REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME II.

BY WILLIAM MUNFORD.

NEWYORK:

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1814.

Judges TUCKER and ROANE adhering to their respective opinions formerly pronounced; the judgment of the district court, upon the demurrer to the declaration, was reversed, and the cause remanded to be proceeded in as to the remaining pleas and demurrer.

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Clay *against* Williams and others, and The Same *against* The Same.

Tuesday, March 5th.

UPON appeals from two decrees of the late judge of the superior court of chancery for the *Richmond* district, pronounced the 16th of *May*, 1804; by the first of which a bill exhibited, by *Matthew Clay*, and *Mary* his wife, against *Sarah Williams*, executrix of *Joseph Williams*, and administratrix of *Robert Williams* and others, defendants, was dismissed with costs; and, by the second, the equity of a cross bill, exhibited by *Sarah Williams*, executrix and administratrix aforesaid, against *Clay* and wife, was sustained.

The primary object of the first-mentioned bill, (filed *September* 10, 1795,) was a discovery of assets to satisfy a judgment confessed, in *Pittsylvania* county court, on a bond for 7,500*l.* given by Mrs. *Williams*, as executrix of *Joseph Williams*, to *Matthew Clay*.

The plaintiffs alleged that *Robert Williams*, second

1. If an executrix, (without being subject to any compulsion, or undue influence,) for the *fraudulent* purpose of protecting the estate of her testator from the demands of creditors, give her own bond as executrix, for a *fictitious* debt, and confess a judgment; *she* is not entitled to relief in equity: neither will the court give its aid to the obligee, but will leave him to his remedy at law. Yet if he be entitled (independently of the transaction in question) to an *account of assets*, the court will decree such *account*, and allow him what may be justly due, *not exceeding the amount of the judgment*; the rule, in such case, being, that he is bound by his own fraud, so far as it operates against him.

2. A court of equity will not assist in carrying into effect compositions of claims by executors, or other fiduciaries, unless the party praying it will first unfold and disclose all the circumstances of the case, that the court may see there has been no fraud, and that every thing was fair.

3. *Quære*, whether the evidence of a person employed, by both parties, as an *attorney*, or *scrivener*, to write a bond for a *fraudulent* purpose, be admissible to *prove the fraud?*(1)

(1) Note. *It seems* from BROOKE'S and TUCKER'S opinions in this case, that they considered such testimony admissible. ROANE *is pointedly contra*; and FLEMING said nothing upon the point. *Ideo quære?*

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husband of the defendant, *Sarah*, had wasted and appropriated to his own use large sums belonging to the estate of *Joseph Williams*, for which he never accounted; that the plaintiff *Mary* was the only child of the said *Joseph*, and entitled, under his will, to a very considerable part of his estate, which was now in the possession of the defendant, *Sarah*, and of the other defendants, distributees of the estate of *Robert Williams*. They prayed, therefore, a settlement of the executorship of *Robert Williams*; "that *Sarah Williams* might show what estate she had, as executrix of her first, and administratrix of her second husband; that the other defendants might show what estate of *Robert Williams* they had in their possession; that all proper accounts might be taken, and a proper decree made."

To this bill Mrs. *Williams* put in, successively, two answers. The first (which was sworn to *February* 25, 1796,) admitted the recovery against her in *Pittsylvania* court, (without making any objection on the ground of fraud,) rendered, partly, an account of the executorship of the estate of *Joseph Williams* by *Robert Williams*; (referring for more complete information to the books of the said *Joseph* and *Robert*;) and as to the estate of *Robert Williams*, referred to the inventory; observing, that part had been appropriated in discharge of debts, and part allotted to the distributees. She did not admit that any waste of the estate of *Joseph Williams* had been committed by *Robert Williams*.

A second answer, filed *September* 24, 1798, ("but no rule or order allowing it appears to have been entered,") sets forth sundry additional circumstances relative to the executorship; particularly, that all the payments to *Robert Williams*, of debts due to the estate of *Joseph Williams*, were in paper money; part of which (as *Robert Williams* informed the defendant) was offered by him to be paid into the treasury of *North Carolina*, according to the laws of the said state, in discharge of

British debts, and was rejected, because no person had been appointed with authority to receive it; and the same, so offered and rejected, (together with the balance of the said paper money,) depreciated, and became of no value, in his hands; that, since the death of *Robert Williams*, the defendant had received only sixty dollars as executrix of *Joseph*; that many debts were still due to the said estate, but the defendant believed that very few could be collected at this late period; many trials having been made in vain. She did not deny "that the complainants had obtained a judgment against her in *Pittsylvania* court for the sum of 7,500*l.*; but conceived them not entitled (if there be no error in the said judgment) to receive the same, except as far as the assets of the estate of the said *Joseph Williams*, which had and might hereafter come to her hands, should extend, after payment of the yet unsatisfied debts: she had declared to the said *Matthew Clay* her willingness to pay him his share of the said assets, provided he would give her bond and security to satisfy a proportional part of such debts as might arise to charge the said estate; to which proposal he had refused to accede." As to the estate held by the defendant, as legatee of her first husband, she stated her right to hold it as being the same by which the complainants hold a part of the same estate; that commissioners were long since appointed, who divided the land, negroes, and other property on the land, according to the will of *Joseph Williams*, between the defendant and the complainant *Mary* her daughter; and the complainants could, therefore, have no right or title to any part of the property so held by the defendant; although the same (as well as the share of the complainants) might be liable to creditors.

