

of opinion, that during the life of William Holmes, the uncle of the testator, and of his aunt, Sarah Floyd, the income should be divided between them in equal moieties; and that the title of the children of the aunt, to participate in the income of the trust estate, is postponed until after the death of the uncle. With regard to the proper application of the income, during the joint lives of the uncle and aunt, there does not seem to me to be much difficulty, it being clearly the intention of the testator to divide it equally between them.

In the event of the death of the uncle, living the aunt, a question of some difficulty might arise respecting the proportions in which, upon that contingency, the income of the estate should be divided among the aunt and her children; but as this contingency may not happen, there does not appear to be any necessity for an expression of the opinion of the court upon it. As the case is submitted without argument, there seems to be a peculiar propriety in confining the opinion of the court, to the questions which the condition of the case at this time, renders important.

The other question has reference to the commission of the trustee.

He has already received as executor, eight per cent. upon the personal estate now in his hands as trustee; and the answer of the defendant Holmes, insists, that the trustee is only entitled to ten per cent. commission on the gross income of the personal estate.

But the testator has said, that he shall have "ten per cent. upon the whole amount of property, which may come into his hands as trustee." Not upon the amount of income, but upon the amount of property, and this declaration of the testator gives the law of the case. The compensation thus fixed by the testator to be paid to the trustee, is to be paid to him as such; regarding him, when acting in that capacity, as filling an office wholly distinct from the office of executor. The per centage is to be paid him on the property, which may come into his hands *as trustee*; an office, so far as this question is concerned, entirely distinct from that of executor, and the compensa-