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Compensation of Executors

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COMPENSATION OF EXECUTORS.

By FREDERICK VIERLING.

We present for consideration the question: Whether bequests to executors intended to be in lieu of compensation for services should prevail over compensation allowed by statute or rule of court. Herein we review the authorities bearing on the proposition or closely related to it. There is considerable conflict on the question in the reported cases of the various jurisdictions and also there is lack of uniformity in the decisions within each of several states.

FORMERLY FIDUCIARIES NOT ENTITLED TO COMPENSATION.

It will be surprising to many present day officers of fiduciary corporations to be informed that formerly there were laws prohibiting fiduciaries from receiving compensation for services rendered to estates in their charge. Such was the case at the time of the adoption of the common law of England by the various colonies of the United States.

We quote the following from opinion rendered in 1842 in case of *Meacham v Sternes*, 9 *Paige*, N. Y., 398, to-wit: "There is no doubt that the rule of the English court of Chancery was to refuse to allow compensation to executors,

guardians, committees of lunatics and other trustees, either in the shape of commissions or otherwise, for their personal services in the execution of the trust, beyond their actual expenses and disbursements. * * * In 1815 Chancellor Kent held that executors and other trustees were not entitled to commissions or compensation for their services in the execution of their trust where no provision therefor was made in the will or other instrument by which the trust was created; that the practice in some of our sister states was different." We quote also from opinion rendered in 1915 in the case of *Connolly v Leonard*. 114 Me. 29, to-wit: "It is familiar learning that under the common law of England executors and administrators were entitled to no compensation for the discharge of their duties." Such was supposed to be the law in New York previous to the passage of the Act of 1817 relative to executors, administrators and guardians.

Justice Cullen in 1899 in his opinion in *re Arkenburgh*, 38 App. Div. N. Y., 479, wrote as follows, to-wit: "Executors commissions are none too large for faithful service and it is my opinion that the best practice is to give executors full compensation and then hold them to the strictest accountability. I imagine persons could readily be got to serve in the case of a large estate without pay, but they would be apt to manage the estate so as to get indirectly a much larger profit than that allowed by the statute. It is such management that leads to the depletion of trust estates. * * * Except where it is a matter of affection or duty, services rendered without pay are generally worth no more than what is paid for them."

FIDUCIARIES NOW ENTITLED TO COMPENSATION.

The English practice of not allowing compensation to fi-

duciaries was not adopted in this country. To change the rule some of the states adopted appropriate statutes while in other states the courts declared it to be the custom to allow compensation and approved such custom.

Probably the first case in this country touching the question of compensation of an executor arose in Virginia in 1793. See *Granberry v Granberry*, 1 *Wash. Rep. Va.*, 250. That case was considered by the Court of Appeals of Virginia and the court decided that an executor was entitled to compensation for his trouble and by custom the allowance was generally fixed at 5 per cent upon his actual receipts. In 1809 a similar question was considered in Virginia in the case of *Miller v Beverleys*, 4 *Hen. & Munf. Rep. Va.*, 415. The latter was the case of a trustee appointed by a deed of trust and the Chancellor declared it was inconsistent with natural justice to ask for the services of a trustee and then to refuse to pay him a reasonable compensation therefor. The Chancellor refused to be governed by the English decisions on this question and allowed commission usually given to executors by the custom of the state.

In this country nearly every state has provided by legislative enactment for the just and moderate remuneration for services of this class of trust officers—referring to executors and administrators. See remarks of court in decision in 1915 in case of *Connolly v Leonard*, 114 *Me.* 29.⁶

STATUTES AND RULES OF COURT FIX COMPENSATION.

In states where the statutes or well established rules of court definitely fix the rate of compensation of executors and other fiduciaries, such rate is necessarily conclusive. Where such rates are fixed for executors and not for other fiduciaries

the courts early followed the suggestions of such rates for fiduciaries generally, as was done in 1809 in the Virginia case of *Miller v Beverleys*, 4 *Hen. & Munf. Rep. Va.*, 415. In New York in 1842, in the case of *Meacham v Sternes*, 9 *Paige, N. Y.*, 398, the Chancellor suggested: That the equity of the statute allowing a fixed compensation to executors and guardians for their services by way of commissions might properly be extended to the case of other trustees performing similar services, so as to allow such trustees the same compensation, where the instrument creating the trust was silent on the subject.

