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EXECUTORS AND ADMINISTRATORS - EFFECT OF TESTAMENTARY PROVISIONS ON EXECUTORS' FEES

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EXECUTORS AND ADMINISTRATORS — EFFECT OF TESTAMENTARY PROVISIONS ON EXECUTORS' FEES — At the early English law an executor was entitled to the surplus of the personal estate after the payment of debts and legacies,[1] but this practice nowhere prevails today. At common law the office of executor was regarded as honorary, to be performed without compensation unless the will expressly provided for compensation.[2] It is doubtful if the common-law rule ever obtained in this country,[3] where from a very early time it has been universally considered that executors are normally entitled to reasonable com-

[1] Chamberlin's Appeal, 70 Conn. 363, 39 A. 734 (1898); 11 R. C. L. 230 (1915).

[2] Gordon v. Greening, 121 Ark. 617, 182 S. W. 272 (1916); 24 C. J. 973 (1921).

[3] 42 YALE L. J. 771 (1933).

pensation,[4] not only to reward them for their time, labor and trouble, but also for the responsibility incurred and for the fidelity with which they discharge the duties of their trust.[5] The tendency is to regard executorship more as a business motivated on economic principles than as a personal fidelity.[6] As a result of this changed concept of the office of executor, only one state now follows the common-law rule, and there it has been enacted into statute law.[7] All the other states permit compensation in the absence of an express provision in the will to the contrary.[8]

Most of the states have statutes regulating executors' fees. These statutes fall into four classes. Twenty-four states have statutes fixing the amount, usually based on a percentage of the estate, and leaving no discretion to the court.[9] Eight states allow the court discretion, but fix a maximum fee.[10] Two states and the District of Columbia fix both a maximum and minimum, leaving room for the exercise of a limited discretion.[11] Ten states give the court absolute discretion to award rea-

[4] Granberry's Exr. v. Granberry, 1 Va. 246 (1793).

[5] Walker's Estate, 13 Del. Ch. 439, 122 A. 192 (1923); 24 C. J. 974 (1921).

[6] Clark's Estate, 10 Pa. Dist. 378 (1901), stating at 379, "Experience has shown that, as a general rule, cheap trustees are poor trustees, for the simple reason that the measure of skill and attention lies in the compensation. Gratuitous services are not to be expected in business relations."

[7] La. Civ. Code Ann. (Dart, 1932), § 1686; Succession of Abrams, 145 La. 627, 82 So. 727 (1919). A slightly different view than the one taken above is expressed in 11 AM. & ENG. ENCYC. LAW, 2d ed., 1277 (1899).

[8] In most cases this is statutory. Cf. 11 AM. & ENG. ENCYC. LAW, 2d ed., 1277 (1899); 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., § 524 (1923).

[9] Ariz. Code (Struckmeyer, 1928), § 4051; Cal. Prob. Code (Deering, 1937), § 901; Fla. Comp. Gen. Laws (Perm. Supp. 1936), § 5541 (90); Ga. Code Ann. (1935), §§ 113-2001, 113-2004; Idaho Code (1932), § 15-1107; La. Civ. Code Ann. (Dart, 1932), §§ 1683, 1684, 1685; Mich. Comp. Laws (1929), § 15928 as amended by Mich. Pub. Acts (1939), c. 288 [Mich. Ann. Stat. (Supp. 1939), § 27.3178 (284)]; Mo. Rev. Stat. (1929), § 221; Mont. Rev. Code Ann. (Anderson & McFarland, 1935), § 10287; Neb. Comp. Stat. (1929), § 301411, as amended by Neb. Laws (1937), c. 74, p. 263, Neb. Laws (1939), c. 31, p. 166; Nev. Comp. Laws (Hillyer, 1929), § 9783; N. M. Stat. Ann. (Courtright, 1929), § 47-701; N. Y. Sur. Ct. Act, § 285 [Cahill's Civ. Prac. 1937]; 2 N. D. Comp. Laws Ann. (1913), § 8822; Ohio Code Ann. (Throckmorton, 1930), § 10837; Okla. Stat. (1931), § 1332; 1 Ore. Code Ann. (1930), § 11-711; S. C. Code (1932), § 9017; S. D. Comp. Laws (1929), § 3365; Tex. Rev. Code (Vernon, 1939), art. 3689; Utah Rev. Stat. Ann. (1933), § 102-11-25; Vt. Pub. Laws (1933), § 9039; Wis. Stat. (1931), § 317.08; Wyo. Rev. Stat. Ann. (1931), § 88-2607.