To this answer, the defendant added a demurrer to so much of the bill as demanded an account of her administration of the estate of *Robert Williams*; observing

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that his estate was not bound to pay the debts or legacies of *Joseph Williams*, until it be proved that the estate of the said *Robert* was justly indebted to that of *Joseph*; but expressing her willingness, if the complainants could establish that circumstance, (which she thought they could not,) to render such account, when hereafter lawfully called upon.

John Call, one of the defendants, (whose wife *Lucinda*, was one of the daughters of *Robert Williams*,) relied on a marriage contract by which he became entitled to all the property he had ever received from his estate, and had obtained a decree for it, in the county court of *Pittsylvania*, in a suit against the widow and distributees. His answer, moreover, (sworn to the 13th of *August*, 1796;) suggested, that the plaintiff *Matthew Clay*, and defendant *Sarah Williams*, had combined together to defraud the respondent and his wife, and the creditors of the two estates; that (as the respondent verily believed) the judgment obtained by the complainant, for 7,500*l.* was collusive; for "that *Matthew Clay* told the respondent that he the said *Clay* had told the said *Sarah Williams* a method of securing him, and keeping a good living herself, but that she would not consent to it; and that she was wrong, for, if he did not get the estates, *Hamilton*" (a *British* creditor) "would;" "and asked the respondent why he (as a friend to her and her children) did not advise her to such measures as he supposed would enable her to secure herself against the claims of *Hamilton?* The respondent verily believed, the complainants, and the defendant *Sarah*, never had any settlement of their accounts; (if they had, it is presumable that she called upon some person to assist her, by whom the complainants could prove it;) that the complainant *Matthew*, in order to prevail on the defendant *Sarah* to confess the judgment, promised her to let her keep what she had in possession, and to permit her children to keep theirs also, provided he prevailed in the

present suit; that, a few weeks only before the judgment in question, the respondent was at the house of the complainant *Matthew*, in company with him and the defendant *Sarah*, and a proposal was made for her to give him the said *Matthew* a judgment; that she said she would do it willingly, if the estate of *Robert Williams* would not be injured by it;" and the respondent "heard the complainant *Matthew Clay* tell her it would not, and ask, how can it? The respondent understood that, in a few days after the aforesaid conversation, the defendant *Sarah* passed her note to the complainant for 7,500*l.* and, at the next quarter session court for *Pittsylvania* county, confessed the judgment." The respondent further said that he "heard the defendant *Sarah Williams*, tell her son-in-law *John Williams* that the complainant *Matthew Clay* had offered to take from her Judge *Williams's* bond due the estate of *Joseph Williams*, for six hundred pounds, debt, and interest, or thereabout, and give her a full discharge against all claims from him on account of his wife's estate; to which the said *Williams* advised her; but she replied, she would not, for she was convinced that, on a fair settlement of accounts, the said *Clay* would fall in her debt."

Nathaniel Washington Williams and others, distributees of *Robert Williams*, in their answers, (sworn to the 21st of *August*, 1800,) averred, that they believed the said *Robert Williams* conducted himself fairly, honestly and honourably in all his transactions relative to the estate of *Joseph Williams*; that, after the intermarriage of the complainants, there was an order of the county court of *Pittsylvania*, made on the motion of *Clay* and wife, summoning the said *Robert Williams* to render an account of his guardianship of the complainant *Mary*; that, thereupon, a full, fair and final settlement of the accounts of the said *Robert Williams's* guardianship took place; showing a balance of only 3*l.* 6*s.* 8*d.* due from the said *Robert Williams*; that, after his death, the complainant

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Matthew Clay had constant access to his books, as well as those of *Joseph Williams*, and, therefore, probably acquired all the information necessary to form a judgment whether any thing was due to his wife or not; yet he suffered the estate of *Robert Williams* to be divided amongst his family, and never once endeavoured to prevent it, although he lived within two miles of the place, and was well acquainted with the intention of the administratrix to make a distribution of the estate. Upon the whole, the defendants explicitl stated their belief that nothing was due from the estate of *Robert Williams* to that of *Joseph*. They also charged the judgment to have been obtained by fraud; setting forth that they were informed and believed " it was a scheme contrived by the complainant *Matthew Clay* to circumvent and injure the defendants to this suit, at the very time that he was imposing on the credulity and confidence of *Sarah Williams*, by making her believe that it was a step which was necessary for preserving the estate of the said *Robert Williams* from the *British* creditors of the said *Joseph Williams*, who (the said *Matthew* had contrived to make her believe) would have a right to come upon the estate of the said *Robert Williams* for satisfaction, and that the only means of preventing it would be by suffering him to get it, through the channel of a fictitious claim, and that he would give his bond, to secure it to the family of the said *Robert Williams* after he had secured it against the aforesaid creditors of the said *Joseph;* that there was nothing due to the complainants from the said *Sarah Williams*, as executrix of the said *Joseph Williams*, or in any other capacity, and that the sum mentioned in the note, on which the said judgment is founded, was altogether fictitious and pretended; and although the said *Sarah Williams*, in her answer to this suit, hath not stated the fraud, *that* is owing to part of the same system of imposition which the complainant had been practising on her during the lifetime of the

complainant *Mary*, who died on or about the 26th day of *March*, 1798; that, according to his promise aforesaid, the said *Matthew*, on receiving the said note, gave his bond, to restore the estate of the said *Robert Williams* to his family after he had secured it against the creditors of the said *Joseph Williams*, deceased; which bond, together with all the books and papers of the said *Robert Williams*, were unfortunately destroyed, on or about the 28th day of *October*, 1798, by the accidental burning down of the mansion-house and office of the said *Robert Williams*, deceased; after which, the complainant *Matthew* appears to have conceived that, by the loss of those important evidences, he should have it in his power to mature his fraud and defeat the claims of the representatives of the said *Robert Williams*, and therefore he now pretends that the said note was given for a just debt, and is endeavouring to compel payment of the said judgment from the estate of the said *Robert Williams*."