MARYLAND RULE WHERE WILLS ATTEMPT TO FIX COMPENSATION.

In cases where wills fix the compensation of executors at less than the usual allowances or where the will declares no compensation shall be allowed, questions have arisen as to whether the executors should take the usual allowance or take according to the will.

In Maryland, Alabama and New Jersey the courts have adopted the unusual theory that the legal provisions should prevail over the provisions of the will.

Maryland early adopted a statute covering the proposition. *Laws Md. 1798, Chap. 101, Sec. 10, Par. 2.* The statute provided that an executor shall be entitled to credit for his commission, "which shall be at the discretion of the court not under 5 per cent or exceeding 10 per cent on the amount of inventory or inventories excluding what is lost or hath perished." Par. 5 of Sec. 14 of the same Act reads as follows: "If anything be bequeathed to an executor by way of compensation, no allowance of commission shall be made, unless

said compensation shall appear to the court to be insufficient and if so it shall be reckoned in the commission to be allowed by the court." The statute came under review of the Maryland court in 1815 in the case of *Eversfield v Eversfield*, 4 *Harris & J Rep. Md.*, 12, in which it was asserted that the executrix had agreed to act without compensation. The executrix denied that she agreed to act without commission. The court ruled, even if true, the court can not compel her to execute that intention; that the Act of 1798 is express that the court shall allow a commission and this commission is to be not less than 5 per cent and not to exceed 10 per cent; that the Orphans Court could not refuse to her that which the law expressly secures to her. It will be noticed that the precise question herein presented was not involved in the *Eversfield* case but that case is mentioned because it declared a principle which was followed in a later case involving the precise question. The precise question arose in 1846, *McKim v Duncan*. 4 *Gill. Md.*, 72. The court said: The question is, can the testator take from the court the power which the law gives to it and which is conferred in language which makes it their duty to allow not less than 5 per cent. The will provided: "I do hereby declare it as my will and intention that neither of my said executors shall be entitled to any commissions for settling my estate, but all necessary expenses shall be charged to my estate." The court held the provisions inconsistent with the Act of 1798. The question arose for the second time in Maryland in 1883, *Handy v Collins*, 60 *Md.* 229. The court said: "It has been explicitly decided that a testator can not by anything put in his will in any wise affect the commissions

which the law allows his executor; the testator can not deprive the executor of such commissions nor cut them down, nor take away the discretion in the Orphan Court." The Maryland Court gave the statute an unusual effect. Does the language quoted justify the decisions? We think not. The language can not reasonably be said to require that an executor do not accept as compensation less than the court might allow within the limits authorized by the statute. Unless positively prohibited by law it should not be said that a testator may not make a bequest to his executor to be taken as compensation in lieu of an allowance the court may make. While the court has given the strained construction to the statute along the line indicated, yet the court in 1855 drew a fine line of distinction where the principle was sought to be applied to a guardian in the case of *Manning v Baker*, 8 *Md.* 44.¹³ The Maryland court indicated that the Act mentioned should be applied only to executors and not to other fiduciaries. In the latter case a guardian was appointed upon his representation to the court that he would take care of money and property of his ward until her majority and make no charge therefor in any manner whatever and account to her when she attained majority for the full amount of principal and interest without any deductions. The court ruled such contract to be binding; that it is not like the case of *McKin v Duncan*, as that decision was based on the peculiar language of the Act of 1798.

In the decisions of the Maryland courts no reference is made to the provisions of Par. 5, Sec. 14, and it must be assumed that the court considered that the statute did not apply or that the court overlooked the provision. Does the second

word "anything" refer only to lands or chattels or securities or choses? If so, then the provision does not apply to the cases considered. If the word "anything" includes money, then the provision does apply and it was proper for the court to conclude that an executor was not bound to accept compensation fixed by will in lieu of allowances of court under Par. 2, Sec. 10. In the latter view, the Maryland cases are not authority for courts of other states not having similar statutory provisions governing compensation of executors.

