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In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR THE PROVINCE OF
BRITISH COLUMBIA.

BETWEEN

HUGH CRAWFORD MAGEE, a Lunatic, by MAUDE
LOUISE MAGEE, his Committee in Lunacy
(Plaintiff) - - - - - *Appellant*

AND

10 CHARLES W. MAGEE, JAMES D. MAGEE, M. I.
MAGEE, EDITH G. V. MAGEE, TORONTO
GENERAL TRUSTS CORPORATION, Execu-
tors of the Estate of Eliza Jane Carson, deceased,
MARY CAROLINE DESTER, F. O. MAGEE,
ETTA McKIBBON, ALFRED BULL,
REGINALD HIBBERT TUPPER and C. W.
MAGEE, Executor of the Estate of Walter E.
Magee, deceased (Defendants) - - - - - *Respondents.*

Case for the Appellant.

RECORD.

20 1. This is an appeal from the judgment of the Court of Appeal
of British Columbia, dated the 8th day of January 1935, reversing by a
majority (dissentiente MacDonald, C.J.A., in part, and McPhillips, J.A.)
the judgment of Fisher, J., in the Supreme Court of British Columbia,
dated the 22nd day of August 1934, whereby the Will of Hugh Magee,
deceased, late of Point Grey, British Columbia, was construed and the
true intent and meaning thereof declared. p. 47.
p. 24.

2. Hugh Magee died at Point Grey, British Columbia on the
9th day of March 1909, leaving surviving him his widow and the following
children, namely :— p. 7, l. 12.
p. 8, l. 18.
p. 13.

30 Hugh Crawford Magee,
Charles Wesley Magee,
James D. Magee,

APPELLANT'S CASE.

May I. Magee,
 Edith G. V. Magee,
 Eliza Jane Carson,
 Mary Caroline Dester,
 Fred O. Magee,
 Etta McKibbon,
 Walter E. Magee.
 George E. Magee (who died on the 8th August, 1912).

p. 4, l. 4. 3. The Will of the testator, Hugh Magee, was made on the
 p. 7. 7th day of August 1903. Letters Probate of the Will were granted by the 10
 p. 4, l. 6. Supreme Court of British Columbia, on the 21st day of May 1909, to
 Sir Charles Hibbert Tupper, K.C.M.G., K.C., the surviving executor and
 trustee by the said Will appointed. The Respondents Alfred Bull and
 Reginald Hibbert Tupper are the present trustees of the said Will.

p. 4. 4. By his said Will the testator gave to his widow all his personal
 p. 4, ll. 10-18. estate and part of his real estate absolutely, and by the now material
 p. 4, ll. 31-43. part of his said Will gave his residuary real estate to his trustees " Upon
 " trust to pay the income of the trust premises first thereout discharging
 " all liabilities in respect to my estate as follows: One-half thereof to my
 " wife during her life in manner hereinafter described and the rest as 20
 " follows: To such of my children including the said George F. Magee
 " from time to time as to my executors shall appear to be most in need
 " the payments to be at the absolute discretion of my executors. If at
 " any time it appears to my Trustees that none of my children are in need
 " of assistance but are all unembarrassed financially then after the death
 " of my wife my Trustees may divide the estate among my children then
 " living in such proportions as to them shall seem fit my desire being that
 " as far as possible the division shall be made so as to give the larger shares
 " to those of my children who are not so well off as the others nevertheless
 p. 5, ll. 1-2. " this desire is not to affect the absolute discretion hereby vested in my 30
 " Trustees."

p. 24, l. 42. 5. The widow of the said testator died on the 7th September 1927,
 and since her death three children of the testator have died, namely :—

p. 13, l. 6. Eliza Jane Carson, on 2nd May 1931,
 p. 13, l. 29. Walter E. Magee, on 23rd August, 1928,
 p. 25, l. 20. James D. Magee (since proceedings started).

p. 9, ll. 8-9. 6. Since the death of the widow of the testator, Hugh Magee, the
 p. 13. executors of the Will have distributed the income of the testator's said
 p. 19. residuary real estate among the children of the deceased from time to
 time living.

7. The value of the estate is \$141,479.15.

p. 16, l. 18.

