

58, 1936

# In the Privy Council.

No. 52 of 1936.

## ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of the Estate of Katherine Hamilton Browne deceased ;  
and

IN THE MATTER of the Construction of the Will of the said deceased.

BETWEEN

ENID BROWNE ... .. *Appellant,*

AND

FLORENCE YODA MOODY, CONSTANCE EMMA KINNEAR, HELEN SMITH, THE OFFICIAL GUARDIAN on behalf of the Infant Children of Florence Yoda Moody and Constance Emma Kinnear, and of any unborn children of the said Florence Yoda Moody and Constance Emma Kinnear as well as of Helen Smith and of Enid Browne, and WILLIAM GEORGE HAMILTON BROWNE and THOMAS CAMERON URQUHART Executors of the Estate of Katherine Hamilton Browne Deceased, and NEDRA CAROLINE SMITH ... .. *Respondents.*

### CASE OF THE RESPONDENTS,

WILLIAM GEORGE HAMILTON BROWNE and THOMAS CAMERON URQUHART, Executors of the Estate of the deceased.

1. This is an Appeal from a Judgment of the Supreme Court of Canada dated the 6th day of March, 1934, affirming a Judgment of the Honourable Chief Justice Rose of the High Court of Justice for Ontario dated 25th March, 1933. Record.  
pp. 20-21.  
pp. 12-13.

2. The hereinbefore named Testatrix, Katherine Hamilton Browne, died on the 17th day of March, 1930, domiciled in the City of Toronto, Ontario, having made a Will dated the 16th day of December, 1929. p. 5, l. 43.  
p. 5, l. 45.

Record.  
p. 5, l. 47. *et*  
*seq.*  
p. 6.

**3.** Probate of the said Will of the Testatrix was on the 22nd day of January, 1931, granted to these Respondents William George Hamilton Browne and Thomas Cameron Urquhart, the Executors therein named.

p. 8, l. 5 *et*  
*seq.*

**4.** The Testatrix left her surviving her son, William George Hamilton Browne, her grand-daughter, Enid Browne, the daughter of her said son, and her daughters, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith. Florence Yoda Moody has three infant children. Constance Emma Kinnear has one infant child. Helen Smith has one child, an adult, the Respondent Nedra Caroline Smith.

p. 8, l. 7.  
p. 8, l. 14.

p. 8, l. 20.

**5.** The said Katherine Hamilton Browne at the time of her death had a fund of \$100,000.00, which was then in the hands of E. H. Watt, a stock-broker of the City of Toronto, for investment on call loans for her benefit ; and the said fund, except for certain disbursements thereout, remained in his hands after her death and was invested by him at first in call loans and, later, when these ceased to be available, in other investments. The remainder of her estate, including her residence, consisted of various properties and investments amounting to \$27,013.00.

pp. 6-7.

**6.** The provisions of the Will relating to the above-mentioned fund of \$100,000.00 and to her residuary estate are paragraphs 5, 6 and 7.

**7.** The whole of the estate of the deceased, with the exception of the fund in question in this appeal and the residence of the deceased, which under Ontario law became vested in her son, William George Hamilton Browne, on the 17th day of March, 1933, had been distributed to the beneficiaries entitled thereto on or before the 17th day of August, 1931, which was more than a year before the originating Notice of Motion in these proceedings was instituted.

**8.** The said fund is all that now remains undistributed in the estate.

**9.** On the 1st day of September, 1932, an Originating Notice of Motion to the High Court of Justice for Ontario was launched by certain beneficiaries for the determination of the following amongst other questions, namely :— 30

p. 5, l. 30 *et*  
*seq.*

“ (2) When do the respective shares of the four beneficiaries entitled to the corpus of the . . . fund in remainder, under Paragraph 5 of the . . . Will, become vested ?

“ (3) Do their shares vest absolutely immediately upon the death of the Testatrix, payable on the death of the said William George Hamilton Browne, through their having survived the Testatrix, under the first contingency of Clause 7 of the said Will ? Or

“ (4) Are such respective shares liable to be divested through the beneficiaries predeceasing the said William George Hamilton Browne, leaving issue, under the second contingency of Clause 7 ? ” 40

p. 8, l. 33.

