay their proportion of any damages which may be recovered upon his bond to *Wells*, for making a title, as far as their share of *George West's* estate will extend. I am therefore of opinion, that the decree be reversed, and a decree made upon the foregoing principles.

ROANE, Judge. I am also of opinion, that there is not sufficient evidence of assent or ratification on the part of the executors of *H. West* (other than *George West*), or a majority of them. The circumstances relied on by the chancellor are too slight to justify such a conclusion, and may be otherwise satisfied and accounted for. I differ from that judge, therefore, in the presumption which he has deduced

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therefrom. It would be too much, on such slight and equivocal circumstances, to say the least, to ratify an act done by one man, when the power is only confided to several. As to the lapse of time in this case, it ought to be no bar: The infancy of the appellants, and other circumstances, which have been particularly stated by the judge who preceded me, accounting for, and excusing the same. I am therefore of opinion, that the decree should be reversed, and the injunction dissolved.

FLEMING, Judge. The will required, that there should be a necessity for the sale, and that a majority of the executors should concur in it: neither of which was attended to; for it does not appear that the sale was necessary; or that it was made, or assented to, by more than one of the executors; and that one a dissipated, and imprudent man. Consequently, as the directions of the will have not been pursued, the sale is void. The length of time is no objection to the appellants; who are excused by infancy and ignorance of their rights; which were not discovered until the year 1795. But it is an objection to the appellees; who lay by without taking any steps towards perfecting their title, until the other executors, who might have combatted their pretensions, were all dead; and now affect to rely upon the alledged antiquity of the transaction to support them. I think, therefore, that the decree ought to be reversed, and the injunction dissolved.

CARRINGTON, Judge. The personal estate appears to have been abundantly sufficient to pay the debts; and therefore the sale was plainly unnecessary: Which, of itself, renders the appellees' claim to relief in some degree exceptionable. But, passing over that, the will expressly required that a majority of the executors should concur in the sale: Whereas the proof is, that it was made by one of them only, without the concurrence or assent of the rest. The authority, therefore, was not pursued; and consequently

the sale is void. The decree ought, therefore, to be reversed, and the injunction dissolved. The appellants, however, should restore the £ 84 which were paid; but without interest.

LYONS, President. This is not a bill for a specific performance by the purchaser of the land; but for relief, by the heirs, against a pretended fraud, notwithstanding long submission to the sale, to the prejudice of subsequent purchasers, who had a right to presume title in their own immediate vendors, from the long acquiescence in those interested to controvert it. Although the sale, upon the face of the contract, appears to have been made by one of the executors only, there seems to be great reason to think it was concurred in by the others: and in an earlier contest, it might perhaps have been completely proved. I think the negligence of the appellants culpable, and see but little to blame in the purchaser and his assignees, who were left in undisturbed possession of the land until 1797, and were not bound to see to the application of the purchase money, as the power was to sell for payment of debts generally, without any schedule, or other specific direction. Nothing, therefore, can be objected to them, but their failure to obtain a conveyance. A majority of the court, however, is of a different opinion, and the following is to be the decree:

"The court is of opinion, That the sale of the lands of *Hugh West*, the testator, made by *George West*, one of the executors only, does not satisfactorily appear to have been made with the concurrence, assent or approbation of a majority of the executors of the said *Hugh West*, all of whom qualified as such; or with the concurrence, assent or approbation of a majority of the survivors of the said executors, without which such sale ought not to be enforced even in a court of equity, more especially since it doth not appear that there was actually a deficiency of personal assets of the testator, or that the sale was openly and publicly made to the highest bidder, as charged in the complainant's

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bill, or that the purchase money was actually paid to the executors, or either of them, in a reasonable time, or that the whole thereof hath been at any time paid: Circumstances, which, if they had appeared in this case, might have afforded a much stronger presumption, that such assent or approbation, though not proved, was actually given, than the presumption arising from length of possession before the writ of ejectment was brought by the appellants, which is rebutted by other circumstances affording a reasonable excuse for the delay in bringing that suit: Therefore it is decreed and ordered, that the injunction, obtained by the said *Daniel Morgan* in the said court of chancery, be dissolved; and that the appellee deliver to the appellants the possession which he holds under the said *Daniel Morgan*, of the premises recovered against him and others by the judgment in the said writ of ejectment. And it appearing to this court that the sum of eighty-four pounds only, including *Hector Ross's* note for thirty pounds discounted by *George West*, was paid by *Edward Snickers*, the testator of the defendant *William Snickers*, and that the rents, issues and profits of the land whereof the said *Edward* obtained the possession, have been probably much more than adequate to the lawful interest on that sum, It is further decreed and ordered, that the appellants pay to *William Snickers*, the executor of the said *Edward Snickers*, the aforesaid sum of eighty-four pounds without interest, within three months after this decree shall have been entered in the said court of chancery; and further, that they give bond with security to satisfy and pay their proportionable parts of any damages which may be recovered against the estate of *George West*, upon his bond to *Humphrey Wells* for making a good title to the said lands, so far as their distributive share of the real and personal estate of the said *George West* will extend, and that they be forever restrained from bringing any suit at law against the appellee as executor of the said *Daniel Morgan*, deceased, for the mesne profits of the lands by them recovered in ejectment: that the bill be dismissed

as to all the defendants not noticed in this decree, and that each party bear their own costs in the said court of chancery. But nothing in this decree contained shall be construed to bar the representatives of *Hugh West* and *Edward Snickers* respectively from any remedy which they may think proper to pursue for the settlement of the accounts of their respective testators with each other."

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WILSON *v.* ISBELL.

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A slave born in Virginia was carried to Maryland, and there sold to a person who brought her back to Virginia, and kept her here for more than twelve months. She was entitled to her freedom.

This was a suit brought in the county court by *Isbell* against *Wilson*, to recover freedom; and the parties agreed a case, which stated, That *Matthew Whiting* of Virginia, owned the plaintiff as a slave, on the 5th of October, 1778; and in the year 1781 or 1782, removed with part of his property (among which was the plaintiff) to Maryland; where he sold the plaintiff to the defendant; who brought her back to Virginia. That *Whiting* also returned in about three or four years afterwards, to Virginia. The county court gave judgment for the defendant; which the district court reversed; and the defendant appealed to the court of appeals.

*Wickham*, for the appellant. The act of 1778, to prevent the further importation of slaves, *Chan. Rev.* 80, does not operate upon this case; for that act was intended to apply to foreign slaves only; and not to those born here, and carried into one of the United States afterwards. This is proved by the fifth section, which allows the citizens of the other states of the Union removing here, to bring their slaves with them: which shews that those from other parts of the world, only, were in the view of the legislature. The