On the 10th of *September*, 1800, Mrs. *Williams* filed her cross bill, (which does not appear to have been sworn to,) charging *Clay* with fraud in obtaining the note of hand and judgment, by taking advantage of the confidence she reposed in him, as having married her daughter; by playing upon her fears of a recovery by *John Hamilton & Co.* against her, of very large sums, for which suits were pending in the federal court; by making her believe that the estate of *Robert Williams* (who had been guilty of no malversation) would be liable to satisfy those demands, instead of the estate of *Joseph Williams*, which she had since discovered was the true debtor; and thereby persuading her to give him the note for a fictitious sum which should be equal to all the estate of *Robert Williams*, on which he would afterwards sue, and, having absorbed the whole estate in satisfaction of the judgment, would afterwards restore it to the family.

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The cross bill further stated, that *Clay*, in order to preserve the appearance of good faith, gave, as he had previously promised, a bond, obliging himself to restore the estate in manner aforesaid; "but the same was lately destroyed, with all the books and papers of the said *Robert Williams*, by the accidental burning down of his mansion-house;" that *Clay* and wife, "afterwards, according to the plan which he had proposed, exhibited their bill demanding satisfaction of the judgment out of the estate of *Robert Williams*; to which she put in an answer, drawn by counsel employed by *Clay*, and in which the circumstances aforesaid were purposely omitted; that she still confided in *Clay*, and believed he would perform his engagement, until after the burning of the house aforesaid, when, having found out that his bond was burnt, he began to show his real intentions, and immediately claimed the whole amount of the judgment; that *Clay's* conduct was the more oppressive, as *Hamilton & Co.* had recovered judgments against her as executrix of *Joseph Williams*, to satisfy which she had no assets; and the property of that estate, which was delivered to the said *Clay*, ought to be restored to her for the purpose of discharging those judgments; (a suit she had brought to compel him to give security to refund, having been dismissed, in consequence of the said arrangement agreed upon between them;) and, moreover, that in the year 17 , she delivered sundry public securities or certificates belonging to the estate of *Robert Williams*, to the said *Clay*, to make sale thereof, for which he had never accounted. She, therefore, prayed an injunction to prevent all further proceedings on the judgment for 7,500*l.*; an account of the proceeds of sales of said certificates, and general relief."

Clay, by his answer, "passing over the obloquy which the plaintiff attempted to throw upon him, denied that he endeavoured to alarm her by any representations of the liability of the estate of *Robert Williams*; averring, that

he never gave to the plaintiff any bond for refunding; that the dismission of the suit which the plaintiff had brought against him was not to be ascribed to any other cause than the settlement with her, founded upon a conviction in her that the sum of 7,500*l.* was really due, even without interest;" as evidence of which, he stated that, "in the lifetime of *Robert Williams*, he had sued him and Mrs. *Williams*, for an account of the executorship, and a decree was entered against them, in *North Carolina*, for 10,000*l.* proclamation money, with liberty reserved to make known any credits at the succeeding term; (before which the said *Robert Williams* died, and the suit continued against her alone;) that he then made oath to the amount of his claim, and bail was demanded of *Robert Williams* by authority to the amount of 20,000*l.* He also denied that the plaintiff's answer to his bill was drawn by counsel employed by him. As to the public securities or certificates mentioned in the cross bill, he observed, that *Henry Clay* (and not himself) had the power of attorney from Mrs. *Williams* to dispose of them; which was done, and the proceeds accounted for to her, as would appear by the accounts and receipts hereunto annexed." But it does not appear that any such accounts and receipts were filed.

The deposition of *Theodorick B. M'Robert* (taken *May* 6th, 1801,) stated, that "some time about the year 1794, or 1795, he was requested by *Matthew Clay*, or *Sarah Williams*, either one or both of them, to attend at the house of the said *Clay* to transact some business interesting to both parties; that, on his arrival, after some conversation with the parties, he was requested to write a bond, from *Sarah Williams*, as executrix of *Joseph Williams*, for the sum of 7,500*l.* (as well as he recollects) to *Matthew Clay;* that, at the time of executing the said bond, the deponent understood, and was informed by both parties, that a certain *Hamilton* claimed a *British*