[10] Ala. Code (Michie, 1928), § 5923; Ark. Dig. Stat. (Pope, 1937), § 183; Colo. Ann. Stat. (1935), c. 176, § 232; Iowa Code (1935), § 12063; Ky. Stat. (Carroll, 1930), § 3883; Me. Rev. Stat. (1930), c. 75, § 43; N. J. Rev. Stat. (1937), § 3:11-2; N. C. Code Ann. (Michie, 1935), § 157.

[11] D. C. Code (1929), tit. 29, § 265; Md. Ann. Code (Bagby, 1925), art. 93, § 5; Miss. Code Ann. (1930), § 1740.

sonable compensation.[12] Four states have adopted the discretionary method by judicial decision.[13]

The obvious effect of most of these statutes is to fix an arbitrary fee which may have little relation to the actual value of the services performed; hence testators are inclined to attempt to control the fees of their executors to conform to what the testator thinks is a fair reward. The purpose of this comment is to discuss the effect of testamentary provisions upon executors' fees. Five major situations will be considered: (1) cases where the will expressly denies compensation; (2) cases where compensation greater or less than the statutory amount is provided; (3) problems arising under statutes permitting renunciation of the provisions of the will; (4) cases where the executor is also a legatee; (5) cases where unusual extraneous circumstances exist.

I.

There are broad dicta to the effect that a testator has the power to deprive his executor of all compensation by expressly so providing in his will,[14] but the cases fail to bear out this position. One factor the testator must consider is that the chosen executor may refuse to act and that an executor substituted by the court would be entitled to the usual compensation.[15] The most drastic limitation on the testator's common-law right to determine his executor's compensation by testamentary provision has been made by statutes enacted in twenty-four states permitting an executor to renounce the specific compensation provided in the will and claim the statutory fee.[16] Clearly such statutes

[12] Ill. Ann. Stat. (Smith Hurd, Supp. 1939), c. 3, § 490; Ind. Ann. Stat. (Burns, 1933), § 6-1416; Kan. Sess. Laws (1939), c. 180, § 147; Mass. Gen. Laws (1932), c. 206, § 16; Minn. Stat. (Mason, 1927), § 8788; R. I. Gen Laws (1938), c. 580, § 7; Tenn. Code Ann. (Michie, 1938), § 8250; Va. Code Ann. (Michie, 1930), § 5425; Wash. Rev. Stat. (Remington, 1932), § 1528; W. Va. Code (1931), § 44-4-14.

[13] Hayward v. Plant, 98 Conn. 374, 119 A. 341 (1923); Walker's Estate, 13 Del. Ch. 439, 122 A. 192 (1923); Tuttle v. Robinson, 33 N. H. 104 (1856); Reid's Estate, 250 Pa. 103, 95 A. 392 (1915).

[14] Secor v. Sentis, 5 Redf. Sur. (N. Y.) 570 (1882); Hill v. Zanome, 184 Ark. 594, 43 S. W. (2d) 238 (1931); 24 C. J. 975 (1921).

[15] Young v. Smith, 72 Ky. 421 (1872); Williams v. Roy, 9 Ont. Rep. 534 (1885).

[16] Ariz. Code (Struckmeyer, 1928), § 4049; Cal. Prob. Code (Deering, 1937), § 900; Fla. Comp. Gen. Laws (Perm. Supp. 1936), § 5541 (90); Idaho Code (1932), § 15-1105; Ind. Ann. Stat. (Burns, 1933) § 6-1417; Kan. Sess. Laws (1939), c. 180, § 115; Mich. Comp. Laws (1929), § 15928, as amended by Mich. Pub. Acts (1939), c. 288 [Mich. Ann. Stat. (Supp. 1939), § 27.3178 (284)]; Minn. Stat. (Mason, 1927), § 8788; Mont. Rev. Code Ann. (Anderson & McFarland, 1935), § 10285; Neb. Comp. Stat. (1929), § 30-1410; Nev. Comp. Laws (Hillyer, 1929), § 9781; N. J. Rev. Stat. (1937), § 3:11-5; N. M. Stat. Ann. (Courtright, 1929), § 47-607; N. Y. Sur. Ct. Act, § 285 [Cahill's Civ. Prac. 1937]; N. D. Comp. Laws Ann. (1913), § 8821; Ohio Code Ann. (Throckmorton, 1930),

make it possible completely to defeat the testator's intent. Problems arising under these statutes will be considered later and for the present some of the limitations set by the courts without the aid of statutes will be examined.

