

41, 1938

In the Privy Council.

No. 20 of 1938.

**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 . . . *Appellant*

AND

CLIFFORD SIFTON AND WILFRED VICTOR SIFTON  
SURVIVING EXECUTORS AND TRUSTEES OF THE LAST WILL AND  
TESTAMENT OF THE SAID CLIFFORD WINFIELD BURROWS  
SIFTON DECEASED THE OFFICIAL GUARDIAN AND  
MABEL CABLE SIFTON . . . . . *Respondents.*

**CASE**

**FOR THE RESPONDENTS CLIFFORD SIFTON  
AND WILFRED VICTOR SIFTON.**

1. This is an appeal from an Order dated the 17th June 1937 of the Supreme Court of Ontario (Court of Appeal—Rowell C.J.O., Latchford C.J.A., Fisher, Henderson and Kingstone JJ. A.) varying an Order dated the 18th February 1937 of the Supreme Court of Ontario (Middleton J.) determining questions arising upon the construction of the Will of the above named Clifford Winfield Burrows Sifton deceased (hereinafter called "the Testator").

**RECORD.**  
pp. 36-37.  
pp. 12-13.

2. The short point arising for determination in this appeal is the validity and effect of a direction in the Will of the Testator that payments

CASE FOR RESPONDENTS  
C. Sifton & W. V. Sifton.

**RECORD.** directed to be made to his daughter the Appellant Elizabeth Arminella Burrows Sifton "shall be made only so long as she shall continue to reside in Canada."

3. These respondents are the surviving executors and trustees of the Testator's Will.

**p. 41.**  
**p. 40.** 4. The Testator died on or about the 13th July 1928 having by his Will dated the 12th July 1926 appointed such of his brothers as should be alive at his death to be his executors and Letters Probate of his said Will were on the 10th August 1928 granted out of the Surrogate Court of the United Counties of Leeds and Grenville to John Wright Sifton (since deceased) Henry Arthur Sifton (since deceased) and these Respondents Clifford Sifton and Wilfred Victor Sifton the brothers of the Testator. **10**

**p. 41.** 5. By his said Will the Testator (inter alia) gave devised and bequeathed his residuary real and personal estate to his executors upon the following trusts namely "To manage the corpus of the estate in accordance with "their best judgment . . . and to pay to or for my said daughter" (viz. the Appellant Elizabeth Arminella Burrows Sifton) "a sum sufficient "in their judgment to maintain her suitably until she is 40 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." **20**

6. By his said Will the Testator further provided that in the event of the Appellant dying leaving issue such issue should take the estate on attaining 25 years and in the event of the Appellant dying leaving no issue the estate should be divided equally between the then living grandchildren of the parents of the Testator.

**p. 4.** 7. The Appellant is the daughter of the Testator and his former wife whom he married in the year 1913 and from whom he obtained a divorce in England in August 1916. The Appellant is now of age about 23 years. The custody of the Appellant was upon the said divorce awarded to her said mother but from the year 1921 the custody and control of the Appellant was by agreement given to the Testator. The Testator having been for some years domiciled and resident in England returned with the Appellant in 1925 to Canada where he remained (except for temporary absences on business or pleasure trips) until his death. **30**

8. The Appellant has no income other than such payments as these Respondents as such Executors as aforesaid make to her for her benefit.

9. From the death of the Testator the Appellant remained in Canada until October 1934, in which month (being then an Undergraduate at the University of Toronto taking the Honour Course in Modern Languages which allowed the option of taking the third year thereof by extensive travel in foreign countries) she left Canada, and remained abroad, travelling and studying in European countries for the purpose of completing her **40**

education, until her return in September 1935 to Canada, where she has since remained. RECORD.

10. In the year 1937 the Appellant wishing to ascertain the true effect of the provisions of the Testator's Will quoted above addressed to these Respondents certain questions as to the effect of such provisions in the events outlined in such suggestions, desiring to govern her movements according to the answers thereto. These Respondents being in doubt as to the true answers to such questions and the effect of the said provisions by Originating Notice of Motion dated the 10th February 1937 applied pp. 6-7.  
10 (as such Executors) to the Supreme Court of Ontario for directions thereon.

