41, 1938

CASE FOR APPELLANT.

No. 20 of 1938.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR THE PROVINCE OF 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.

BETWEEN

ELIZABETH ARMINELLA BURROWS SIFTON (Spinster) (Respondent) ... ... *Appellant*

— AND —

CLIFFORD SIFTON and WILFRED VICTOR SIFTON Surviving Executors and Trustees of the last Will and Testament of the said Clifton Winfield Burrows Sifton deceased (Applicants) *Respondents*

THE OFFICIAL GUARDIAN and MABEL CABLE SIFTON (Respondents) ... ... *Respondents*

CASE FOR THE APPELLANT.

1. This is an appeal by Elizabeth Arminella Burrows Sifton from the Judgment of the Court of Appeal for Ontario pronounced on the 17th day of June, 1937, which Judgment varied the Judgment of the Honourable Mr. Justice Middleton pronounced upon an application by way of originating motion brought by Clifford Sifton and Wilfred Victor Sifton, the surviving Executors and Trustees of the Will of Clifford Winfield Burrows Sifton, deceased, for the opinion, advice and direction of the Court on and about certain questions arising in the administration of the deceased's Estate.

pp. 36-37
pp. 12-13
pp. 6-7

2. The main point with which this appeal is concerned is whether a direction contained in the Will that the monies to be paid to the Appellant thereunder are to be paid only so long as she continues to reside in Canada is void for uncertainty.

4 8-9 3. The Testator, Clifford Winfield Burrows Sifton, died on or about the 13th day of June, 1928, leaving him surviving his widow, the Respondent Mabel Cable Sifton and his daughter and only child, the Appellant, then aged 13.

40. 4. Probate of the Testator's Will dated the 12th day of July, 1926, was granted by the Surrogate Court of the United Counties of Leeds and Grenville, to John W. Sifton, Henry A. Sifton and the Respondents Clifford Sifton and W. Victor Sifton the Executors named in the Will, of whom Clifford Sifton and Wilfred Victor Sifton are the surviving Executors and Trustees.

41 5. The Will, after bequeathing the Testator's furniture and personal effects to the Appellant, contains the following clause:—

41 10-18 "I give, devise and bequeath all other property, real and personal, to my Executors upon the following trusts, namely:—

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.

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

The Will contains no gift over in the event of a forfeiture of the Appellant's interest by virtue of the condition with regard to residence.

1 26-31 6. The Appellant resides in the City of Montreal, in the Province of Quebec. At the time of the institution of these proceedings she was 22 years of age, had completed two years 4 23-24 as an Undergraduate in the Course of Honour Modern Languages 8 8-15 at the University of Toronto and had elected to take her third year in that Course by studying and travelling abroad between October, 1934, and September, 1935, as permitted by the University. The Appellant was a minor at the conclusion of this trip abroad.

7. The Appellant, having attained her majority, informed the Executors that she desired to go abroad again for the purpose of study and travel for a period of eleven months during each of the next following two or three years and desired to know whether in that event she would forfeit her interest in the estate and, if so, for what lesser periods of time and in what circumstances she might absent herself from Canada. p. 1 ll. 32-36 p. 2 ll. 1-8. p. 2 ll. 26-32

8. The Respondent Executors applied to the Supreme Court of Ontario by way of an originating notice of motion dated the 10th day of February, 1937, for the opinion, direction and advice of the Court on certain questions raised by the Appellant's request and the application came on for hearing before the Honourable Mr. Justice Middleton on the 11th day of February, 1937. The point that the condition was void for uncertainty was not argued before him. p. 6 p. 12 l. 9

9. On the 18th day of February, 1937, a written Judgment was delivered by the Honourable Mr. Justice Middleton and on April 2nd, 1937, the formal Judgment of the Court was issued. pp. 9-11 pp. 12-13

10. In his Reasons for Judgment the learned Judge pointed out that the Appellant desired to know with definiteness to what extent she may go abroad without disentitling herself to the income provided for her in the Will. He agreed with the view put forward on her behalf that a temporary absence for education or travel will not bring about a forfeiture and decided that her absence in 1934-35 worked no forfeiture. But it was impossible to say that an absence of eleven months during each succeeding year would not work a forfeiture. It would unless the Executors were satisfied in each instance that the Appellant's absence was bonâ fide and due to a wish to complete her education. It was impossible to define with any accuracy what future conduct would fall within the terms of the Will. The limits of absence suggested by the Executors (two months in each year) appeared to him to be a little too narrow and he suggested that an additional month's absence in each year should be allowed. " This however is by way of suggestion only for I think that while the Court might be compelled to determine the question, after the event and in the light of facts, the Executors are in an infinitely better position to judge as to the future. The word ' residence ' is an elastic word; it takes colour from the context in which it is used." p. 9 p. 9 ll. 30-40 p. 10 ll. 43-44 p. 11 ll. 1-2 p. 11 ll. 2-4 p. 11 ll. 7-9 p. 11 ll. 10-16 p. 11 ll. 16-19