One line of cases unequivocally holds that, even in the absence of a statute permitting renunciation, an executor is entitled to the statutory commissions notwithstanding a provision in the will that he shall be entitled to no compensation,[17] and that after full administration even the court has no power to deprive him of the minimum fixed by law.[18] These holdings proceed upon the rather dubious theory that the statute setting a maximum and minimum fee places upon the court the power and positive duty of allowing a fee somewhere between those limits and that nowhere is such power given to the testator. The New Jersey courts also in terms deny the testator's plenary power to deprive his executor of compensation,[19] but such statements were not essential to the decisions since a New Jersey statute permitting renunciation reached the same result. However, the majority view, at least as expressed by way of dictum, is that the testator has the plenary power[20] to exclude compensation and that once the executor has performed the duties of his office he is bound by the stipulation in the will, either on the theory of estoppel[21] or contract.[22] This view as stated in the cases seems clear and definite, but has been so strictly construed in its application to specific cases as to lose most of its effect. The first qualification is that a testamentary provision will not be construed as depriving the executor of compensation if it may be construed otherwise with equal reason.[23] Thus the provision, "It is my request that *A*, *B* and *C* will consent to act as executors and that each of them other than *A* do also take and receive the full rate of commissions provided by law," was held ambiguous and *A* not precluded from claiming statutory commissions.[24] A provision that the executors shall "make no charge for distribution of legacies" was held not to prevent compensation for pre-

§ 10838; Okla. Stat. (1931), § 1330; 1 Ore. Code Ann. (1930), § 11-709; S. D. Comp. Laws (1929), § 3363; Utah Rev. Stat. Ann. (1933), § 102-11-24; Vt. Pub. Laws (1933), § 2819; Wash. Rev. Stat. (Remington, 1932), § 1528; Wis. Stat. (1931), § 317.07; Wyo. Rev. Stat. Ann. (1931), § 88-2606.

[17] McKim v. Duncan, 4 Gill (Md.) 72 (1846); Handy v. Collins, 60 Md. 229 (1883).

[18] Handy v. Collins, 60 Md. 229 (1883).

[19] Tichenor v. Mechanics & Metals Nat. Bank, 96 N. J. Eq. 560, 125 A. 323 (1924); Heath v. Maddock, 83 N. J. Eq. 681, 94 A. 218 (1914).

[20] Secor v. Sentis, 5 Redf. Sur. (N. Y.) 570 (1882).

[21] Bailey v. Crosby, 226 Mass. 492, 116 N. E. 238 (1917).

[22] Secor v. Sentis, 5 Redf. Sur. (N. Y.) 570 (1882); 24 C. J. 976 (1921).

[23] In re Marshall's Estate, 3 Dem. Sur. (N. Y.) 173, 67 How. Prac. 519 (1884).

[24] Ibid.

paring the estate, a large one, for distribution.[25] A recent New York case held that where an executor accepted appointment under a will providing no compensation, he was entitled to no compensation as executor, but could receive compensation for services in the capacity of temporary administrator where the appointment was obtained in good faith because of prospective delay in probate.[26] The results reached in these cases were probably desirable under the circumstances, but it is difficult to avoid the conclusion that they violate the testamentary intent in spite of their dicta to the contrary. One searches in vain for cases depriving an executor of all compensation unless he is receiving some other benefit under the will which mitigates the harshness of the rule.

2.

Where the will provides a specific compensation, though less than the statutory minimum, it is easier to hold the executor bound thereby, and the courts generally so decide.[27] The principles applied are those of effectuating the testator's intent,[28] election,[29] estoppel,[30] and implied contract.[31] Where some compensation is provided, there is at least consideration upon which to predicate an implied contract (an element absent where fees are excluded), but the courts proceeding on the contract theory are a little vague as to how the executor contracts with a dead man. The difficulties of finding a real election or estoppel will be considered later.

To what extent a testator may provide for more than the statutory fee without constituting his executor a legatee is not clearly answered in the cases. An inter vivos agreement with decedent to act as executor for a compensation in excess of that allowed by statute is not void as fixing compensation of a public officer or on other grounds.[32] Provisions that the executor "be paid liberally" [33] or "handsomely" [34] have been held not to justify more than the statutory allowance. In Maryland

[25] Fidelity Trust & Safety Vault Co. v. Watkins' Exrs., 19 Ky. L. Rep. 957, 42 S. W. 753 (1897).