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debt of the estate of *Joseph Williams;* that an effort had been made to discharge this debt under the law of the state of *North Carolina*, authorizing payments into the state treasury in discharge of such debts; and that the whole, or a considerable part, of this debt had been paid or tendered, at the treasury of *North Carolina;* that the parties, doubting as to the liability of *Joseph Williams's* estate to the payment of *Hamilton's* debt, (the decision of the federal court on such payments being unascertained, or, at least, it not being certainly known, at that time, by the parties, how far that court had gone, or would go, in sustaining or rejecting such payments,) some plan was thought right and necessary to shelter the estate from a claim considered by both parties to be unjust, insomuch that *Joseph Williams's* estate ought, in equity, to be entirely exonerated; that, to accomplish this plan, the bond aforesaid was given, judgment confessed, under a representation made by the said *Clay*, that Mrs. *Williams* must and would find herself safer in the hands of said *Clay* than in the power of a *British* creditor; that bonds were interchangeably executed by the parties; the condition of which, as this deponent believes, (trusting to his best recollection,) stipulated the mutual dismission of suits then depending between them; one by Mrs. *Williams* against said *Clay* in *Pittsylvania* court, to compel him to refund the property received by him as a legatee of *Joseph Williams's* estate; the other, in some court in *North Carolina*, against the said *Sarah Williams*, as executrix of the said *Joseph*, by *Matthew Clay;* and that nothing was inserted in the said bonds respecting *Hamilton's* claim, and the arrangement on that subject, because the thing was fully understood between the parties, and it was thought more prudent not to reduce any thing of that kind to writing; that the mutual dismission of the suits above referred to did not (as this deponent understood) form any part of the consideration of the bond on which the judgment was confessed; and

that the proceedings on this bond were designed to answer no other purpose than to protect the estate of *Joseph Williams* from *Hamilton's* debt: this deponent knows of no settlement between the parties, of the accounts of *Joseph Williams's* estate, although the bond for 7,500*l.* expresses "upon a settlement," &c.; but he was requested to write the bond in that style, as best adapted to the nature of the transaction, and to guard against any impression that might arise from an inspection of the bond that it was a loose, random transaction; and he was at the same time assured by the parties that there had been no previous reference to the books of *Joseph Williams*, or any liquidation, final or otherwise, of the accounts relative to *Joseph Williams's* estate, and that the spirit and design of the transaction was to defeat *Hamilton's* claim, not to furnish evidence of a *bona fide* debt to *Matthew Clay;* and the sum specified in the bond was assumed as sufficient to shelter *Joseph Williams's* estate completely. This deponent further states, and he understood it as agreed by *Matthew Clay*, that the transaction should in no shape affect the estate of *Robert Williams*, either in the hands of his administratrix, or of his children; and that an assurance to that effect being required by the said *Sarah Williams*, was given by the said *Clay*, (as this deponent firmly believes and is persuaded,) previous to, or at the time of, signing the judgment bond, and thus a difficulty removed which might otherwise have prevented the signature of the said bond by the said *Sarah Williams*."

On the 6th of *November*, 1802, the deposition of the same witness was taken over again to the same effect, with these additions, that, being asked whether he knew that the dwelling-house and office of *Robert Williams* were burnt? he answered, "I know that they were, and since the transactions referred to in the foregoing deposition;" and being asked, "Do you recollect any other stipulation in the condition of the bonds interchangeably

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given ?" he answered, " Having seen (since I gave my first deposition a bond in the possession of Mr. *Clay*, which I believe to be one of the bonds above referred to, I think the condition contains a stipulation to rectify any mistakes that might be found in the settlement."

Sundry other depositions proved declarations by Mrs. *Williams*, (when *Clay* was not present,) of circumstances corresponding with the statement in her cross bill.

The chancellor, on a hearing, dismissed the bill of *Clay* and wife, and awarded an injunction to restrain him from proceeding to obtain satisfaction of his judgment until further order; decreeing, moreover, " that *Clay* should seal and deliver to Mrs. *Williams* his obligation, in the penalty of 2,000*l.* with condition to be void if he shall refund so much of the estate of the said *Joseph Williams*, received by him, as he ought to contribute towards discharging the debts of that testator; and that the cross bill be dismissed as to the public securities, or certificates, thereby demanded; the receipt of which by him is denied, and not proved ;" from which decrees *Clay* and wife appealed.

Peyton Randolph and *Botts*, for the appellants.

Call, for the appellees.

Thursday, March 21st. The judges pronounced their opinions.

Judge BROOKE. If, as was contended by the counsel for the appellees, the judgment confessed, in *Pittsylvania* court, upon the note, which is alleged, in the cross bill, to have been executed by the appellee *Sarah Williams*, for the purpose of defeating the claim of a *bona fide* creditor of *Joseph Williams*, her testator, were the only ground on which the appellant entitled himself to the aid of the court of chancery, he having exhibited no

settlement of accounts, or other document for the amount of which the note was given, I should be of opinion the aid of that court ought not to be afforded him; because a court of equity will not assist in carrying into effect compositions, of claims, by executors or other fiduciaries, unless the party praying it will first unfold and disclose the whole circumstances of the case to the court, that it may see there has been no fraud, and that every thing was fair; as is in effect said by Lord *Macclesfield*, in the case of *Pollen* v. *Huband*;(a) but, as it appears by the bill, answers, and exhibits in the first suit, that the complainant *Clay*, in right of his wife, the only daughter of *Joseph Williams*, is entitled to a considerable proportion of the large estate of which he died possessed; no administration account of which has been rendered, either in the lifetime of *Robert Williams*, the second husband of the appellee *Sarah Williams*, or by her, since his death; I am of opinion the appellant is entitled to an account thereof, unless something appears in the cross suit by which he has forfeited that title. If the deposition of *M'Robert*, aided by some circumstances which do not appear to me very weighty, be considered as outweighing the positive answer of the appellant, and, of consequence, as establishing the allegation in the cross bill, that the note on which the judgment was confessed, was executed by the appellee *Sarah Williams*, in pursuance of a plan preconcerted by the parties to defeat the claim of *Hamilton & Co.* upon the estate of her testator *Joseph Williams*, she then brings herself completely within the rule that in "*pari delicto potior est conditio possidentis*," or that the possession must stand for the right in a controversy between parties equally guilty of a fraud. Nor is there any thing in this case, which can entitle her to the benefit of the exception to this rule, laid down in the case of *Austin* v. *Winston*, in this court. She was in no danger of being oppressed by the appellant; he had no execution hanging over her; it was her

(a) 1 *P. Wms.* 751.

