

41, 1938

# In the Privy Council.

No. 20 of 1938.

## ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

IN THE MATTER of the Estate of CLIFFORD WINFIELD BURROWS  
SIFTON, late of the Township of the Broken Front of Yonge,  
in the County of Leeds

AND IN THE MATTER of Consolidated Rules 600 and 604.

### CASE OF THE RESPONDENT

THE OFFICIAL GUARDIAN.

10     **1.** This is an appeal by Elizabeth Arminella Burrows Sifton from a judgment of the Court of Appeal of Ontario dated the 17th June, 1937, varying an Order of Middleton J.A. dated the 18th February, 1937, upon a Motion raising certain questions of construction of the Will of the above-named Clifford Winfield Burrows Sifton deceased (hereinafter called "the Testator").

Record.

20     **2.** By his Will dated the 12th day of July, 1926, the Testator after directing payment of his debts and funeral expenses revoking prior wills and/or codicils and making certain other directions not material to be here stated (including a specific legacy to his daughter the Appellant) gave devised and bequeathed all other property real and personal to his Executors upon trusts in the following terms namely :—

p. 41.

“ To manage the corpus of the estate in accordance with their best judgment continuing any investments that exist at the time of my death if they see fit and to pay to or for my said daughter a sum sufficient in their judgment to maintain her suitably until she is forty years of age after which the whole income of the estate shall be paid to her annually. ”

p. 41, l. 12.

“ The payments to my said daughter shall be made only so long as she shall continue to reside in Canada. ”

Record.

“ If my said daughter dies leaving issue her child or children shall receive the whole estate sharing equally on attainment respectively by each child of the age of twenty-five years.

“ If my said daughter predecease me or dies leaving no issue then the corpus of my estate shall be divided equally between the then living grandchildren of my Father Sir Clifford Sifton by his wife the late Lady Elizabeth Sifton my lamented Mother.

“ I appoint such of my brothers as are alive at the time of my death to be the Executors of this my Will.”

p. 40. **3.** The Testator died on the 13th June, 1928, and his said Will was proved in the Surrogate Court of the United Counties of Leeds and Grenville on the 10th August, 1928, by John Wright Sifton, Henry Arthur Sifton and the Respondents Clifford Sifton and Wilfred Victor Sifton the surviving brothers of the Testator. 10

p. 4, l. 22. **4.** The Appellant is aged upwards of 22 years old having been born in the year 1915.

p. 8, ll. 8 to 15. **5.** The Appellant spent a period between October 1934 and September 1935 inclusive in European Countries travelling and studying for the purpose of completing her education after which she returned to Canada. 20

p. 6.. **6.** On the 10th February, 1937, the Respondents Clifford Sifton and Wilfrid Victor Sifton as surviving Executors of the Testator applied by Motion to the Supreme Court of Ontario under Consolidated Rules 600 and 604 raising a number of questions as to whether certain acts therein specified would or would not constitute a failure on the part of the Appellant to “ continue to reside in Canada ” within the meaning of the last quoted words as used in the Will of the Testator. The Official Guardian was not served in the first instance with the said Motion.

p. 12. **7.** The said Motion came on for hearing before Middleton J.A. on the 18th February, 1937, and he made an Order thereon in the following terms :— 30

“ 1. This Court doth declare that the true intent meaning and construction of the clause ‘ The payments to my said daughter shall be made only so long as she shall continue to reside in Canada ’ used in the Last Will and Testament is :—

“ (A) That the words ‘ to reside in Canada ’ are equivalent to ‘ spend substantially all of her time in Canada ’ but that mere temporary absences from Canada in certain circumstances would not bring about a forfeiture of the interest of the said daughter in the Estate.

“(B) That any and all absences of the said daughter from Canada not exceeding two calendar months in the aggregate on one or more occasions during any one calendar year or not exceeding two calendar months on one continuous occasion and one additional calendar month on one or more additional occasions in one calendar year, be in all events incapable of constituting a failure to continue to reside in Canada so as to bring about a forfeiture of the right of the said daughter to receive payments or the benefits thereof for her maintenance under the said Will.

Record.

10           “(C) That the absence of the said daughter from Canada abroad between October 1934 and September 1935 does not work a forfeiture of such interest.

          “(D) That an absence from Canada for a period of eleven months during the next two or three years will work a forfeiture of such interest unless the Executors of the Estate are satisfied it is in good faith for the purpose of completing the education of the said daughter ;

“AND doth Order and Adjudge the same accordingly.

20           “2. And this Court doth further Order and Adjudge that the questions propounded in the Notice of Motion do not now admit of categorical answers but the parties may apply to this Court from time to time as circumstances arise for the advice opinion and direction of the Court on the matters in question.

