

should depend upon their being still unmarried at the time of the distribution of the residue, "and for this purpose I direct that the said estate of mine be sold within one year after my said youngest child surviving me shall have attained the age of 21 years then the share or shares of such one or more of them as shall have got married shall not be required to be paid in full by my executors if they think that she or they are then in comfortable circumstances which I leave to the good judgment of my said executors and the said share or shares or portions of such share or shares thus saved to the estate shall be divided equally amongst the other persons herein named as legatees namely the three or less than three remaining legatees."

The plaintiff alleged that the defendant had committed a breach of trust by taking a conveyance to himself, from the surviving executor, of the testator's farm, and refusing to account for the share of his sister Matilda.

Matilda, however, had married long before the time set for the distribution, and her right to share had become dependent upon the discretion conferred upon the executors. Though not proved by any written document, there was abundant evidence of the exercise of discretion in regard to Matilda by the two executors, and that the manner of their dealing with the daughters was in accordance with what manifestly was the desire of the testator. Matilda's husband, at the time of and following her marriage, was apparently in comfortable circumstances. She was given by the executors some household furniture and other chattels to assist her in setting up housekeeping, and it was manifest that, in their discretion, they considered her entitled to no further benefit from the estate.

The question whether the surviving executor could exercise this discretion (as to which see now the Trustee Act, R.S.O. 1914 ch. 121, sec. 27) did not arise, for the discretion had been exercised and lived up to by the two executors before the death of the widow, and any action or expression of the surviving executor, after her death, was merely in pursuance of and founded on the discretion which they together had exercised.

The defendant's dealings throughout were in good faith and without improper motive or fraud such as was suggested by the plaintiff. He was not the trustee and did not act or assume to act as such.

*Action dismissed with costs.*