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own voluntary act, against which she ought not to be relieved by a court of chancery.

If, however, on the contrary, (as I am inclined to think is the case,) the deposition of *M'Robert*, aided as before mentioned, does not outweigh the positive answer of the appellant, corroborated by the circumstance, that the appellee *Sarah* permitted several years to elapse (during which the charge of a fraud, practised in obtaining the note by the appellant, might have been exhibited in some one of her answers to his bill) without having even noticed it, and also by the inconsistencies in the cross bill, relative to the counter bond, and the burning of the house of *Robert Williams*, then the allegations in the cross bill are totally unsupported by proof, and it ought to have been dismissed. But pursuing the rule before stated, relative to compositions by executors; and it appearing that the appellant has received a part of the estate of *Joseph Williams*, and that there are outstanding debts to be satisfied; I am of opinion that the appellant, before he has the aid of the court of chancery, ought to give the security required by the chancellor in the cross suit; and that (waiving his judgment until an account shall come in) he then will be entitled to an account (not exceeding his judgment in amount) of the estate of *Joseph Williams*, deceased, according to the principles of the decree, which has been agreed upon by this court. I am, therefore, of opinion, that both the decrees bereversed.

Judge TUCKER. These causes, as between the appellant *Clay*, and the appellee *Sarah Williams*, are cross suits. The complexion which the deposition of *Theodorick B. M'Robert* (the lawyer who was employed to draw the bond, and to obtain the judgment alluded to in the original suit, and complained of in the cross suit) gives to the transaction between those parties, seems to me to afford to neither any claim to the aid of a court of equity.

My opinion in the case of *Austin* v. *Winston*,(a) to which I still adhere, will save me the trouble of repeating my reasons in this case. The opinions of some of the judges delivered on that occasion, in support of the decree which was pronounced, operate, perhaps, in favour of a widow, who states that she was imposed upon by a son-in-law, in whom she had confidence; (though circumstances appear to disprove the latter part of that allegation;) and the uncertainty of the public mind upon the much agitated question respecting the recovery of *British* debts, in the federal courts, (which possibly was not then decided,) may afford some apology for both, for wishing to avoid the payment of such a debt, by every lawful means; but cannot, in my opinion, sanction the plan which that deposition discloses, which (though denied by the answer of the defendant in the cross suit) stands uncontradicted in the original suit. I therefore think the chancellor would have decided rightly in dismissing both suits, if there had been no other object than what relates to that transaction: but as *Clay*, in right of his wife, appears to be entitled to an account, I am of opinion that, instead of dismissing the plaintiff's bill in the original suit altogether, the chancellor ought to have retained it for a settlement and adjustment of the accounts of the estate of *Joseph Williams*, deceased, not only with his executrix *Sarah Williams*, one of the appellees, but with the other executors of that testator or their representatives, (who ought, for that purpose, to be made parties to the original suit,) and with the representatives of *Robert Williams*, the second husband of the said *Sarah*, who acted in her behalf, as executor of *Joseph Williams*, from the time of his intermarriage with her. And if, upon that settlement, it shall appear that the estate of *Robert Williams* is, in justice and equity, indebted to that of *Joseph Williams*, the representatives of the former ought to contribute their several proportions to the payment thereof,

(a) 1 *H. & M.* 33.

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according to the value of the property they may respectively have received from his estate, since his death; except so much thereof as may have been received by *John Call*, in virtue of the decree of the court of *Pittsylvania* county; liberty being reserved to the plaintiff in the original suit to show, if he can, that such decree was obtained by fraud and collusion between the parties to that suit: and that so much of the decree in the cross-suit as directs the appellant to give bond to contribute towards the discharge of the debts of *Joseph Williams*, and as is not contradicted by the decree which has been agreed on, be affirmed; and the remainder of both the decrees reversed.

Judge ROANE. This is a bill brought by *Clay* and wife, against the appellee Mrs. *Williams*, as executrix of *Joseph Williams*, her first, and administratrix of *Robert Williams*, her last husband, and against the children of *Robert Williams*, who are the distributees of his estate. Though not very formally or technically drawn, it prays the aid of the court of equity, to assist them in getting the benefit of a judgment obtained against Mrs. *Williams*, by confession, in the court of *Pittsylvania* county, for 7,500*l.*; and, as conducive thereto, prays an account of the administration of *Joseph Williams's* estate by Mrs. *Williams*, and by *Robert Williams* acting in her right; and of *Robert Williams's* estate, who is charged with having wasted the estate of *Joseph Williams*, and whose estate is, consequently, alleged to be responsible therefor; as also a discovery, from the distributees of *R. Williams*, of the portions of his estate, which have severally come to their hands.

The bill was exhibited on the 10th of *September*, 1795. On the 26th *February*, 1796, Mrs. *Williams*, the principal defendant, answered this bill, but set up no ground of fraud to impeach the judgment on which the bill of *Clay* is predicated. On the 24th of *September*, 1798, she

exhibited another answer, (without any order or leave of the court for that purpose,) which, like the former, while it is full upon the subject of the administration of the estate of *Joseph Williams*, is silent upon the subject of fraud. It was not until the 10th *September*, 1800, five years after the institution of the suit in question, that she set up this ground of defence by a cross bill; thus endeavouring to avail herself of a defence, by the testimony of others, which her conscience was probably too tender to allow her to set up, upon her own oath as defendant, and which she was possibly urged to set up by the importunities of the other defendants, and by the increasing pressures which were advancing upon her.