The first case in New Jersey did not allow the executor usual compensation, in lieu of the provisions of the will. The case was decided in 1850, in *re Haines*, 8 *N. J., Eq.* 506. The testator provided: "It is my will and I do order and direct that all my just debts and expenses be duly paid and satisfied by my executors out of the legacies bequeathed to my two sons as soon as conveniently can be after my decease." The court said paying debts is a part of the services for which commissions are allowed. The debts in this case are by the will to be paid out of the property devised to the sons, they to receive no commissions for that service. The devise to them was the consideration in the mind of the testator why the sons should pay the debts; testators frequently provide in their wills a mode or amount of compensation to executors for settling the estate. The second case in New Jersey was decided in 1914, *Heath v Maddock*, 83 *N. J., eq.* 681. The court said: It is possible, perhaps probable, that testatrix did not know the state of the law which provides that an executor may renounce the specific compensation for services and claim such compensation as the court may award; in my judgment the limitations

can not be enforced as against the renunciation of defendant; instead of the fixed sum of \$500 specified in the will, the court allowed 3 per cent on the total of the estate. In the third case in New Jersey, decided in 1924, *Tichenor v Bank*, 125 *Atl. N. J.*, *Eq.* 323, the will nominated T and M executor and executrix of the testator, without bond; both were particularly requested to qualify and act as such without compensation, further than their actual and necessary expenses incurred on or about the administration of the estate. The court said: I think the cases in this state clearly show that the executors are entitled to their commissions irrespective of any statement in the will.

In the first case the New Jersey court avoided the question at issue. In the second and third cases that court refers to the cases from Maryland and accepts them as establishing the rule to be followed in New Jersey, although there did not appear to be any New Jersey statute relative to the question. This the New Jersey court should not have done, since decisions based on a statute can have little or no weight in a state having no such statute.

The one case in Alabama on the question was decided in 1874, *Raines v Raines*, 51 *Ala.*, 237. It appears that the testator bequeathed to each of the executors \$1,000 as compensation for their services in executing the provisions of the will; the court deemed the amount inadequate. The court said: We can hardly suppose that testator meant what he said; by making it a bequest, it could scarcely by a strained construction be said that he intended the bequest as a gratuity or acknowledgment of the services the executors would render him in executing the will. Under the circumstances of the case

the court below made the executors an allowance of 10 per cent. The Appellate Court did not think this excessive and permitted the allowance to stand.

The Alabama court assumed that the testator made a mistake and deliberately ignored the intentions of the testator as expressed in the will.

PENNSYLVANIA RULE WHERE WILLS FIX COMPENSATION.

Many cases have arisen where testators by wills limited the compensation of executors and where no claim was made that the provisions contravened any statute or definite rule of court, but where the executor nevertheless claimed greater compensation than was provided for in the will.

There seem to be about seven cases in Pennsylvania touching the proposition. The first case was decided in 1878, in re Hartolets, *1 Walker, Pa., 77*, in which the court said: The appellant accepted the office of executor under a will limiting the compensation he was to receive for his services as such, and it would have to be a case of extraordinary character which would induce the court to allow more. The second case was decided in 1897 in re Hays, *183 Pa. 299*.¹⁹ The court said: The executor is under no obligations to accept the trust; if he does not like its terms, he is perfectly at liberty to decline it; but if he accepts it and claims his right to act as executor under the will, certainly he is bound by the terms in which that right is given; if the provisions as to his compensation is obligatory upon the estate, it certainly should be held obligatory upon the executor. The third case was decided in 1901, in re Betts, *198 Pa., 641*. The court said: The testator gave his executors power to sell at public or private sale the whole or