The learned Judge held that the Testator did not contemplate an occasional residence by the Appellant in Canada during which time she would receive the income and periods of non-residence p. 11 ll. 34-39

during which she should not, and that, therefore, an absence which would indicate an intention to abandon residence in Canada would not reserve a right to again receive income upon resuming residence in Canada. It was not expedient to answer that question until definite facts had arisen. The specific questions as propounded in the Notice of Motion did not admit of categorical answers.

p. 11 ll. 40-41

pp. 12-13

11. By his Judgment dated 11th February 1937 it was declared 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; that in any event certain defined absences would not bring about a forfeiture; that the absence from Canada in 1934-35 did not work a forfeiture; and that an absence for eleven months during the next two or three years would work a forfeiture, unless the Executors are satisfied such " absence is in good faith for the purpose of completing the education " of the Appellant. It was further declared that the questions propounded in the Notice of Motion did not then admit of categorical answers, but that the parties might apply to the Court from time to time as circumstances arose, for its directions.

p. 13 l. 13

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p. 14

12. The Appellant appealed from the Judgment of the Honourable Mr. Justice Middleton to the Court of Appeal for Ontario by Notice of Appeal dated the 5th day of March, 1937, on the grounds that the Judgment was not a proper interpretation of the Will and that the questions submitted should have been answered. By a supplementary Notice dated the 8th day of April, 1937, the Appellant gave notice that on the hearing of the appeal she would apply for leave to submit that the clause in question is void for uncertainty.

p. 15

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pp. 16-17

13. The appeal came on for hearing before the Court of Appeal on the 21st day of April, 1937, when it appeared to the Court that all persons interested in the Testator's estate should be represented. The hearing of the appeal was accordingly adjourned until the 23rd day of April, 1937, notice of the hearing was directed to be given to the Testator's widow the Respondent Mabel Cable Sifton in order that she could appoint Counsel to represent her and the Official Guardian was appointed to represent the Appellant's unborn issue and the grandchildren of the Testator's parents, who under the Will are contingently entitled to the residue of the Estate after the Appellant's death.

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14. The appeal came on for hearing before the Court of Appeal (The Chief Justice, the Chief Justice in Appeal, Fisher, Henderson and Kingstone J.J.) on the 23rd day of April, 1937, when all parties were represented by Counsel and leave was given to the Appellant to argue that the condition in question is void for uncertainty. p. 36 l. 17 p. 36 ll. 26-28

15. The Court of Appeal gave judgment on the 17th day of June, 1937, declaring that the condition is not void for uncertainty and that the true intent, meaning and construction of the condition is that the words " to reside in Canada " are equivalent to " to live in Canada," and varying the Judgment of the Honourable Mr. Justice Middleton in other incidental particulars. Each of the five learned Judges gave written Reasons; Mr. Justice Henderson delivered a dissenting Judgment to the effect that the condition was void for uncertainty. pp. 36-37 pp. 18-35

16. In his Reasons for Judgment the Chief Justice of Ontario said that during the argument he was much impressed with the contention that the condition was void for uncertainty but upon further consideration of the terms of the Will and the authorities he had reached the conclusion that the clause is valid. There did not appear to him to be anything uncertain or ambiguous in the words " to reside in Canada " : the words " to reside " have a clear and definite meaning. They mean to live in a place. On the other hand, he said, in none of the cases relied upon by the Appellant and referred to in the dissenting Judgment of Mr. Justice Henderson were the words as definite and precise as in this Will. p. 19 ll. 16-19 p. 19 ll. 22-29 p. 19 ll. 30-35

The learned Judge reviewed many authorities as to the meaning and effect of conditions with regard to residence and similar conditions and said that he agreed with Mr. Justice Middleton that the words " to reside in Canada " mean far more than maintaining a permanent residence there and mean to continue to live in Canada. But he did not agree with the Executors that the Appellant cannot leave Canada either to pursue some particular study abroad or for a holiday abroad. The absence of the Appellant from Canada in 1934-35 was not a breach of the condition. p. 19 l. 36 p. 23 l. 43 p. 23 ll. 43-45 p. 24 ll. 17-19 p. 24 ll. 24-25

17. The learned Chief Justice in Appeal said that he agreed with the Chief Justice of Ontario, with a slight variation. He thought that the words of the Testator in question were absolutely definite in their intendment. In his opinion the Court could not be properly called upon now to decide for what periods of time p. 26 l. 1 p. 26 ll. 30-32 p. 27 ll. 8-17

the Appellant might absent herself from Canada without forfeiting her interest under the Will. If that question should arise at any time the Executors would have to apply their judgment to it. Their decision might be questioned in the Courts, but until it was reached the Court should not advise the Executors what length of non-residence constitutes a breach of the condition.