In taking this ground of defence, in her cross bill, (which is flatly denied in all its parts, by the answer of the defendant thereto,) she comes with a very ill grace into a court of equity. She comes alleging her own turpitude and fraud, in a case in which she was influenced by no duress or coercion whatever, and in which her colleague in the fraud had her not in his power, further, at least, than his just claims against the estate, of which she was executrix, would extend.

This case is, therefore, widely different, in this respect, from that of *Austin* v. *Winston*, in this court; and the appellee now in question stands, on this point, entirely in the situation of a person not to be received or countenanced in a court of equity. While she stands so, upon the general principle, the strength of that principle is greatly increased against her, by the before-mentioned consideration, that she is endeavouring to avail herself of a defence by the testimony of others, which she did not dare to set up, by her own oath, in the character of a defendant.

The sole witness, whom she opposes to the answer of Mr. *Clay* to the cross bill, is Mr. *M'Robert*. He was an attorney confidentially employed, according to his

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own account, by both the parties, to transact the business between them. He was an attorney; for although this is not said by him or others in detailing the circumstances of that particular transaction, (no question being asked him upon that point,) yet, very shortly afterwards, he got a judgment upon the bond, as the attorney of the plaintiff, as appears by the record; but he was at least the scrivener who acted confidentially between the parties, in drawing the bond in question.

The settled law upon this subject is, that counsel or attorneys, so far from being obliged, are not permitted, to give evidence of such matters as come to their knowledge in the way of their profession; that this principle extends even to scriveners acting as attorneys in any particular transaction; nay, even to interpreters going between the attorney and his client; that this is not the privilege of the counsel, &c. but of the client; without which it would be impossible that any business could be done with safety; that a court will even stop a witness of this class seeming desirous or disposed to reveal confidential communications; and that courts of equity will refer the depositions of such witnesses to a master, to expunge so much thereof as shall be found to be of this character. (Such reference was not necessary in the case before us, as the whole of the testimony contained in the deposition is of that character.) All these positions are to be found in 2 *Bac.* 579. and the cases there cited: they are bottomed upon the soundest propriety, and go to the utter exclusion of the testimony of Mr. *M'Robert* in the case before us. As to any supposed waiver of this objection, on the part of the appellant, it is neither seen that he cross-examined the witness; was present at his examination; or knew that that particular witness was to be examined; nor, if it were otherwise, would such waiver be justly inferred therefrom.

In 2 *Bac.* 579. it is said, that by the practice of the courts, if a witness be produced and sworn by the plain-

tiff or defendant, being once sworn, the other may examine him to any thing whatsoever, though he be the solicitor of the party who produces him; but this is with an exception of matters confidentially communicated to him by his client.

Again, this same idea seems to be admitted by the before-mentioned authority, which states that a court will stop a witness of this class being desirous to reveal confidential communications.

This doctrine would seem to hold, *à fortiori*, in relation to examinations before commissioners, who have not power, as the courts have, to reject a witness who is produced for examination; and, consequently, it behoves the adverse party to make the testimony as little adverse to him as possible, lest his objection to the admissibility of the deposition should fail him, when it comes to be decided on by the proper tribunal. This position seems to have been taken by this court in the case of *Blincoe* v. *Berkeley*, 1 *Call*, 412. There is, on the other hand, no great utility resulting from a party's objecting to a deposition on a ground which is equally manifested to the court upon the face of the deposition itself. As, therefore, Mrs. *Williams* can neither be received to allege the fraud herself, which she sets up in this case; nor her sole witness be admitted to testify thereto, without overturning the best established principles of the law; the answer of Mr. *Clay* stands entirely unimpeached in the point in question, and all further inquiry upon this topic is entirely unnecessary. While I say this, I am by no means prepared to admit that that answer would be outweighed by the opposing testimony, were the deposition of Mr. *M'Robert* not to be excluded. Although there may be some slight circumstances (throwing the conversations of Mrs. *Williams* out of the question) seeming to support that deposition, there are others, on the ther hand, equally strong to corroborate the answer. These, or most of them, have been stated by the appel-

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lant's counsel, to whose view of the case I beg leave to have a particular reference.(1) They are not necessary to be repeated and analyzed by me, in the view I have taken of this subject. I go by the well-established principles of law and equity, and the rules of evidence; (any private surmises, or conjectures of my own, or of others, touching this particular case, to the contrary notwithstanding;) as being the only safe and proper guides by which a court of justice can be governed. On the ground of the fraud alleged in the cross bill, therefore, the claim of the appellant cannot be affected; especially, as he has stated that the bond was preceded by a settlement of the accounts; and that in consideration thereof, he dismissed a suit, brought by him, against the appellee *Sarah Williams*, in a court of equity in *North Carolina*, by which he had a prospect of recovering as large, or a

(1) Note by the Reporter. The circumstances chiefly relied upon, for the appellant, in support of his answer to the cross bill, were, 1. That charges of fraud and improper conduct were exhibited by him and Mrs. *Williams*, against each other in their respective suits in *Granville*, (*North Carolina*,) and *Pittsylvania*, (*Virginia*,) which proved that no friendship or confidence existed between them, sufficient to produce any undue influence on the part of *Clay*; 2. Those suits were reciprocally dismissed upon her giving the bond for 7,500*l.* which, therefore, appears to have been the effect of a compromise; 3. Her two answers to *Clay's* bill in the original suit, did not charge him with obtaining that bond by fraud; 4. That bond is alleged in the cross bill to have been intended for the protection of the estate of *Robert Williams*; yet it was given by her as executrix of *Joseph Williams*; and, 5. The original suit was brought by *Clay* and wife four years before the burning of her mansion-house and papers; yet she says in the cross bill, that after finding that his bond was burnt, he determined to enforce the judgment against her.

