

*WILLIAM S. NICHOLLS and others, Appellants, v. THOMAS HODGES, Executors of THOMAS L. HODGSON, deceased.

Decedents' estates.—Executors' commissions.—Claims against the estate. Issue.—Jurisdiction.

The orphans' court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, and is not to be under five per cent., nor exceeding ten per cent., on the amount of the inventory. p. 565.

If the executor has a claim on the estate of the deceased, it stands on an equal footing with other claims of the same nature. p. 565.

On a plenary proceeding, if either party require it, the court will direct an issue or issues to be made up and sent to a court of law to be tried, and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the court of chancery, or to a court of law, and in Maryland, the decision of the court, to which the appeal is made, is final. p. 565.

The supreme court of the United States has jurisdiction of appeals from the orphans' court, through the circuit court for the county of Washington, by virtue of the act of congress, of February 13th, 1801, and by the act of congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of \$1000, in order to entitle the party to an appeal. p. 565.

The commission to be allowed to an executor or administrator is submitted by law to the discretion of the court, upon a consideration of all the circumstances; it was obviously the intention of the legislature, that the decision of the orphans' court should be final and conclusive. p. 565.

The court being satisfied, by an examination of the evidence contained in the record of the proceedings of the orphans' court of the county of Washington, relative to a claim made upon the estate of the testator, by the executor, that such evidence was too loose and indefinite to sanction the claim, disallowed the same, and reversed the decree of the orphans' court which allowed the claim.¹ p. 566.

Nicholls v. Hodges, 2 Cr. C. C. 582, reversed, in part.

APPEAL from the Circuit Court of the District of Columbia, for the county of Washington.

The defendant obtained letters testamentary on the estate of Thomas C. Hodges, deceased, and passed his accounts in the orphans' court of Washington county, in which he was allowed ten per cent. commission on the inventory of the deceased's estate, amounting to \$2358.70, and \$1200 for services rendered by him to the deceased.

The testamentary law of Maryland, under which this commission was allowed, is in these words:—"His commission, which shall be at the discretion of the court, not under five per cent. nor exceeding ten per cent. on the amount of the inventory." Act of Maryland, ch. 101, sub. ch. 10, § 2.

*The appellants, creditors of the deceased's estate, filed their petition in the orphans' court, objecting to the allowance of these claims; [*563 and upon the answer of the appellee, and the testimony taken in the cause, the judge of the orphans' court decided in favor of the appellee, and allowed these claims. From this decision, an appeal was prayed to the circuit court for Washington county, where the judgment of the orphans' court was affirmed. From this decision, this appeal was made.

¹ Where a family relationship exists, the law does not imply a promise to pay for services rendered in such relation. *Neel v. Neel*, 59 Penn. St. 347; *Neel v. Gilmore*, 79 Id. 421; *Van Kuren v. Saxton*, 3 How. 547; *Cooper v. Turner*, 2 Id.

515. To establish such claim, an express contract must be shown. *Zerbe v. Miller*, 16 Penn. St. 488; *Hertzog v. Hertzog*, 29 Id. 465; *Mos-teller's Appeal*, 30 Id. 473; *Kelly's Estate*, 1 Tucker 28.

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The depositions of William W. Corcoran, Philip T. Berry, John S. Hare, James A. Magruder and Isaac S. Nicholls were taken, and were sent up with this record. These depositions were intended to prove, that the board and expenses of Thomas C. Hodges were paid by the deceased, by whom he was employed in his store as an assistant. That when the executor was spoken to about the account he had raised against the estate of the testator, he stated, he was sorry he had brought forward the account, and that he should not have done so, but by the advice of another. That he had said, that his uncle, the testator, did not agree to give him wages ; a share of the property was promised, but no agreement was made. The depositions also stated, that some six months before the death of the testator, the defendant applied for wages, which were refused, and he was told to take money from the drawer, and goods from the store, and if not satisfied, he might return to his father. That it was understood, the appellee was in the store of the testator as a clerk. The testator observed, at the time of making hi. will, that he had given the defendant, his nephew, a legacy, as a consideration for his services ; he had always intended to give him something ; he gave him the legacy for his services, because he had not been paid for them. It was also testified, that the executor had a good deal of trouble in settling the estate.

The counsel for the appellants endeavored to maintain, 1. That the claims of the executor had been improperly allowed by the court below. 2. That the evidence shows the commission allowed is unjust and unreasonable. 3. The appellee had no legal claim for services rendered to the deceased.

Key, for the appellant.—The evidence does not establish any claim to the compensation claimed by the appellee. On the contrary, he himself acknowledged he had no claim. But if any debt was due to him, the amount thereof could not be ascertained by the course adopted in this case. It must become the subject of proof, like all other demands on the estate.

*564] *It is contended, that no appeal is allowed in this case, because the provisions of the law of Maryland leave to "the discretion" of the court, the determination of the amount of commissions. What is the meaning of the assertion, that no appeal can be maintained in such a case? It is only when the exercise of discretion by the court is matter of favor or indulgence, that the rule applies ; but when there are legal rights, the discretion of the court applies to those rights, and its exercise is a matter of law, and like all others, when exercised, is examinable.