any portion of his real estate; he further directed his executors to keep his real estate in good order and repair, pay taxes, water rates, and interest on encumbrances, and pay to his wife the net rentals and income during life; he also directed that his executors shall be entitled to deduct from the gross income of the estate for their services as such executors the sum of 5 per cent thereof; the executors claimed, in addition to the 5 per cent on gross rentals, a percentage on mortgages which they had executed on the real estate, but their claim for commissions on mortgages was disallowed. The fourth case was decided in 1902, in *re Hill*, 16 *Pa. Dist. Rep.* 985. The testator bequeathed to N \$100 in consideration that he and his wife, K, act as executors of the will. The court said: The executors have no cause to complain; they must have known the value and character of the estate at the time they applied for letters, * * * they deliberately made a contract to perform certain services and if they then considered the sum of \$100 to be paid to the husband insufficient, the right to renounce was theirs. The fifth case was decided in 1909, in *re Sweatman*, 223 *Pa.*, 552. In that case the testator directed that each one of his three executors should receive \$6,000 in lieu of commissions; all three qualified; four months subsequently one died; the settlement of the estate was only well under way and the executors of course had not completed their work. It was contended that the estate of the deceased executor was not entitled to his \$6,000, since it was to be for services as executor in administering and closing the estate. The court said: We think nevertheless that the deceased executor's estate is entitled to his \$6,000 in full; the testator himself determined the amount that the deceased ex-

error should receive and the testator took the risk of the deceased executor's illness and death. * * * When the executor once qualified as executor he became entitled to some compensation, whether little or large is immaterial; his death did not deprive his estate of his right to what had been earned and it was in lieu of that compensation that he was given the legacy. The sixth case was decided in 1912, in *re Fox, 255 Pa., 105*. The court said: A bequest in a will made to one who is appointed executor is presumed to be a bounty and not compensation for services to be rendered in settling the estate, unless it appears expressly or by clear implication that the testator intended that the legacy should be received by the executor in lieu of his commissions. If the will discloses that it was the intention of the testator to reward the executor for his services by the legacy it is conclusive on the executor and if he accepts the position and administers the estate by virtue of his appointment as executor he must accept the reward for his service named in the will. Of course this does not apply to administrators with will annexed. They are entitled to reasonable compensation for their services regardless of any declaration made by the testator in his will fixing amounts for administering the estate; administrators with will annexed hold the office by virtue of the law while an executor is appointed by the will. The seventh case was decided in 1913 and in this estate has taken a long while in its settlement and required constant duties on the part of the executors. * in *re Lennig, 53 Pa. Superior Ct., 599*. The court said: Ad-
* * If the executors had considered the compensation fixed by the testator as insufficient for the services necessary to carry out his will, it was their right and privilege to decline to accept the offer; having qualified as executors under the

will and received the compensation fixed thereby, it is now too late to repent the bargain and ask for additional payment.

The foregoing seven cases were applied in connection with solvent estates. In 1831, in re Guien, 1 *Ashmead Rep. Phila. Co.*, 317, the court considered the proposition with respect to an insolvent estate, where the will of the testator fixed compensation of his executor at 2 per cent on net proceeds of his estate which at the time of his decease was apparently solvent but on the settlement turned out to be insolvent, and the compensation fixed was wholly inadequate. The court increased the amount from 2 per cent to 4 per cent on the net proceeds. The court explained: It is to be understood that this decision is founded upon the fact of the insolvency of the estate which in the opinion of the court leaves the question of commissions unaffected by the will and dependent on the general merits of the claim.

KENTUCKY DECISIONS NOT UNIFORM.

