

For the defence it was contended that Hugh Stewart, the testator, left it to the discretion of his executors or the survivor to exclude any of his daughters from sharing in his estate, and that such discretion had been exercised against Matilda Sanderson, whereby she took nothing. It was also contended that the plaintiff's claim was barred by the Limitations Act.

The intention of the testator was shewn by his will, the provisions of which might be summarised as follows:—

Upon the youngest of his children, Margaret, Matilda, Janet, and Hugh, attaining the age of 21, his estate was to be sold, and, subject to certain deductions, the residue was to be distributed among the four children, Hugh (the defendant) taking four-tenths and each of the others two-tenths. Then, following these gifts to the four children, there was the proviso that if "at the time of the distribution of such residue of my estate," any of his daughters should have married; the executors might reduce such daughter's share if they should be of opinion that she is "then in comfortable circumstances." In other words, to each of the daughters there was an absolute gift of two-tenths, reducible by the executors if, having regard to the circumstances existing at the time of such distribution, they should see fit so to reduce the same.

Matilda having died before the arrival of the period for distribution, it became impossible for the executors to exercise the discretion given to them by the testator, to cut down her gift.

Where a testator makes an absolute gift to a legatee, and grafts upon such gift a trust which fails, the gift remains absolute: *Hancock v. Watson*, [1902] A.C. 14.

Applying this principle to the gift of two-tenths to Matilda, that gift became absolute upon her death.

The direction in the will that the whole estate should be sold within one year of the youngest daughter attaining her majority was peremptory and for all purposes, and therefore operated as a conversion of realty into personalty at and from that time: *Doughty v. Bull* (1725), 2 P. Wms. 320. Thus the plaintiff's cause of action was in respect of personalty.

Matilda was not paid her two-tenths or any part thereof, and the plaintiff, as administratrix of Matilda's estate, now sought to recover it from the defendant, upon the ground that, in fraud of Matilda, he had possessed himself of all the assets of the estate.

A person who knowingly receives and deals with trust property in a manner inconsistent with the trust is personally liable for whatever loss accrues to the trust: *Magnus v. Queensland National Bank* (1888), 37 Ch. D. 466, 471.

The defendant, as a constructive trustee, was liable to account for the assets come to his hands.