On the other side, it was observed that *Clay's* answer was not expressly responsive to one of the most material allegations in the bill; it comes very near, but cautiously avoids, a direct denial of the allegation, that the sum of 7,500*l.* was an assumed sum without any real settlement. He talks about a settlement, but does not assert it. On the contrary, he says the amount of *Hamilton's* claim against the estate, (which he avers is the "only one he ever heard of,") was not ascertained; how, then, could there have been a settlement? The answer is a *felo de se*. It was also contended that if Mrs. *Williams* was *particeps criminis* in the fraud attempted by *Clay*, the estate of *Joseph Williams* (which she only represented as executrix) ought not to be affected by it.

greater sum, from her, as the executrix of *Joseph Williams.*

But the appellant coming here for the aid of the court, relies upon a composition of a debt by an executrix; and that without showing the particulars on which such composition is founded. I entirely concur with Judge BROOKE, that such compositions are not favoured in equity, save when they are beneficial to those for whom the executors are acting: all compositions of an opposite character are discountenanced in a court of equity; and, in favour of the *cesti que trusts*, the creditor, having obtained an advantage thereby, will be curtailed and brought down to the proper standard; especially, where (as in this case) we can get at him upon the ground of his applying for the aid of the court of equity. He shall not have that aid, unless he will do what is just and right, which is to give up his advantage, (at least so far as it affects those for whom the executor was acting,) and abide by the result of a fair account and settlement. In support of the above ideas, upon this point relative to compositions by executors, I refer, among others, to the cases of *Blue* v. *Marshall*,(*b*) and *Pollen* v. *Huband.*(*c*) The result, as applied to the case before us is, that while the appellant shall never recover more than the amount of his bond with interest, (for he was acting in his own right, and entirely competent to make even an injurious compromise for himself,) he shall be limited in his recovery, on the other hand, by the sum to which, upon an account, he can show himself to be justly entitled. My opinion is, therefore, that the decree in the original suit ought to be reversed, and an account directed of the administration of *Sarah Williams*, and of *Robert Williams*, acting in her right, of the estate of *Joseph Williams*; of *Sarah Williams's* administration upon the estate of her husband *Robert Williams*; and of the property received by the appellees (children of *Robert Williams*) from his administratrix; (excluding the appel-

(*a*) 3 *P. Wms.* 381.
(*b*) 1 *P. Wms.* 751.

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lees *John* and *Lucinda Call*, the decree in whose favour, in *Pittsylvania* court is conclusive to show, that there was a marriage contract with *Robert Williams*, and competent to bind the co-distributees, who claim as volunteers under him; liberty being at the same time reserved to the appellant to show, if necessary, that their exemption should not prejudice him, who was no party to the decree aforesaid;) and, upon such account being taken, that the balance thereby found justly due to the appellants from the estate of *Joseph Williams*, or from the estate of *Robert Williams* in consequence of his mismanagement of the same, so far as such balance does not exceed the amount of the judgment recovered in *Pittsylvania* court, as aforesaid, with interest thereupon, shall be decreed to them, to be paid out of the assets of *Joseph Williams's* estate, or out of *Robert Williams's* estate, so far as he shall be found to have been justly indebted thereto; to which payment, if necessary, the distributees of the said *Robert Williams* (*John* and *Lucinda Call* being excepted as aforesaid) shall be held contributory. As to the decree on the cross bill, I am of opinion that it should be also reversed, so far as it perpetuates the injunction to the judgment aforesaid, and be reformed so as that judgment shall remain enjoined only until the account decreed in the other suit shall be taken, after which, the same shall remain perpetually enjoined for so much thereof as shall exceed the sum found due to the appellants, with legal interest, and be dissolved for the residue. I am therefore of opinion, that both decrees be reversed, with costs, and the cause remanded to the superior court of chancery, to be finally proceeded in according to the principles now stated.

Judge FLEMING. There being no difference of opinion among the judges as to any points of essential importance, the following is to be entered as the opinion and decree of this court.

"If the *sole* object of these suits which, as between

the appellant, *Matthew Clay*, and the appellee, *Sarah Williams* only, may be considered as cross suits between those parties, had been, on the one hand, to compel a discovery of the assets of *Joseph Williams*, deceased, in the hands of the appellee *Sarah*, his executrix, to satisfy the judgment confessed by her on a note given to the appellant for the purpose stated in the deposition of *Theodorick B. M'Robert* in the first suit, and charged by the appellee *Sarah*, in her cross bill, and, on the other, to be wholly relieved from that judgment, as obtained by fraud and imposition, and a collusion between those parties to defeat a just claim against the estate of the said *Joseph Williams;* this court would have approved of the dismissal of the appellant's original bill, and would have considered the appellee *Sarah* as little entitled to the favour of a court of equity, on the grounds mentioned in her cross bill, (although the facts therein alleged had been fully proved,) and would have left both parties in the situation in which they had placed themselves; but, as it appears to this court that the appellant, in right of his wife, is well entitled to an account and settlement of the estate of the said *Joseph Williams*, deceased, not only in the hands of the appellee *Sarah*, his executrix, but in those of the other executors named in the will of the said *Joseph*, (who, for that purpose, ought to be made parties to the original suit brought by the appellant,) and also in the hands of *Robert Williams*, the second husband of the said *Sarah*, (who acted in her behalf, as executor of the said *Joseph* from the time of his intermarriage with her,) or his representatives or distributees, the original bill ought not to have been dismissed as to that object, but retained for the purpose of such an account and settlement; in which account, the appellant ought to be charged with such part and proportion of the estate of the said *Joseph Williams*, as the guardian account settled between the said *Robert Williams* and the appellant, (by virtue of an order of *Pittsylvania* county court, made at