[26] In re Viggiani's Estate, 171 Misc. 74, 11 N. Y. S. (2d) 735 (1939).

[27] Vicksburg Pub. Library v. First Nat. Bank & Trust Co., 168 Miss. 88, 150 So. 755 (1933); 34 A. L. R. 918 (1925).

[28] In re Williams' Estate, 147 Wash. 381, 266 P. 137 (1928).

[29] Brown's Exr. v. Brown's Devisees, 6 Bush (69 Ky.) 648 (1869); In re Hays' Estate, 183 Pa. St. 296, 38 A. 622 (1897).

[30] Washington Loan & Trust Co. v. Convention of Protestant Episcopal Church, 54 App. D. C. 14, 293 F. 833 (1923).

[31] Ross v. Conwell, 7 Ind. App. 375, 34 N. E. 752 (1893); In re Williams' Estate, 147 Wash. 381, 266 P. 137 (1928).

[32] In re McIntosh's Estate, 182 Iowa 23, 159 N. W. 223 (1916); Gordon v. Greening, 121 Ark. 617, 182 S. W. 272 (1916), dicta to the same effect.

[33] Kenan v. Graham, 135 Ala. 585, 33 So. 699 (1903).

[34] Waddy's Exr. v. Hawkins' Admr., 4 Leigh (31 Va.) 458 (1833).

and New Jersey,[35] where it is held that the statutory provision is controlling irrespective of any statement in the will, it would follow logically that a testator's provision for compensation in excess of the statutory amounts would not be given effect, but it is probable that the courts of those states would give such provisions effect as legacies.[36] Though a legacy to an executor, expressly as compensation, does not abate with legacies which are mere bounties, even though the legacy "somewhat exceeds" what the executor would otherwise be entitled to demand,[37] it is indicated that if the amount appeared unreasonable or unearned an abatement would be enforced if the rights of creditors were involved.[38] No good reason appears to prevent a testator's allowing more than the statutory maximum as compensation.

3.

Statutes permitting renunciation of the specific compensation provided by will have caused considerable difficulty where the legislature failed to set a definite time within which the renunciation must be made. In the absence of such a provision the courts are in hopeless conflict as to when the renunciation must be made in order to be effective. One extreme view is illustrated by a holding that qualifying[39] and entering upon the performance of the duties of executor is an election to accept the compensation fixed by the will and subsequent renunciation is too late to be effectual,[40] while the opposite view is that renunciation after managing the estate for "several years" and accepting the specific compensation in the meantime is effective on the grounds that the statute sets no time limit and therefore it is not in the power of the court to do so.[41] The latter court more recently held that renunciation was not too late at the time of accounting if no injustice resulted.[42] The New York courts went through a curious development on this point, first holding that the election must be made promptly or the right would be lost by laches.[43] They later held that so long as the executor did not indicate his election, the right to renounce remained unimpaired[44] and that an agreement with the legatee to accept the

[35] Tichenor v. Mechanics & Metals Nat. Bank, 96 N. J. Eq. 560, 125 A. 323 (1924); McKim v. Duncan, 4 Gill (Md.) 72 (1846).

[36] See notes 17 and 19, supra.

[37] Anderson v. Dougall, 15 Grant Ch. (Up. Can.) 405 (1868).

[38] Richardson v. Richardson, 145 App. Div. 540, 129 N. Y. S. 941 (1911); Matter of Tilden, 44 Hun (N. Y.) 441 (1887).

[39] Brown's Exr. v. Brown's Devisees, 6 Bush (69 Ky.) 648 (1869).

[40] In re Williams' Estate, 147 Wash. 381, 266 P. 137 (1928).

[41] Heath v. Maddock, 83 N. J. Eq. 681, 94 A. 218 (1914).

[42] Parker v. Wright, 103 N. J. Eq. 535, 143 A. 870 (1928).

[43] Arthur v. Nelson, 1 Dem. Sur. (N. Y.) 337 (1882).

