

KELLY, J.

JANUARY 24TH, 1920.

ANKCORN v. STEWART.

Will—Discretion of Executors as to Daughters of Testator Sharing in Estate—Evidence of Exercise—Powers of Surviving Executor—Married Daughter Deprived of Share—Conveyance by Surviving Executor to Son of Testator—Action by Representative of Daughter against Son for Accounting Based on Alleged Breach of Trust.

Action by the daughter and administratrix of the estate of Matilda Sanderson, deceased, against the grantee of the surviving executor of the will of Hugh Stewart, the father of Matilda Sanderson, for an accounting and payment over of the share of Hugh Stewart's estate to which Matilda Sanderson was entitled. The defendant was the son of Hugh Stewart and the brother of Matilda Sanderson.

The action was tried without a jury at Chatham.

J. G. Kerr and W. G. Kerr, for the plaintiff.

O. L. Lewis, K.C., and H. D. Smith, for the defendant.

KELLY, J., in a written judgment, said that Hugh Stewart made his will in 1890 and died on the 21st August, 1893; Matilda Stewart married George Sanderson in December, 1892, and died in December, 1893, when the plaintiff was less than a month old. Probate of Hugh Stewart's will was granted in January, 1894, to the executors, Margaret Stewart, the widow, and William Stewart, who was not related to the testator. Margaret Stewart died in April, 1896. Janet Stewart, the youngest of the testator's children who were named as beneficiaries in his will, attained the age of 21 in October, 1896. She married in February, 1897. The conveyance from William Stewart, as surviving executor, to the defendant, was made in March, 1897. William Stewart died in 1917. In July, 1919, letters of administration of her mother's estate were granted to the plaintiff.

Hugh Stewart's will directed that after his decease his wife should have the use and management of his estate for her support and maintenance and for the support, maintenance, and education of four of his children, Margaret, Matilda, Janet, and Hugh, until the youngest of them should attain her majority, and upon that event happening the estate should be sold by the executors, who, after making all lawful allowance to the testator's widow, were authorised to dispose of the residue among the four named children, four-tenths to Hugh and three-tenths to each of the daughters. There was a proviso that the payments to the daughters