There are three cases in Kentucky touching the question. The first decided in 1869, *Brown v Brown*, 6 *Bush. Ky.*, 648. In that case the will fixed the compensation of the executor. The court ruled: The executor qualified and undertook the execution of the will, knowing that his compensation was fixed and limited to the sum therein named; his protest can have no effect after he qualified; the only way to make his protest available would have been to refuse to qualify; but having qualified he must accept the provision made for him in the will and if he is now not content with it the law can offer him no remedy. The second case was decided in 1872, *Young v Smith*, 9 *Bush. Ky.*, 421. The Appellate Court held that the court below erred in refusing to make the estate of the de-

ceased executor an allowance for his services. It is true the will fixed the compensation of the executors and trustees at \$1,000. Only one of them qualified, and for the reason doubtless that the compensation was insufficient. The trustees have managed the estate faithfully and added greatly to its income; it is a large estate and if C had refused to qualify after the death of the first trustee a stranger appointed by the court would have been entitled to fees for his services. The court ruled the estate of the deceased executor should have at least 5 per cent allowed upon the profits realized from the sale of bonds. The third case was decided in 1903, *Frazer v Frazer*, 25 Ky. L., 473. The testator named his son as executor and stated in positive terms that he should act without compensation for his services. The executor accepted the trust with full knowledge that that provision was in the will and there are several decisions to the effect that under such circumstances the executor is not entitled to anything as compensation. Possibly it was not in the mind of the testator or the executor that the widow would renounce the provisions of the will and take under the statutes and it is reasonable to presume that the testator placed that provision in his will for the reason that he was giving the executor and another son an advantage in the division of the estate. By reason of the changed condition of affairs by the renunciation of the widow we deem it inequitable to hold the executor rigidly to the contract, but under the circumstances of the case we do not think that he ought to have anything near the statutory compensation.

NEW YORK DECISIONS IN CONFUSION.

Prior to the adoption of the statute in New York, giving

executors the privilege of electing to take compensation provided by statute, instead of compensation provided by wills, New York no doubt followed the rule that executors were limited to provisions for compensation made for them in wills. Since the Act of 1817 executors are given the privilege of electing to take the compensation provided by the statute in lieu of that provided by wills, provided the election is promptly made. The New York cases are a line unto themselves as they are necessarily influenced by the special statute referred to. In the first case decided in 1882, *Secor v Sentis*, 5 *Redf. N. Y.*, 570, the testator declared by his will that his executors should receive no compensation or fees for their services in settling the estate; the executors quote the statute giving executors the privilege of accepting particular compensation directed in wills or to renounce the same and receive compensation according to the statute. The court ruled that executors can not claim as of absolute right any commissions and that their demand ought to be disallowed in the present case, notwithstanding the statute. The decision evidently paid no attention to the statute and can not be said to be authority on the question. In the second case decided in 1882, *Arthur v Nelson*, 1 *Dem. N. Y.*, 337, the will fixed the rate of 5 per cent on the first \$5,000 of the estate and 2 per cent on all in excess of that sum, for receiving and paying out, to be charged but once by all of the executors and not by each, to be apportioned among the executors according to service rendered by each. In lieu of the compensation fixed by the will, the executors claimed compensation under the statute. The court ruled: The statute undoubtedly confers upon the executors the privilege of electing to take the compensation provided by

the statute or that provided by the will; however, as the testator died in 1869 and one of the executors did not file his election until 1878 and the other not until 1881 they were too late. The decision takes cognizance of the statute but denies the executors the benefit because of their laches in making their election. In the third case decided in 1883, in *re Gerard*, 1 *Dem. N. Y.*, 244, the testator provided "In a former codicil I gave P as one of my executors \$500 a year for a certain number of years; I have made no provision to pay G and B the other executors, any amounts, because they will work for themselves and their children." B did not qualify. P and G qualified. G claimed compensation. The court ruled: None of the persons named as executors were bound to accept the trust but such of them as assumed its duties became bound by the conditions which the testator had chosen to impose however stringent such conditions might prove to be. Notwithstanding the statute, the court held the executors to be bound by the provisions of the will. In the fourth case decided in 1884, in *re Hopkins*, 39 *N. Y.*, 618, the court held that a contract not to charge commissions was binding. The court no doubt held the view that the statute relating to wills does not apply to an independent contract of a fiduciary relating to compensation. In the fifth case decided in 1899, in *re Arkenburgh*, 56 *N. Y. Supp.*, 523, the testator directed that the sum of \$1,000 and no more shall be allowed to or received by such of those who qualify as executrix or executor, as and for their commissions, and said sum shall be in lieu of all commissions allowed by law. Under the statutes, written renunciation of the provisions of the will were filed. The court ruled: After the renunciation is filed the Surrogate may al-