[44] In re Arkenburgh, 13 Misc. 744, 35 N. Y. S. 251 (1895).

provisions of the will did not estop the executor from later renouncing it.[45] A still later New York case held that acceptance for a period of time of the compensation provided in the will made renunciation ineffectual.[46] The New York legislature finally settled the question by an amendment fixing a time limit of four months within which renunciation must be made.[47]

The recent Indiana case of *Suverkrup v. Suverkrup*[48] will probably be decisive of the above question in the future in the states which have not yet passed upon it. The case was well argued by counsel and the decision thoroughly considered by the court. Suverkrup was named executor under a will fixing the executor's fee. Six weeks after qualifying he filed his renunciation of the compensation provided in the will and claimed his statutory allowance. The statute contained no provision as to the time in which such renunciation had to be made.[49] It was strongly contended that the act of qualifying and entering upon the duties of executor was an election to be bound by the provisions of the will amounting to an acceptance of a contract, and that the executor was estopped to claim more than the compensation fixed in the will. The court, however, construed the statute as allowing the executor a reasonable time after qualifying within which to file his renunciation, and considering six weeks a reasonable time, allowed compensation under the statute. The case is in accord with the weight of authority (though there are but few cases involving this point) and seems to be the better view. As indicated before, it is very difficult to find a real contract[50] and the theory of estoppel is hard to justify unless some injury has been done or there has been a wrongful misleading on the part of the executor; and in most cases this element is not present. In order to avoid a bald violation of the testamentary intent, courts following the majority view frequently resort to the fiction that the testator is presumed to know the law, and therefore has in mind the possibility of the executor electing to take the statutory allowance.[51]

4.

Where the executor is also a legatee, certain problems are likely to arise. The English view,[52] and the view taken by a few early American

[45] In re Arkenburgh, 38 App. Div. 473, 56 N. Y. S. 523 (1899).
[46] In re Nester, 166 App. Div. 224, 151 N. Y. S. 194 (1914).
[47] In re O'Donohue's Estate, 115 Misc. 697, 181 N. Y. S. 911 (1920).
[48] Suverkrup v. Suverkrup, (Ind. App. 1939) 18 N. E. (2d) 488.
[49] Ind. Ann. Stat. (Burns, 1933), § 6-1417.
[50] It is difficult to reconcile the contract theory with the generally accepted doctrine that an offer lapses with the death of the offeror.
[51] In re Arkenburgh, 38 App. Div. 473, 56 N. Y. S. 523 (1899).
[52] Chassaing v. Durand, 85 Md. 420, 37 A. 362 (1897).

cases,[53] was that when an executor was also a legatee he was not entitled to a commission, but this is no longer the rule anywhere. Where a legacy is made in lieu of commissions, all courts, with the few exceptions mentioned earlier,[54] hold that the executor is not entitled to further compensation[55] unless he renounces under a statute permitting him to do so.[56]

Whether or not a legacy stands in lieu of commissions depends upon the testator's intent, and where the will is silent or ambiguous on that point the courts resort to diverse presumptions. Louisiana requires by statute that where the executor is a legatee there must be a formal declaration in the will that the execuor shall be allowed statutory commissions in addition to the legacy before the executor will be entitled to commissions.[57] However, the prevailing view is that a bequest to the executor will not be held to be in lieu of compensation unless the will clearly shows such intent; the presumption being that a bequest is a bounty and not compensation.[58] It has been held that where a legacy is given to a person in the character of executor, the presumption is that the bequest is given upon condition that he perform the duties of the office[59] and that commissions, as such, bequeathed to an executor, constitute compensation, not a gift, and are forfeited by failure to perform properly the duties of executor by making yearly accounts.[60] The courts generally accept this principle but subject it to a very strict construction in its application. Thus, where a will gave $1,000 to each of two executors "as a compensation for their services," the court, believing the sum inadequate, construed the legacy as conditional only upon acceptance of the office, and permitted an additional ten per cent commission for services.[61] Also the United States Supreme Court in a recent tax case held that the executor need do no more than in good faith clothe himself with the character of executor in order to receive a legacy given in lieu of compensation.[62]

[53] Jones v. Williams, 2 Call (6 Va.) 102 (1799).

[54] See notes 18 and 19 supra.

[55] Connolly v. Leonard, 114 Me. 29, 95 A. 269 (1915).

[56] In re O'Donohue's Estate, 115 Misc. 697, 181 N. Y. S. 911 (1920).

[57] Succession of Abrams, 145 La. 627, 82 So. 727 (1919); Succession of Cucullu, 4 Rob. (La.) 397 (1843).

[58] In re Cohen's Will, 128 Misc. 906, 220 N. Y. S. 509 (1927); In re Fox's Estate, 235 Pa. 105, 83 A. 613 (1912); Campbell v. Mackie, 1 Dem. Sur. (N. Y.) 185 (1883).

[59] Fletcher v. Hurd, 60 Hun 576, 14 N. Y. S. 388 (1891); Chassaing v. Durand, 85 Md. 420, 37 A. 362 (1897).

