

## Executors, Trustees--Double Commissions

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of congressional \* \* \* districts \* \* \*." <sup>18</sup> And with regard to resolutions requiring the concurrence of both Houses provides:

"Every order, resolution or vote requiring the concurrence of the two Houses (except such as relates to the business or adjournment of the same) shall be presented to the Governor for his signature and before the same shall take effect shall be approved by him or being returned by him with his objections shall be repassed by two-thirds of the members of the two Houses according to the rules and limitations prescribed in the case of a bill."<sup>19</sup>

The apportionment was held ineffective because it was not repassed as required by law. The Court said:

"Whether the Governor of the State through the veto power shall have part in the making of state laws, is a matter of state policy. Article I, section 4 of the Federal Constitution neither requires nor excludes such participation. And provision for it as a check in the legislative process cannot be regarded as repugnant to the grant of legislative authority."

The New York Court of Appeals has held that the term "legislature" refers not only to the Senate and Assembly but to the law making body as a whole.<sup>20</sup> Since the legislature of each state is the creation of its constitution, what constitutes that legislature and what constitutes the proper exercise of its function resides in the state constitution or the court of last resort of the state in passing upon the legality of the acts of the legislature thereunder.<sup>21</sup>

ROSE LADER.

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#### EXECUTORS, TRUSTEES—DOUBLE COMMISSIONS.

The question of whether a fiduciary, named both executor and trustee, is entitled to commissions in both capacities has frequently been reviewed by the Courts in this jurisdiction. The provisions

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<sup>18</sup> Art. IV, §23.

<sup>19</sup> Art. IV, §12.

<sup>20</sup> *Doyle v. Hofstader*, 257 N. Y. 244, 177 N. E. 489 (1931). "In the state of New York that department is not the legislature alone, but the legislature and the Governor, the one as much as the other, an essential factor in the process. \* \* \* We beg the question when we argue that the legislature may give immunity because the legislature is the sole custodian of the legislative power. It is not the sole custodian of that power. The power is divided between the legislature and the Governor. *Cf. Ohio ex rel. Davis v. Hildebrant*, 241 U. S. 565; *Hawke v. Smith*, 253 U. S. 221. \* \* \* The legislature can initiate, but without the action of the Governor it is powerless to complete."

<sup>21</sup> *Ibid.* See also *Koenig v. Flynn*, 258 N. Y. 292, 179 N. E. 705 (1932).

for compensation for executors and testamentary trustees,<sup>1</sup> in the form of commissions based upon property received and paid out are contained in Section 285 of the Surrogate's Court Act. Where different persons are named to the respective offices there is no question as to their right to commissions, since the determination rests on the testamentary provision for the performance by the fiduciary or fiduciaries of separate and distinct duties, and such provision could not be more clearly expressed than by naming different parties to perform them.<sup>2</sup> Where, however, the same person is named in both capacities what commissions should be awarded?

The accepted general principles, underlying the decisions involving this question were set forth by Finch, J., in *Johnson v. Lawrence*,<sup>3</sup> and *McAlpine v. Potter*.<sup>4</sup> In the former it was said: "That the same person may be entitled to compensation as executor and also as trustee, in respect to the same estate, or some part thereof, is undoubtedly true, but does not follow in every instance where trust duties are imposed upon an executor. Where, by the terms or true construction of the will, the two functions with their corresponding duties coexist and run from the death of the testator to the final discharge; interwoven, inseparable and blended together, so that no point of time is fixed or contemplated in the testamentary intention at which one function should end and the other begin, double commissions or compensation in both capacities cannot properly be allowed." In *McAlpine v. Potter*, the Court, after pointing out that the will may impose trust duties upon the executor and postpone payment of legacies, declared: "A will must go further than that to admit of double commissions, and must clearly and definitely indicate an intention of the testator to end the executor's duty at some point of time, and require him thereupon to constitute and set up one or more several trusts, to be held and managed as such for the interest of the beneficiary." While admitting of the general principles, the decisions in which they have been applied or distinguished have been ineffectual in formulating any definite set of rules to clarify the subject. In *re Abrahams*<sup>5</sup> the Court in an

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<sup>1</sup> §314, subd. 6 of the Surrogate's Court Act reads as follows: "The expression 'testamentary trustee' includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator."

<sup>2</sup> *Matter of Schliemann*, 259 N. Y. 497, 502, 182 N. E. 153, 155 (1932); and where the question was raised the court stressed the appointment of different persons in allowing double commissions. See *Phoenix v. Livingston*, 101 N. Y. 451, 455, 5 N. E. 70, 70 (1886).

<sup>3</sup> *Johnson v. Lawrence*, 95 N. Y. 154, 159 (1884); quoted *Olcott v. Baldwin*, 190 N. Y. 99, 105, 82 N. E. 748, 750 (1907); *Matter of Ziegler*, 218 N. Y. 544, 551, 113 N. E. 553, 554 (1916); *Matter of Schliemann*, *supra* note 2, at 501, N. E. at 155.