low the executors commissions on the same principles which would control if there had been nothing at all in the will in regard to specific compensation. * * * Persons who make wills * * * must be deemed to be aware that the statute gives their executors a right to elect between compensation fixed by wills and the usual commissions. The case fully sustains the principle covered by the statute. In the sixth case decided in 1903, in re Rowe, 86 N. Y. Supp., 253, the testator bequeathed to his executor and trustee, \$500 to be by him received in full of all commissions, personal expenses, disbursements and charges of every kind relating to the full and final settlement of the estate. The executor claimed the bequest was for services as executor only and not for his services as trustee. The court ruled: The bequest in terms applied to the trustee as well as to the executor; he has accepted it and therefore is clearly not entitled to commissions in any capacity. The court applies the statute beyond the duties of an executor and includes services rendered by him as trustee; however, it does not appear that any election was filed by the executor. In the seventh case decided in 1915, in re Nester, 166 N. Y., App. Div. 225, the testator directed that none of his executors should receive any compensation, except that S should receive an annual salary of \$1,000 and N should receive an annual salary of \$1,500; the above salaries to be in full of commissions or salaries as executor or trustee. The two executors drew a monthly salary on the basis stated. After two years and four months they filed a renunciation, but continued to pay themselves the aforesaid monthly amounts. The salary received amounted to \$13,900; commissions would have amounted to \$69,100. The court ruled

the renunciation ineffectual and that the executors are not entitled to commissions but only to the salary fixed by the will. Since the executors continued monthly to pay themselves the salary provided by the will, the court did not take the election of the executors as an actual election and denied their claim under the statute. In the eighth case decided in 1920, in *re O'Donohue*, 115 *Misc. N. Y.*, 697, the testator bequeathed \$1,200 to his executor and executrices for their services. The will appointed three children executors and directed they serve without fees. The executors named could have renounced their appointment and an administrator *c. t. a.* would have been appointed; the executors qualified however and they must be held to have accepted the limited allowances fixed by the will, in lieu of statutory commissions. The court enforced the provisions of the will contrary to the statute.

In 1842, *Meacham v Sternes*, 9 *Paige, N. Y.*, 398, in considering proper fees to be allowed trustees the court ruled: Where the instrument creating the trust fixed a different compensation from that allowed executors under the statute, or declares that none is to be allowed, or where the trustee previous to the acceptance of the trust makes a valid and binding agreement as to the rate of compensation to be allowed for his services, that of course must prevail.

DECISIONS IN VARIOUS STATES DIFFER.

There have been cases in six other states on this question, one case in each. We shall now review them in the order of their publication. The first case was decided in the state of Washington in 1897, in *re Smith*, 18 *Wash.* 131. The court was of the opinion that the provision relating to just compen-

sation was intended to and did include the settlement as well as the management of the estate and found that the sum allowed was just compensation for such services, in addition to allowing the compensation as the percentage provided by statute upon the value of the estate as found by the court. The court did not find from the record that the executor renounced his right to the compensation provided in the will and therefore ruled it would be only necessary to examine the proofs to determine whether a sufficient amount was allowed as just compensation. The second case was decided in California in 1899, in re Runyon, *125 Calif. 195*. The testator provided in lieu of commissions allowed by law for executors, which the testator deemed insufficient, that his executors should be entitled to receive the sum of \$5,000 each as and for full compensation for their services respectively as such executors, in addition to their actual expenses. The California statutes provide executors shall be allowed for their services such fees as provided by the statute, but when a testator by his will makes other provision for the compensation of his executors that shall be full compensation for their services, unless by a written instrument filed in court the executor renounces all claim for compensation provided for by the will. The court found that no renunciation for claim of compensation provided by the will was filed by either of the executors and held that the provisions made by the will was full compensation for the services of the executors and denied their claim for further allowance for extra service. The third case was decided in Mississippi in 1910, *Thomas v Thomas, 97 Miss. 697*. The testator provided that the executor should have a fee of not more than \$200 and not less than \$100 out of the