[60] In re Norris' Estate, 153 S. C. 203, 150 S. E. 693 (1930).

[61] Raines v. Raines' Exrs., 51 Ala. 237 (1874).

[62] United States v. Merriam, 263 U. S. 179, 44 S. Ct. 69 (1923). The reasoning

Statutes permitting renunciation are of course applicable to legacies given in lieu of compensation and about the same problems are involved in their application. It would be easier for the courts to find a real election and estoppel in cases where the label "legacy" rather than "compensation" is used by the testator, because the executor is in possession of the thing bequeathed or devised, but the courts are reluctant to do so. Where the executor lived for several years in a house devised him in lieu of compensation the court did not find an election or estoppel,[63] and where the legacy was grossly out of proportion to reasonable compensation the executor, who had already paid it to himself, was treated as having accepted it on account.[64] Where the person named as executor is also a legatee and the will fixes his compensation as executor, it is often contended that acceptance of the legacy prevents renunciation of the specific compensation upon the familiar doctrine that one who accepts a benefit under a will ratifies the whole instrument.[65] However, the majority view, and the one taken in the recent *Suverkrup* case, is that there is no ratification because the two are not inconsistent and require no election.[66]

5.

As previously intimated, the development of circumstances unforeseen by the testator may induce the courts to grant compensation other than that provided in the will. Thus where a testator's son, appointed executor to act without compensation, lost the advantage provided for him in the division of the estate by reason of the widow taking against the will, the court permitted compensation on the ground that it would be inequitable to hold him to the provision in the will.[67] Also where the will fixed the compensation at two per cent of the net proceeds, an amount which was wholly inadequate compensation because of unforeseen insolvency, the court increased the commission to four per cent.[68] That the courts would probably reduce an unreasonably large fee if the estate proved insolvent was previously indicated.[69]

Bailey v. Crosby[70] presents an interesting method by which a testator may effectively control his executor's fees. In that case the will

of this case is not clear, and as authority for the above proposition it would probably be limited to its peculiar facts.

[63] Heath v. Maddock, 83 N. J. Eq. 681, 94 A. 218 (1914).

[64] Parker v. Wright, 103 N. J. Eq. 535, 143 A. 870 (1929).

[65] Suverkrup v. Suverkrup, (Ind. App. 1939) 18 N. E. (2d) 488.

[66] Ibid.

[67] Frazer v. Frazer, 25 Ky. L. Rep. 473, 76 S. W. 13 (1903).

[68] In re Guien's Estate, 1 Ashm. (Pa.) 317 (1831); In re Good's Estate, 150 Pa. St. 301, 24 A. 624 (1892) (extraordinary circumstances held to justify granting additional compensation).

[69] See note 38, supra.

[70] 226 Mass. 492, 116 N. E. 289 (1917).

provided that the executor's compensation should be such as a majority of the heirs should award him, and the executor was held estopped to claim more than the amount allowed by the heirs. The self-interest of the heirs should serve as an effective check on unreasonable fees and at the same time prevent unfairness due to changing circumstances. The case rests on sound principles because it is easier to find a real contract binding upon the executor than in a case where the testator attempts to set the fee in the will. It has also been held that an agreement by the executor with the heirs and legatees to waive commissions in consideration that the will be allowed probate without contest is binding upon the executor,[71] though a contrary conclusion was indicated by the same court [72] in an earlier decision.

From a general survey of the statutes and decisions, it is clear that the testator's common-law right to determine his executor's compensation by testamentary provision has been greatly limited.[73] Though this result seems a gross betrayal of the sacred testamentary intent, it is probably desirable. The well-known adage about "fair weather friends" applies to friends of the dead as well as the living. Adequate compensation still seems a better guarantee of efficient administration than personal fidelity. A great deal of truth is contained in the somewhat cynical though realistic statement of a Pennsylvania judge that: "Disinterested benevolence is as rare as human gratitude. The law is formed not on exceptional but on prevailing types. Hence, a policy of allowing compensation commensurate to the services and responsibility required is essential to secure the best results." [74]

[71] In re Williams' Estate, 170 N. Y. S. 80 (Sur. Ct. 1918).
[72] In re Arkenburgh, 13 Misc. 744, 35 N. Y. S. 251 (1895).
[73] 42 YALE L. J. 771 at 778 (1933).
[74] Clark's Estate, 10 Pa. Dist. 378 at 379 (1901).