**10.** At the time of the said application and until the 9th day of June, 1933, the Appellant, Enid Browne, was an infant. She is now of the full age of twenty-one years.

11. The said originating motion came on for hearing before the Honourable Chief Justice Rose who delivered Judgment on the 25th day of March, 1933. Record. p. 12.

12. On the 7th day of April, 1933, an Order was made by the Court of Appeal for Ontario granting leave to appeal per saltum direct to the Supreme Court of Canada. p. 14.

13. The Appeal was heard before the Supreme Court of Canada on the 28th and 29th days of November, 1933, when the Court (Duff C.J., Rinfret, Smith, Cannon and Hughes J.J.) reserved their Judgment. The form of the 10 questions submitted to the Supreme Court was as follows :—

“(a) Whether or not the legacies directed by the said Testatrix, Katherine Hamilton Browne, deceased, under paragraph 5 of her said Will, to be paid to Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith (the Appellants herein), upon the death of the life tenant, William George Hamilton Browne, became vested upon the death of the said Testatrix ; p. 8, l. 39 et seq.  
p. 16, l. 16 et seq.

“(b) And should this Honourable Court find that such legacies did become vested upon the death of the Testatrix, then, whether or not the legacy of any of such Appellants is liable to be divested under or 20 “otherwise affected by Paragraph 7 of the said Will.”

14. The Judgment of the Supreme Court was delivered on the 6th March, 1934, by Rinfret J. dismissing the Appeal and declaring in answer to question (a) above, that the legacies referred to did not become vested upon the death of the Testatrix and that in view of the answer to question (a), the point submitted in question (b) did not arise. pp. 20-22.

15. These Respondents were represented upon the originating motion before the Honourable the Chief Justice of the High Court and caused all relative information to be presented to the Court. p. 12, l. 15.

16. These Respondents have appeared by counsel in all subsequent 30 proceedings and appeals except the Application to this Honourable Board for special leave to appeal in this matter and have caused all information in their possession or power to be presented to the Court. p. 21.

17. These Respondents submit their rights to this Honourable Board and respectfully submit that they should be paid their costs in the Courts below and of this appeal for the following

## REASONS

1. Because these Respondents have been brought into all of the proceedings throughout as necessary parties and have been put to great expense.
2. Because they have submitted their rights to the Courts below and to this Honourable Board.

GEORGE A. URQUHART.

# In the Privy Council.

No. 52 of 1936.

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## ON APPEAL FROM THE SUPREME COURT OF CANADA.

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IN THE MATTER OF THE ESTATE OF KATHERINE  
HAMILTON BROWNE, deceased

AND

IN THE MATTER OF THE CONSTRUCTION OF THE  
WILL OF THE SAID DECEASED.

BETWEEN

ENID BROWNE ... .. *Appellant,*

AND

FLORENCE YODA MOODY, CONSTANCE EMMA  
KINNEAR, HELEN SMITH, THE OFFICIAL  
GUARDIAN ON BEHALF OF THE INFANT CHILDREN  
OF FLORENCE YODA MOODY AND CONSTANCE EMMA  
KINNEAR, AND OF ANY UNBORN CHILDREN OF THE  
SAID FLORENCE YODA MOODY AND CONSTANCE  
EMMA KINNEAR AS WELL AS OF HELEN SMITH AND  
OF ENID BROWNE, AND WILLIAM GEORGE  
HAMILTON BROWNE AND THOMAS CAMERON  
URQUHART EXECUTORS OF THE ESTATE OF  
KATHERINE HAMILTON BROWNE, DECEASED, AND  
NEDRA CAROLINE SMITH ... .. *Respondents.*

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CASE OF THE RESPONDENTS,  
WILLIAM GEORGE HAMILTON BROWNE  
and THOMAS CAMERON URQUHART,  
Executors of the Estate of the deceased.

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