p. 28 l. 9-13

18. Mr. Justice Fisher said that he had no difficulty in determining the meaning of the words " reside " and " continue to reside in Canada " when applied to all the facts and circumstances. " Reside " means and was intended to mean by the Testator that his daughter must live in Canada and make Canada her permanent place of abode. He thought the Testator did not mean that she was not entitled to complete her education and that if she went to England or New York, as she desires, for that purpose, living in a school residence, boarding-house, or an hotel, it would not mean she had gone there to reside and make either of those places her place of abode. Such absences would be for a definite and particular purpose and for definite periods of time.

p. 28 l. 22-32

p. 28 l. 33-45

p. 29 l. 1-7

p. 29 l. 17-25

After considering certain special forms of possible absence from Canada which would not in his view operate as a forfeiture the learned Judge concluded by saying that he agreed with the learned Chief Justice but would add a paragraph to the formal Judgment that the daughter is entitled to go abroad, either to England or New York, to qualify as a playwright, for eleven months in each year for three successive years, returning to and living in Canada at the expiration of each period of eleven months.

p. 29 l. 33-40

19. Mr. Justice Kingstone said that on the argument of the appeal he was of the opinion that the words " as long as she shall continue to reside in Canada " were so indefinite and uncertain as to be incapable of being properly and satisfactorily determined and that the condition was therefore void for uncertainty. On further reflection, however, he thought that the words " to reside in Canada " mean " to live in a place," namely, Canada. There might well be difficulty when certain events happen in saying whether or not they fall within the condition, but that was not a matter with which the Court was at the present time concerned or should attempt to express itself on. With some hesitation he concurred in the view that a rational meaning could be given to the words.

p. 30 l. 4-7

p. 30 l. 8-11

p. 32 l. 1-6

20. Mr. Justice Henderson (dissenting) said that he is of the opinion on the authorities that the condition was a condition

subsequent and that upon the Testator's death the Appellant became vested with a life estate in the income of the estate limited only as to amount until she attains the age of forty when she becomes entitled to the whole income. The only discretion vested in the Executors is as to the amount sufficient to maintain the Appellant suitably until she is forty years of age but they have no discretion to determine in what events a breach of the condition occurs. He was further of the opinion that the authorities clearly establish the condition is void for uncertainty and that there was no more cogent argument which would be advanced to establish the uncertainty than the statements of Mr. Justice Middleton that " it is impossible for the Court to determine with any accuracy what future conduct will fall within the terms of the Will " and " the questions as propounded in the Notice of Motion do not admit of categorical answers." The learned Judge reviewed a number of authorities and quoted from the Speech of Lord Cranworth in *Clavering v. Ellison* (1859) 7 H.L.C.707 at 725: " I consider that from the earliest times one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning. precisely and distinctly, upon the happening of that event it was that the preceding vested estate was to determine." In his view the condition was void for uncertainty and the Appellant was entitled to the benefits provided by the Will free from the condition.

p. 32 ll. 7-15

p. 32 ll. 16-23

p. 32 l. 31

p. 33 ll. 22-28

p. 35 ll. 11-13

21. The Appellant's appeal from the Judgment of the Court of Appeal for Ontario to His Majesty in His Privy Council has been admitted.

pp. 38-39

22. The Appellant humbly submits that the Judgment appealed from should be reversed and that it should be declared that the conditions forfeiting her interest if she should not continue to reside in Canada is void or that the Judgment appealed from should be otherwise varied for the following (among other)

REASONS

(1) BECAUSE the condition " The payments to my said daughter shall be made only so long as she shall continue to reside in Canada " is a condition subsequent and is void for uncertainty.

(2) BECAUSE the meaning of the words " to continue to reside in Canada " in the clause in question, is not made more precise or certain by a declaration that they are equivalent to the words " to live in Canada."

(3) BECAUSE the condition, if it is to operate as a valid defeasance of the Appellant's interests under her father's Will, must be such that the Court can see from the date when the Will comes into operation precisely and distinctly what is the event the happening of which is to effect the defeasance.

(4) BECAUSE under this condition such an event cannot be precisely or distinctly foreseen, nor have the Judges in the Courts below been able to agree with any certainty what it is to be.

(5) BECAUSE the fact that in any given set of circumstances a decision, if it had to be come to, could be come to whether the condition had been satisfied or not does mean that the condition is any the less void for uncertainty.

(6) BECAUSE under the Laws of the Province of Ontario the Courts should have answered the questions put by the Executors.

CYRIL RADCLIFFE.

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CASE FOR THE APPELLANT

ELIZABETH ARMINELLA BURROWS SIFTON.

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