11. The questions raised by the said Notice of Motion (being a restatement of the questions put by the Appellant to these Respondents) were shortly:—

(a) Whether the Appellant would "continue to reside in Canada" within the terms of the Testator's Will in the event of her maintaining a residence in Canada but temporarily going abroad for the purpose of travelling and/or studying for a period not exceeding 11 months and returning to Canada thereafter.

20 (b) If yes: whether the Appellant would similarly "continue to reside in Canada" if after the lapse of not less than one month the Appellant should again go abroad in similar circumstances.

(c) If question (a) were to be answered in the negative whether the Appellant would so "continue to reside" if she should absent herself from Canada for any and if so what periods and under what circumstances.

(d) Whether the purpose for which the Appellant should absent herself from Canada were material.

(e) If such purpose were material—

30 (i) Would any temporary purpose enable it to be said that the Appellant "continued to reside" within the meaning of the said provision or if not

(ii) what purposes would so enable it to be said and

(iii) if the intention of the Appellant should be material would the written statement of the Appellant of her intention delivered to these Respondents be sufficient evidence of such intention for these Respondents.

40 (f) Whether in the event of the said provision as to continuance of residence in Canada coming into operation these Respondents are thereby prevented from making any further payments to the Appellant or only from making any payments until she shall again "reside in Canada."

12. At the hearing before the Court of first instance the only party to the proceedings other than these Respondents as Executors was the Appellant.

RECORD.  
pp. 12-13.

13. The order dated the 18th February 1937 (Middleton J.) made upon the said Originating Motion was in the following form

“ 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 said last Will and Testament is—

“ (a) That the words ‘ to reside in Canada ’ are equivalent to ‘ spend substantially all 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 (the Appellant) in the Estate. 10

“ (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 of the benefits thereof for her maintenance under the said Will. 20

“ (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.

“ 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.” 30

p. 14. 14. By Notice of Appeal dated the 5th March 1937 the Appellant appealed from the said Order of Middleton J. to the Court of Appeal of the Supreme Court of Ontario. By Supplementary Notice of Appeal dated p. 15. the 8th April, 1937 the Appellant gave notice of appeal against the said Order on the further ground (not raised below) that the said provision in the Testator’s Will was void for uncertainty. By Order of the said p. 16. Court of Appeal dated the 21st April 1937 it was ordered that the above named Respondent the Official Guardian be appointed to represent the grandchildren of the Testator’s parents and any unborn persons and that the above named Respondent Mabel Cable Sifton be served with Notice of the said Appeal. 40

15. By Order of the said Court of Appeal dated the 17th June, 1937 it was ordered as follows (Henderson J. A. dissenting):— pp. 36-37.

“ This Court doth order that the said Judgment ” (viz : of Middleton J.) “ be varied and as varied be as follows :—

“ 1. 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.

10 “ (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 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.

20 “ (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 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.”

16. By Order dated the 6th December 1937 of Henderson, J.A. (in p. 39. chambers) the present appeal of the Appellant was admitted.

30 17. These Respondents as such executors as aforesaid are anxious that in the event of it being held that the said condition as to residence in Canada is valid such directions should be given and such order be made as will so far as possible make it plain in what circumstances related to the presence in or absence from Canada of the Appellant they may properly make payments to the Appellant out of the estate of the Testator. These Respondents submit to act as they may be directed and will give such information relating to the estate of the Testator and such assistance as they may be required or able to give. These Respondents will submit that provision should be made for their costs.

CHARLES RUSSELL.

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CLIFFORD SIFTON AND OTHERS  
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CASE

FOR THE RESPONDENTS CLIFFORD  
SIFTON AND WILFRED VICTOR SIFTON.

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CHARLES RUSSELL & CO.,

37, Norfolk Street, Strand, W.C.2.

*Solicitors for the Respondents Clifford Sifton and  
Wilfred Victor Sifton*

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EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C.4