

England on sick leave returns to Canada, and as they have under the 63 section of the Division Courts Act, the power to frame rules and make orders in relation to matters as to which doubts have arisen or may arise, or as to which there have been or may be conflicting discussions in any of the Division Courts, we think it well to postpone further remarks of our own and invite correspondents to lay before our readers any suggestions which may occur to them, as to the desirability of having questions under the Act, settled by legal sanction in a regular way.

PAYMENT OF EXECUTORS.

THIRD PAPER.

IV. *Privilege of executors and preference accorded to their compensation.*—In England a trustee and an executor will be allowed his expenses, even though he has a legacy as a reward for his trouble: *Wilkinson v. Wilkinson*, 2 Sim. & St. 237. In the case of an East Indian estate, where the executor had a legacy for his trouble, he was held disentitled to any commission; and he was not allowed, after a lapse of time, during which he had dealt in a contrary manner, to renounce his legacy and claim the usual compensation: *Freeman v. Fairlie*, 3 Mer. 24; see *Cockerell v. Barber*, 1 Sim. 23. In accord with this is the rule of the New York Revised Statutes, where it is laid down that when a provision shall be made by any will for specific compensation to an executor, the same shall be deemed a full satisfaction for his services in lieu of the statutory allowance, unless the executor shall renounce in writing all claim to the legacy: Tit. 3, Part ii, cap. 6, sec. 66. This rule has not been observed in this country; on the contrary, in *Denison v. Denison*, 17 Gr. 311, it is said that the executor being here entitled to compensation for his services, his acceptance of a legacy by way of compensation does not bar his right to further compensation in a proper case, where it is made to appear that the amount bequeathed is not a fair and reasonable allowance within the meaning of the statute; but if it is a sufficient compensation, then nothing more should be allowed.

Further, the executor is privileged to receive his commission before debts are paid; and in case of a deficiency of assets, he is to be preferred to all the creditors of the estate. This is upon the ground, that the allowance is for

services which form part of the expense incurred in administering the estate, forming, therefore, a primary charge upon the assets before the payment of debts: *Harrison v. Patterson*, 11 Gr. 105, 112. It was held in *Anderson v. Dougall*, 15 Gr. 405, that a legacy by way of compensation to executors, though larger in amount than the sum which the court would have awarded for compensation, was entitled to priority over legacies which were mere bounties; and this for the reason that in cases of deficiency of assets, legacies for which there is valuable consideration are entitled to rank before others which are mere matters of bounty. This decision is, however, only applicable to cases in which the will in question has been made or republished after the passing of the statute giving the right to compensation.

V. *Right of compensation, and manner of allowing and apportioning the same.*

In the earliest case under the statute—*McLennan v. Heward*, 9 Gr. 279—it was held that, generally speaking, five per cent. was a fair commission to be allowed on all moneys collected and paid over, or properly applied; but that on all moneys received and paid over only under the compulsion of the decree in the administration suit (however honest the contention as to liability therefor may have been), no more than two-and-a-half per cent. should be allowed.

In fixing the quantum of allowance, regard should be had to the size of the estate, the care, judgment and circumspection required and exercised in its management, and the length of time over which the supervision extends: *Denison v. Denison*, 17 Gr. 310. Although the duties do not involve much manual or physical labour, and although a clerk has been employed, yet if they require and cause anxiety and watchfulness, skill and exactness, good judgment and honesty, all of which are rendered, then the allowance should be liberal: Per Vankoughnet, C., in *Proudfoot v. Tiffany*, cited in *Denison v. Denison*, 17 Gr. at p. 311. See *Matthews v. Bagshard*, 15 Jur. 977.

The present Chancellor has laid it down that regard should be had to the amounts passing through the executors' hands. In fixing the poundage payable to sheriffs on levying moneys under execution, the courts, both of common law and equity, have considered the amounts a proper element of consideration, allowing