Coxe, for the appellee.—This is an application to have an examination of an account which has been passed upon by the orphans' court. It is denied, that a matter to be determined by the discretion of the court, can be the subject of appeal. The party must point out an error in law, and if the allowance by the court is not beyond the per-centage authorized by the statute, there cannot be such error. These accounts having been passed by the orphans' court, before whom were all the facts, the only remedy which remains is upon the bond given by the executor ; and in such an action, all the matters are open for examination.

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DUVALL, Justice, delivered the opinion of the court.—The appellee in this case obtained letters testamentary on the estate of Thomas C. Hodges, deceased, and passed accounts in the orphans' court for Washington county, in which he was allowed ten per cent. commission on the inventory of the deceased's estate, amounting to \$2358.70, and \$1200 for services rendered to the deceased in his lifetime. The appellants, creditors of the deceased, finding that the estate would probably be insufficient to pay the full amount of their claims, filed their petition in the orphans' court, objecting to the allowance of the claims of the executor, alleging that the property of the deceased consisted only of a store of goods in Georgetown, and a few debts due to him; and that the settlement of the estate was made without much labor or expense. Upon the answer of the executor, and the testimony taken in the cause, the judge of the orphans' court decided in favor of the executor, and decreed, that both claims be allowed. From this decree, an appeal was prayed and granted to the circuit court for Washington county, in which the judgment of the orphans' court was affirmed. From this decision, the cause is brought up, by appeal, to this court, for final hearing and decree.

Several questions have been raised in arguing this cause. On the part of the appellants, it is contended, 1st, that the *allowance of ten per cent. on the inventory, circumstanced as this case appears to be, is [[†]565 unjust and unreasonable: 2d, that there is no foundation for the claim of \$1200, made by the executor, for services rendered the testator in his lifetime.

The counsel for the appellee contends, 1st, that the whole allowance made by the orphans' court was no more than a moderate compensation for the attention and prompt settlement of the accounts of the deceased, by the executor, and for his services for several years as a clerk in the store of the deceased; and 2d, that the decision of the orphans' court was final and conclusive, and from which there ought to have been no appeal.

The power and authority of the orphans' court is derived from the testamentary laws of Maryland. The last general act upon the subject, is that passed in the year 1798, ch. 101. The orphans' court has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, "not under five per cent. nor exceeding ten per cent. on the amount of the inventory." If the executor has a claim against the deceased, it shall stand on an equal footing with other claims of the same nature. On a plenary proceeding, if either party shall require, the court will direct an issue or issues to be made up and sent to a court of law to be tried, and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the court of chancery, or to a court of law. And in Maryland, the decision of the court to which the appeal is made, is final and conclusive. But in the case under consideration, this court has jurisdiction, by virtue of the act of congress of February 1801, by which the circuit court for the district of Columbia was created, which provides that "any final judgment, order or decree in the said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of \$100, may be re-examined, and reversed or affirmed in the supreme court of the United States, by writ of error or appeal." By an act of congress, subsequently passed, the matter in dispute,

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exclusive of costs, must exceed the value of \$1000, in order to entitle the party to an appeal.

With respect to the commission to be allowed to the executor or administrator, it is submitted by law to the discretion of the court, not less than five, nor more than ten per cent. They may allow the lowest, or highest rate, or any intermediate proportion between the *minimum* and *maximum*, to which, in their discretion, they may adjudge the party to be entitled, *566] *upon a consideration of all circumstances, according to the services rendered, and the trouble and expense in completing the administration. Upon a just construction of this act, it was obviously the intention of the legislature, that such the decision of the orphans' court should be final and conclusive, and is the opinion of this court.

The claim of \$1200 for services rendered in the lifetime of the testator, rests upon different ground. The law places it "on an equal footing with other claims of the same nature." The legality and equity of the claim, must be examined in the same manner as the claim of any other creditor. Of course, it is a claim, on the trial of which either party might have required a trial by jury, in the manner prescribed by law. But this was not asked, and the claim was submitted in gross to the decision of the orphans' court, and was decided on, in like manner, by the circuit court; and it is now brought in the same shape before this court.

To support a claim of this nature, it is incumbent on the party making it to prove some contract, promise or agreement, expressed or implied, in relation to it. The testimony contained in the record may be summed up in a few words. It is admitted by the appellee, that there was no agreement to pay him wages. It is in proof, that he lived with his uncle three or four years in the capacity of a clerk, and that for more than half the time, he was the only clerk in the store, his uncle having great confidence in him. That it was distinctly understood between them, that the testator had agreed to pay his board, to find him in clothing, and to pay his expenses generally; that it was customary among merchants to take young men, of a certain age, for their board and clothes; that the uncle had said, that at a future day, he intended to take him into partnership with him; and it was proved, that the testator, at the time of making his will, observed, that he had given his nephew a legacy as a consideration for his services, and that he had always intended to give him something. It is not denied, that the testator had fully complied with his engagement to pay his board, supply him with clothes, and pay his expenses. On this testimony, the claim rests. The evidence is too defective to require comment. It is the opinion of this court, that it is too loose and indeterminate, to sanction the claim, and it cannot be allowed.

The decree of the circuit court, affirming the decree of the orphans' court, as to this claim, is reversed; in all other respects, it is affirmed.