<sup>4</sup> *McAlpine v. Potter*, 126 N. Y. 285, 289, 27 N. E. 475, 476 (1891).

<sup>5</sup> *In re Abrahams*, 136 Misc. 538, 141 N. Y. Supp. 212 (1930).

endeavor "to conserve the time of the court in the study of precedents," and to "assist the bar by a clarification and comparison of authorities, and to decrease litigation,"<sup>6</sup> reviewed some twenty-two cases and deduced therefrom the following rules: (I) The expressed intention of the testator governs the allowance or disallowance of double commissions. (II) Reference to the fiduciary as trustee is to be disregarded, but reference as executor is to be given some weight. (III) The naming of different persons to the offices is strong evidence of a contemplated severance of the two functions. (IV) The test is whether the executorial functions are terminated prior to distribution, and not whether there are trust duties imposed. (V) Unless executorial functions are terminated prior to distribution, no dual representation will be held to exist. (VI) Inclusion or failure to include purely executorial acts has no bearing on the question. (VII) Where there is a direct bequest with mere postponement of payment and direction to pay income during interval; or, where a gross and undivided fund is set up for two or more persons the division of principal being postponed; or, where property is to be held for life tenant with a remainder over after his death; or, where purely executorial functions remain to be accomplished, double commissions will not be allowed. (VIII) Where specific or ascertainable sums are to be erected into trusts for specified individuals; or, the residue is to be divided into specific trusts, double commissions will be allowed. (IX) Each item must be analyzed to determine whether double commissions should be allowed. (X) Although circumstances point to disallowance of double commissions, they will be allowed where an unquestioned decree has been entered allowing them. (XI) Where the provisions of the will contemplate the erection of separate funds of determinable amounts there need not be an actual physical division of the funds to entitle the fiduciary to double commissions.

The rules while mere dicta and formulated for convenience of the Courts and bar, are fairly comprehensive in scope, but are not free from inaccuracy, nor in all respects fair deductions from the cases cited in their support. That a testator may expressly declare that no compensation shall be allowed and it shall bind the fiduciary therein named, was decided early by the Courts of this state<sup>7</sup> and if the Court referred thereto, in rule one, no question arises. But the cases cited<sup>8</sup> lead to the inference that the reference was made to construction only, in which case the rule has no support. The intention is construed only for the purpose of determining the nature

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<sup>6</sup> *In re Jackson*, 138 Misc. 167, 171, 245 N. Y. Supp. 156, 161 (1930).

<sup>7</sup> *Meacham v. Sternes*, 9 Paige 398, 403 (N. Y. 1842); *In re Sprague*, 46 Misc. 216, 217, 94 N. Y. Supp. 84, 85 (1905).

<sup>8</sup> *Matter of Ziegler*, *supra* note 3; *Olcott v. Baldwin*, *supra* note 3. These cases determine the nature of the duties imposed and no reference is made to testator's intention with regard to commissions.

of the duties imposed and this principle is contained in rule four.<sup>9</sup> Rule two contains two propositions which are not consistent with good reasoning but rather result from too close adherence to unnecessary dicta in an earlier case.<sup>10</sup> There the will, after making certain provisions for the widow in the form of annuities and bequeathing specific legacies of certain personalty, directed the residuary estate to be held by the executors for testator's son, with provision for his support and education during minority and the payment of one-fourth part of principal at specified stages of his life, or upon his sooner death to be divided among testator's brothers and sisters and their heirs. The executors were given the power of sale to dispose of real property. Double commissions were denied and, while the propriety of the holding is unquestioned, the Court unnecessarily stressed the reference in the will to the fiduciaries as executors. In reality it seems that no executorial functions were performed with relation to the real property and, under rule nine, the same result would obtain had the Court awarded commissions as trustees, and not as executors.<sup>11</sup> A better rule would be that the reference to the fiduciary will carry no weight in the allowance or disallowance of commissions.<sup>12</sup>

Rule five would be, of course, subject to the limitation that is contained in rule eight, *viz.*, "where the will directs specific or ascertainable sums to be erected into trusts for specified individuals." The setting up of such a trust prior to final distribution could in no way affect the right to double commissions; to hold differently would be to encourage delay in setting up trusts to enable the fiduciary to avoid the rule.

The question as to whether or not the prior accounting of the executor and the award of commissions as such will be *res adjudicata* as to the right to commissions as trustee does not seem to have been specifically passed upon, nor are the cases cited support for the rule thus stated.<sup>13</sup> In *Olcott v. Baldwin*, the Court,<sup>14</sup> after deciding that the duties imposed were separate and distinct, pointed out that it was further necessary for the trustee to enter upon his duties as

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<sup>9</sup> *Supra* note 3.

<sup>10</sup> *Matter of Ziegler*, *supra* note 3, at 553, N. E. at 555.