          “3. And this Court doth further Order and Adjudge that the costs of the parties represented on the Motion herein be paid out of the Estate forthwith after taxation thereof those of the said Executors and Trustees to be taxed as between Solicitor and Client.”

30           The reasons for the said judgment of Middleton J.A. are stated on pages 9, 10 and 11 of the Record.

**8.** The Appellant appealed from the Judgment of Middleton J.A. on various grounds and on the 21st April, 1937, the Court of Appeal adjourned the further hearing of the Appeal and ordered that the Official Guardian be and he was thereby appointed to represent the grandchildren of the late Sir Clifford Sifton by his wife the late Lady Elizabeth Sifton mentioned in the said Will and also any unborn Infants. And also that Mrs. Winfield Sifton widow of the Testator be notified of the Appeal in manner thereby specified. pp. 14, 15. p. 16, l. 23. p. 16, l. 28.

40           **9.** The said Appeal was heard on the 23rd April, 1937, before Rowell C.J.O., Latchford C.J.A. Fisher and Henderson J.J.A. and Kingstone J. in the presence of Counsel for the Appellant the Respondent

Record. Clifford Sifton and Wilfred Victor Sifton the said Mrs. Winfield Sifton and the Official Guardian. In the Court of Appeal it was argued by the Appellant for the first time that the clause "The payments to my said daughter shall be made only so long as she shall continue to reside in Canada" was void for uncertainty. The judgment of the Court was delivered on the 17th June, 1937 and upon the question of uncertainty it was held by a majority (Rowell C.J.O., Latchford C.J.A., Fisher J.A. and Kingstone J., Henderson J.A. dissenting) that the clause was not void for uncertainty. In the result an Order was made as follows:—

pp. 18 to 35.

pp. 36, 37.  
p. 36, l. 35.

" 1. This Court doth Order that the said judgment be varied 10 and as varied be as follows:—

" I. This Court doth Declare:—

" (1) That the Clause or Condition 'The payments to my said daughter shall be made only so long as she shall continue to reside in Canada' used in the said last Will and Testament is not void for uncertainty.

" (2) That the true intent, meaning and construction of the said clause or condition is that the words 'to reside in Canada' are equivalent to 'to live in Canada.'

" (3) That leaving Canada for a limited period and for a 20 purely temporary purpose with the intention of returning to Canada and actually returning when the temporary purpose is accomplished would not be a breach of the condition.

" (4) That the absence of the said daughter from Canada abroad between October 1934 and September 1935 pursuing her studies as part of her University Course, does not work a forfeiture of such interest.

" And Doth Order and Adjudge the same accordingly.

" 2. And this Court doth further Order and Adjudge that the questions propounded in the Notice of Motion do not now admit 30 of categorical answers but the parties may apply to this Court from time to time, as circumstances arise, for the advice, opinion and direction of the Court on the matters in question.

" 3. And this Court doth further Order and Adjudge that the costs of the parties represented on the Motion herein be paid out of the Estate forthwith after taxation thereof those of the said Executors and Trustees to be taxed as between Solicitor and Client.

" II. And this Court doth further Order and Adjudge that the costs of all parties represented on this Appeal be paid out of the Estate forthwith after taxation thereof those of the said 40 Executors and Trustees to be taxed as between Solicitor and Client."

**10.** The Official Guardian is interested in this appeal on behalf of grandchildren of the late Sir Clifford Sifton (of whom there are some living) and any unborn issue. The said grandchildren and unborn issue are contingently interested in the corpus of the residuary estate of the Testator after the death of the Appellant.

Record.

As regards the questions arising on this appeal they are interested in obtaining a decision which will so far as possible result in or increase the chances of income of the residuary estate being accumulated and added to capital.

10 In the event of it being held upon this appeal that the condition in the Will relating to residence in Canada is void for uncertainty further questions will arise as to the destination of the income of the residuary estate of the Testator during the lifetime of the Appellant and the Official Guardian reserves the right to ask that such questions be determined and to contend for an accumulation of income as aforesaid. Whilst reserving however his rights in respect of all such last-mentioned questions the Official Guardian considers that the interests of the grandchildren and unborn issue whom he represents are properly protected by the Order of the Court of Appeal, and submits that the said Order was right and  
20 ought to be affirmed for the following amongst other

## REASONS.

- (1) BECAUSE the said Order gives proper interpretation and effect to the Will of the Testator.
- (2) BECAUSE upon the true construction of the said Will the Appellant was not intended to take any interest in the residuary estate of the Testator except so long as she should comply with the said clause or condition as to residence in Canada.
- (3) BECAUSE the grandchildren and unborn issue whom the Official Guardian represents are interested in any income to which the Appellant may become disentitled by any breach of the condition.
- (4) GENERALLY for the reasons given in the majority judgments of the Court of Appeal.

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McGRECOR YOUNG.

G. P. SLADE.

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