

CHARLOTTE, DUCHESS D'AUXY, v.  
SOUTTER AND ANOTHER, EX'RS.

*Circuit Court, S. D. New York.*      October 6. 1886.

WITNESS—SUITS BY AND AGAINST EXECUTORS  
AND ADMINISTRATORS.

The exclusion of testimony of parties to actions by or against executors, administrators, or guardians, under section 858, Rev. St., does not extend to an inquiry incidental to taking an account, and not upon an issue which is the subject of a decree.

In Equity.

*Lewis Sanders*, for complainant.

*Vanderpoel, Green & Cuming*, for defendants.

WHEELER, J. This cause has now been heard upon a motion to exclude the testimony of one of the executors upon the accounting heretofore decreed to settle the amount of the estate in the hands of the executors, one-twentieth part of which is decreed, when ascertained, to the oratrix. The testimony is sought to be excluded under section 858, Rev. St. which provides that, in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, with certain qualifications not here material. The testimony offered is as to a transaction between the testator and the executor offering himself as a witness. No judgment can be rendered in this action upon that transaction, however. The inquiry is incidental to taking the account, and not upon an issue which is the subject of a decree. Therefore the testimony does not appear to come 734 within the statute. *Monongahela Bank v. Jacobus*, 109 U. S. 275; S. C. 3 Sup. Ct. Rep. 219.

Motion to exclude testimony denied.

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