

PAYMENT OF EXECUTORS.

entitled to any remuneration whatsoever for his pains, trouble and personal services. There are some English cases to be found pointing in an opposite direction, such as *Marshall v. Holloway*, 2 Swanst. 452; *Ex. p. Fernor*, Jac. 404; *Newport v. Bury*, 23 Beav. 30. These have been usually considered as cases of special exception, but may perhaps be viewed as instances wherein the rule has been properly relaxed, on the ground that compensation had been intended.

The English Courts, however, did not consider the rule in question applicable to their Colonial possessions. In many cases touching both East and West Indian estates, a commission of five per cent. has been allowed to the Indian executor, upon passing his accounts in the English Courts: *Chetham v. Audley*, 4 Ves. 72, in which five per cent. was allowed upon the payments made on account of the estate: *Cockerell v. Barber*, 1 Sim. 23 S. C. in appeal, 2 Rus. 585, in which five per cent. was allowed on all assets collected by the executor in East India, including assets retained by him for a legacy to himself, not given to him as executor,

In *Matthews v. Bagshaw*, 14 Beav. 123, five per cent. was allowed on the gross receipts of the East Indian assets. There the Master of the Rolls laid it down, that by the custom of India, which the law of England will follow, Indian executors are entitled to five per cent. on the gross sum received by them. (A note to this case shews that this custom was abolished in 1849.) See also *Campbell v. Campbell*, 13 Sim. 168; and 2 Y. & C. 607. Similar allowances have been sanctioned as to West Indian estates on the ground among others that such was the constant course of practice in those colonies—a practice indeed in some of the islands which was recognized and regulated by the acts of colonial legislatures. See *Denton v. Davey*, 1 Moo. P. C. 15; *Chambers v. Goldwin*, 9 Ves. 254, 267. In this case it is said that the commission is the reward of personal care and attention, and if that care and attention are not administered, the unquestionable principle of the Court is that not being within the case, upon which the commission can be claimed, the executor is in the situation of a person entitled only to the commission actually paid to those who really managed the estate: *Forrest v. Elwes*, 2 Mer. 68.

The like principle of compensation to executors has been declared by the Legislatures of many of the States in the American Union. Thus for instance in New York State an Act was passed in 1817, declaring that in settling the accounts of guardians, executors and administrators, the Court of Chancery should make a reasonable allowance to them for their services over and above their expenses, to be fixed by a general rule of the Court in that behalf. Upon this the Chancellor passed a general order providing a scale of per-centages by way of commission, as follows:—For receiving and paying out money, five per cent. on all sums not exceeding \$1,000; two and a half per cent. upon all sums between \$1,000 and \$5,000; and one per cent. for all above \$5,000. The mode adopted of computing the allowance was to reckon two and a half, one and a quarter, or a half per cent., according to circumstances on the aggregate amount received; and the same in respect of the aggregate amount expended. Thus if \$10,000 had been collected, the per centage on \$1,000 would be \$25, on 4,000 would be \$50, and on \$5,000 would be \$25; total amount allowed, \$100, and the same scale of allowances on the amount paid out. These regulations were afterwards changed upon legislative interference, and the rules in New York are now settled by the revised statutes of 1852, in which it is provided that “on the settlement of the account of an executor or administrator the Surrogate shall allow to him for his services, and if their be more than one, shall apportion among them, according to the services rendered by them respectively, over and above his or their expenses:—

“1. For receiving and paying out all sums of money not exceeding one thousand dollars at the rate of five dollars per cent.

“2. For receiving and paying any sums exceeding one thousand dollars and not amounting to five thousand dollars, at the rate of two dollars and fifty cents per cent.

“3. For all sums above five thousand dollars at the rate of one dollar per cent.; and in all cases such allowance shall be made for their actual and necessary expenses as shall appear just and reasonable.”—*Rev. St. N. Y., Tit 3, Part II., Chap. VI., Sec. 64.*

The manner of estimating the allowance is, and always has been the same in the New York Courts—that is to say, full per-centages