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the instance of the said appellant,) shows to have been accounted for, and delivered to the appellant, in right of his said wife, by the said *Robert* in his lifetime. And if, upon a just and equitable settlement and adjustment of such accounts, it shall appear that the estate of the said *Robert Williams*, in the hands of his administratrix, or of his distributees, is indebted to the estate of the said *Joseph*, the said administratrix, out of the assets in her hands to be administered, or the several distributees, respectively, according to the portions of the said *Robert's* estate which they may have received since his death, ought to satisfy and pay to the appellant the amount of his just proportion of the said *Joseph's* estate, after payment of all his just debts, not exceeding seven thousand five hundred pounds, *Virginia* currency, the amount of his judgment against the administratrix; from which account of the estate of the said *Robert Williams*, in the hands of his distributees, is to be excluded whatever may have been recovered and received by *John Call*, as the marriage portion of his wife *Lucinda*, in the lifetime of the said *Robert*, or by virtue of the decree of the court of *Pittsylvania* county, for that account, since his death; liberty being reserved to the plaintiff in the original bill to controvert the validity of such marriage contract, or to show, if he can, that such decree was obtained by fraud and collusion between the parties to that suit, if necessary for the discharge of his claim against the said *Robert's* estate.

4. Property claimed, by a son-in-law, under a marriage contract with a decedent in his lifetime, and recovered, by a decree against the administratrix and distributees, is not in any manner responsible to the creditors of such decedent; unless it appear that such decree was obtained by fraud and collusion between the parties.

"This court is further of opinion, that the said *Matthew Clay*, the defendant in the cross bill, having, by his answer to that bill, so far admitted that he possessed a knowledge of the disposal of the certificates belonging to the estate of the said *Robert Williams*, in the cross bill charged to have been delivered to him to make sale of, as to have the accounts and receipts respecting the

5. If a defendant, called upon to account for sales of certain public securities, deny that he ever received them; yet aver that the proceeds were accounted for to the plaintiff, "as would appear by the accounts and receipts annexed to his answer," he ought to produce such accounts and receipts, or answer to interrogatories respecting them, if required so to do.

same in his hands, (which he refers to in his said answer as exhibits, but does not appear to have produced them,) he ought to produce such accounts and receipts, or to answer to interrogatories respecting them, if required so to do.

"And this court, approving of so much of the decree in the cross suit as directs that the appellant shall give bond to contribute towards the discharge of the testator *Joseph Williams's* debts, affirmeth the same; and, reversing so much of both decrees as is not approved of by this decree, the suits are remanded to the said superior court of chancery to be proceeded in, according to the principles of this decree."

6. A legatee is not entitled to a decree, but on the terms of giving bond and security (if demanded by the executor) to refund, in case it be needful, for the payment of debts.

Roberts's Widow and Heirs *against* Stanton.

Argued Wednesday May 30th, 1810.

IN *November*, 1797, *William Stanton* filed his bill in the superior court of chancery for the *Richmond* district,

1. It is error to enter a decree against *infant* defendants, without assigning them a guardian *ad litem*; and though the infancy did not appear in the original proceedings, yet, if it be alleged in a petition for a rehearing, (the decree being interlocutory,) a guardian *ad litem* ought to be appointed.

2. It is not error in a court of equity to direct *commissioners* instead of a *jury*, to state and report an account of the profits of *land*.

3. Rents and profits of land, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought not to be charged against his *executors* and *heirs jointly*, but apportioned among them according to their respective interests.

4. As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given by a will, to executors or trustees, to sell lands for payment of debts or legacies. A conveyance, therefore, by *one* executor or trustee *only*, (instead of *three*,) but in all other respects conformable to the intention of the testator in creating the trust, will be supported in favour of a purchaser for a *valuable consideration*; and this, notwithstanding it be provided by the will, that if one or more of the executors, or trustees, should die before the object of the trust was accomplished, others should be appointed, by the survivors, jointly with them to finish the execution of the trust.

5. A deed of above thirty years' standing requires no further proof of its execution than the bare production, where the possession has gone according to its provisions, and there is no apparent erasure or alteration.

6. A *patent, though not registered,* is good *in equity* against a purchaser *having notice.* And *quære*, is it not also good *at law?*

7. In such case, information of the existence of the patent, by neighbourhood report, and from a person declaring he had seen it, together with knowledge of possession and cultivation by tenants of the patentee, is *sufficient notice*, to bar the laying a warrant upon the land *as waste and unappropriated.*

8. *Quære*, is a patent, *not registered*, good, *either at law, or in equity*, against a purchaser *without notice*; no proof appearing of *visible* possession, or cultivation, by the patentee in person, or by his tenants?