<sup>11</sup> In support of Rule 9, the Court cites: *Matter of Vanneck's Estate*, 175 App. Div. 363, 161 N. Y. Supp. 893 (1st Dept. 1902); *Matter of Martin*, 124 App. Div. 793, 109 N. Y. Supp. 217 (1st Dept. 1908); *Leask v. Beach*, 173 App. Div. 873, 160 N. Y. Supp. 147 (1st Dept. 1916); *cf.* *Matter of Hunt*, 121 App. Div. 96, 105 N. Y. Supp. 696 (4th Dept. 1907).

<sup>12</sup> See *Jewett v. Schmidt*, 83 App. Div. 276, 280, 82 N. Y. Supp. 49, 51 (1st Dept. 1903).

<sup>13</sup> *Johnson v. Lawrence*, *supra* note 3; *Olcott v. Baldwin*, *supra* note 3; *Phoenix v. Livingston*, *supra* note 2; *Matter of Slocum*, 169 N. Y. 153, 62 N. E. 130 (1901); *Matter of Accounting of Mason*, 98 N. Y. 527 (1885); *Matter of Hogarty*, 62 App. Div. 79, 70 N. Y. Supp. 839 (1st Dept. 1901); *Matter of Union Trust Company of New York*, 70 App. Div. 5, 75 N. Y. Supp. 68 (1st Dept. 1902); *Matter of Hunt*, *supra* note 11.

<sup>14</sup> *Olcott v. Baldwin*, *supra* note 3, at 106, N. E. at 751.

such and that a judicial decree is the most satisfactory proof of the completion of the executorial duties and the commencement of those of trustee.<sup>15</sup> *Johnson v. Lawrence*<sup>16</sup> was cited in support of this proposition and the Court there stated: "and that where the will does so provide for the separate and successive duties that of trustee must be actually entered upon and its performance begun either by a real severance of the trust fund from the general assets or a judicial decree which wholly discharges the executor and leaves him acting and liable as trustee." These cases pass upon an entirely different proposition and the rule cannot be said to find support therein.

In a recent case<sup>17</sup> testator bequeathed his residuary estate to The Peoples Trust Company in trust, directing a sale of real property and securities and the investment of the proceeds thereof in mortgages upon real property. The trustee was to "set aside out of the said securities so invested by it" two separate funds producing specified yearly sums to be paid annually to his wife and son August. The remainder of the income was to be paid annually to his sons Julius and John and a daughter Anna, in equal shares, or upon their death to their issue. The trust was measured upon the lives of Julius and John; and upon their death the principal was to be paid in equal shares to the issue of the two sons and to Anna or her issue, after provision for the purchase of annuities for testator's wife and son August, should either be living.

The same trust company was named as executor. The will was probated on December 14, 1911. On March 17, 1913, a decree was entered settling the executor's account, awarding commissions, and directing the transfer of the residuary estate to itself as trustee. The Peoples Trust Company merged with the National City Bank of New York which petitioned the Court for leave to resign and for the substitution of the City Bank Farmers Trust Company, its affiliate, as trustee. Petitioners asked commissions for receiving and investing principal. The Special Guardian objected to the award of commissions on principal on which commissions had been paid to the Peoples Trust Company as executors.

Here the precise question of the binding effect of the prior decree was presented but the Court refused to pass upon it<sup>18</sup> and based the award upon a finding that the duties imposed were separate and distinct and that, "evidently he contemplated that the duties

<sup>15</sup> *Id.* at 107, N. E. at 751.

<sup>16</sup> *Johnson v. Lawrence*, *supra* note 3, at 162, and it was there further stated: "But it is said, the Surrogate by judicial decree has discharged the executors and made them trustees. He did not so discharge them, and could not foreclose by an opinion, as to the future functions of the executors, the question not before him which is before us. \* \* \* how impossible it proved to be to separate duties which in their nature under the will were inseparable."

<sup>17</sup> *Matter of Schliemann*, *supra* note 2.

<sup>18</sup> *Id.* at 505, N. E. at 156.

of the trustee should begin when the bequest in trust took effect, and it could take effect only when the executor had administered the estate and held the remainder, not by virtue of the appointment as executor, but under the trust bequest."<sup>19</sup>

While the nature of the question, involving as it does the construction of testamentary intent, makes the formulation of fixed tests difficult, the innumerable decisions in which the subject has been litigated demonstrate the need of clarification; and in the light of the confusion resulting from judicial determinations, resort to legislation would seem to be the only alternative.

The subjection of estates to excessive allowances to fiduciaries would suggest the need of limitation. The exacting, however, of careful management of an estate over a considerably long period of time at a comparatively inadequate compensation, especially where small estates are involved, would tend to discourage the undertaking by those capable of shouldering the burden of responsibility. While historically the office was a position of honor, it has grown to be the work of specialists who are entitled to compensation commensurate with their efforts.<sup>20</sup>

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<sup>19</sup> *Id.* at 505, N. E. at 156.

<sup>20</sup> See Jacobs, Cahn, *The Fiduciary of the Future* (1930) 5 ST. JOHN'S L. REV. 32.