estate. The court below also allowed reasonable compensation from year to year according to the success and trouble of the executor in managing the trust. The allowance was approved. The fourth case was decided in Maine in 1915, *Connolly v Leonard*, 114 Me. 29. The testator having nominated his executor also made him a devise of certain real estate, which according to the will was to be in lieu of any payment for services as executor or trustee of the estate, and it was stipulated that the property was to be accepted with that understanding. The court ruled that the weight of authority seems to be that if the testator has given a legacy in lieu of commissions, or imposed upon his executors the condition that they should not have commissions, the court can not defeat the provisions of the will. The fifth case was decided in Arkansas in 1916, *Gordon v Greening*, 121 Ark. 617. The testator directed that his executor should for three years after death of testator continue the mercantile business in which the testator was engaged; that for his services in continuing the business and winding up the estate the executor was to receive the sum of \$150 per month for such time as he may be so engaged. One of the questions presented to the court was the right of the testator to fix the compensation to be paid his executor. The court ruled: While there is some conflict in the authorities the great weight of authority sustains the proposition that a testator can fix the compensation of his executor. The sixth case was decided in Massachusetts in 1917, *Pailey v Crosby*, 226 Mass. 492. It appears that the person named in the will as executor and trustee was appointed both executor and trustee, the will providing that his compensation as executor and trustee should be such as a

majority of the beneficiaries of the testator should award the executor for his services in the care of the estate; the majority of the beneficiaries in a fair and reasonable exercise of the power given them fixed the amount of his compensation at a certain sum; the executor and trustee contended under the statute he was entitled to a reasonable compensation and more than was awarded. The court ruled: The contention of the executor was not open to him, as his only right to compensation was on the terms prescribed by the will; that the statute was not intended to restrain testators from fixing the compensation of executors and trustees under wills.

DECISIONS OF UNITED STATES COURTS.

There are three decisions in the United States Courts touching the question. The first case was decided in 1904, *McIntire v McIntire*, 192 *U. S.* 116. By consent of parties interested in the estate M acted as administrator and agreed to act without any allowance for commission or other charge for services as such administrator. The assets were turned over to solicitors of the parties. Later the assets were returned to the administrator on his giving additional bond. The administrator argued the restoration of the funds to him with duty to distribute relieved him of his bargain to act without charge. The court ruled: Whether the bargain was good or bad the services were rendered under it and therefore purported to be gratuitous; the law does not forbid gratuitous service even in fiduciary relations and if acts purport to be done gratuitously no claim for payment can be founded upon them at a later date. The second case was decided in 1923, *Washington Co. v Church*, 54 *App. D. C.*, 14. The testator appointed the Washington Co. executor upon condition that

the compensation provided for in the will should be accepted in lieu of commissions as executor and of other charges, inasmuch as the duties of executor of the estate would be without special trouble. The executor was authorized to retain as commission for executing the trust and the executorship of the will a sum of 5 per cent on the net income of the estate, such sum to be in lieu of all other charges as trustee or executor. In a codicil the amount of the compensation was reduced to 3 per cent. In the petition for its appointment the executor stated that it had been advised by counsel that the provisions relating to the compensation were void and of no effect, that its petition asking for the grant of letters was based on that advice and was presented with the expectation that petitioner would be made an allowance in accordance with the statutes, the quantum of the estate and the duties to be performed. Letters testamentary were issued to the petitioner. On its final settlement it asked for an allowance of 3 per cent on the corpus of the personal estate. Various beneficiaries objected. Counsel for the executor based the claim on statutory provisions in force in the District of Columbia, similar to the Maryland statute of 1798. We quote from D. C. Code 1919, Sec. 1, Chap. 1, Art. 365: Executors commissions "shall be at the discretion of the court not under 1 per cent nor exceeding 10 per cent on the amount of the inventory or inventories, excluding what is lost or perished." Article 366: "If anything is bequeathed to an executor by way of compensation, no allowance of commission shall be made, unless his said compensation shall appear to the court to be insufficient; and if so it shall be reckoned in the commission to be allowed by the court." It is a canon of construction when

a state adopts the statute of another state that decisions of the courts of former state rendered prior to the adoption shall be accepted as properly construing the statute and are thus considered a part of the act of adoption. In that view, the District court should have followed the Maryland decisions quoted above. However the decision seemed so strained that the District court was constrained not to do so; the court also considered the principle whether an executor should be allowed to elect between receiving compensation fixed in a will or compensation under the law; also that the intentions of the testator should control, if his intentions do not conflict with any rule of law or rule of public policy. The United States Court ruled: The company accepted the executorship but expressed the opinion that the conditions were illegal; this was not equivalent to a refusal to be bound by the conditions; it rather disclosed a disposition to retain the executorship, while reserving the right to assail the conditions; this was not permissible; it could not take the benefit and reject the burden. * * * We think it must be held that in accepting the executorship the W. Co. consented to be bound by the provisions * * * moreover it is manifest what the intention of the testator was and if his intention does not conflict with any rule of law or public policy—and we have seen that it does not—it is the court's duty to be diligent in seeing that it is obeyed.

The third case touched the question incidently. It was decided in 1923, *U. S. v Herrian*, 263 *U. S.* 179. In that case the testator provided that bequests made to his executors are in lieu of all compensation or commissions to which they would otherwise ben entitled as executors or trustees under

the will. The court ruled: The bequests to be in lieu of commissions and the amount received not subject to U. S. Income Tax under the Act of 1913.

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Considering that in the administration of estates of testators it is a cardinal rule to ascertain and carry out the intentions of the testator as expressed in his will, where his intentions do not violate any statute or definite rule of law, it seems extraordinary that the decisions of the courts on the question under discussion are not more uniform. In brief the decisions hold as follows, to-wit:

(a) It appears the rule that executors must act without compensation at no time prevailed in this country, except possibly in New York as indicated by Chancellor Kent.

(b) Under the so-called Maryland rule, where executors are not satisfied with the compensation allowed to them by will, on application the court is required to make executors an allowance within the limits prescribed by the statute.

(c) New Jersey did not follow the Maryland rule in its first case but did so in a later case without the authority of any statute similar to the Maryland statute, and the court therefore established an unwarranted precedent.

(d) Alabama followed the Maryland rule, without explaining the basis of the decision and without any statutory authority, thereby also establishing an unwarranted precedent.

(e) Pennsylvania in a consistent series of decisions holds that provisions in wills for compensation of executors are binding, except in case of an insolvent estate.

(f) Kentucky follows the provisions of the will in its first case, but did not do so in the second and third cases because of special facts involved.

(g) In New York there is a statute permitting executors to take an allowance to be made by the court in lieu of provisions of wills. The fifth case in New York sustains the claim of executors. The first, third and eighth cases denied the claims of executors, apparently without reference to the statute. The second and seventh cases denied the claim of the executors because of laches or defective renunciations of the compensation fixed in the will. The fourth case denied the claim of the executor because the executor made a contract not to charge and therefore the case did not come under the statute. The sixth case denied the fiduciary compensation as trustee, in addition to compensation as executor, because the case did not clearly come under the statute. The New York cases are inconsistent as a series and leave the question in that state in great confusion.

(h) The following six states each have one decision on the question: Washington, California, Maine, Arkansas and Massachusetts each sustaining the right of a testator to fix the compensation of his executor; but in Mississippi the court allowed additional compensation to the executor.

(i) There have been three cases in the United States Courts on the question. The first held that an executor is bound by his agreement as to compensation; the second and third that an executor is limited as to his compensation by the provisions of the will under which he is appointed.

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Aside from the bearing the various decisions of the courts have in their respective jurisdictions as quoted above, the weight of authority appears to be in favor of the proposition that a legacy to an executor in lieu of commission must be accepted instead of usual allowance for service under the law.