8. The Appellant by his Originating Summons issued the 13th October 1933, in the Supreme Court of British Columbia, sought construction of the Will of the testator. The Summons came up for hearing before Mr. Justice Fisher in the Supreme Court of British Columbia in Chambers on the 28th and 29th days of June, and the 4th and 16th days of July, A.D. 1934. The learned Judge delivered written judgment on the 22nd day of August 1934. The learned Judge held that upon the true construction of the said Will the residuary real estate of the testator vested in the children living at the death of the widow, and that the said children were entitled to immediate distribution of the said estate then remaining.

p. 1.

p. 24, l. 14.

p. 20.

p. 22, l. 45.

p. 23, ll. 1-11.

9. By the Order of the Court, dated the 22nd day of August 1934, it was ordered that the income and the capital of the residuary real estate of the testator be divided into ten equal shares and be distributed, share and share alike, to each of the children then living, and to the executors or administrators of the estates of those deceased since the death of the widow.

p. 24.

p. 25, l. 16.

10. On the 5th day of September 1934, the Respondents, Charles W. Magee, M. I. Magee, Edith G. V. Magee and C. W. Magee, the Executor of the Estate of Walter E. Magee, deceased, gave notice of appeal from the judgment of the learned Judge. The appeal was heard by the Court of Appeal (MacDonald, C.J.A., and Archer Martin, McPhillips, M. A. MacDonald and McQuarrie, J.J.A.) on the 19th, 20th and 21st days of November A.D., 1934, Archer Martin, M. A. MacDonald and McQuarrie, J.J.A., were in favour of allowing the appeal, McPhillips, J.A., of dismissing it, and the learned Chief Justice of allowing it in part only. The appeal was accordingly allowed with costs of all parties payable out of the estate by Order of the Court of Appeal, dated the 8th day of January 1935, whereby it was declared that the trustees may distribute the corpus of the estate among the children of the testator living at the time of such distribution but only if and when it appears to the said trustees that none of the said children are in need of assistance but all are unembarrassed financially and further that until such distribution the trustees should continue to distribute the income as heretofore.

p. 27.

p. 47, l. 15.

p. 48, l. 6.

p. 47.

p. 47, l. 35.

p. 48, l. 1.

11. The trial judge was of opinion that the will contained an express or implied gift of the residuary real estate to the children of the testator living at the death of the widow: that the testator having effectively provided for his wife and children during the life of the former by dividing the income between them then manifested an intention and wish to benefit only persons living at the death of the widow and made them the only persons interested in either the corpus or the income thereafter: and that

p. 21,

ll. 9-14.

p. 22,

ll. 25-31.

p. 21, l. 19. owing to the vagueness and uncertainty of the phrase " none are in need of
 p. 22, " assistance but all are unembarrassed financially " no time and manner of
 ll. 32-42. distribution of corpus had been sufficiently defined and the vested interests
 of the children living at the date of the widow's death should therefore be
 given present effect to by the Court.

p. 30, l. 26. 12. The learned Chief Justice held that the gifts vested in interest
 at the death of the widow, but that the time of distribution was wholly
 in the discretion of the trustees.

p. 38, 13. McPhillips, J.A., was of opinion that the moment for ascertain-
 ll. 38-41. ment of the class to benefit and of vesting was the death of the widow : 10
 p. 40, and that the provision relating to a time when none of the children are
 ll. 25-28. in need of assistance but all are unembarrassed financially was too vague
 p. 39, ll. 8-14. and uncertain and wholly inoperative.
 p. 40,
 ll. 12-13.

p. 44, 14. M. A. MacDonald, J.A., was of opinion that the words " children
 ll. 39-44. " then living " referred to a time after the death of the widow when it should
 p. 45, appear to the trustees that none of the testator's children were in need of
 ll. 1-10. assistance but all were unembarrassed financially : and that there was no
 vagueness or uncertainty in that phrase relating to the distribution of
 corpus.
 p. 45,
 ll. 25-35.

p. 31, p. 46. 15. Archer Martin and McQuarrie, JJ.A., concurred with M. A. 20
 MacDonald, J.A., and gave no additional reasons.

16. The Appellant (whose contentions are supported by the Respondents The Toronto Trusts Corporation, Etta McKibbon, and the executor of the estate of James D. Magee) contends that the residuary real estate of the testator became on the death of the widow vested in and divisible in equal shares between the children of the testator then living. The Appellant does not seek to reopen the payments of income made since that date by the trustees.

17. The Appellant submits that the appeal ought to be allowed and the judgment of the Court of Appeal reversed and the order of the 30 trial judge restored for the following (among other)

REASONS.

- (1) BECAUSE on the true construction of the testator's Will the testator's residuary real estate was devised to such of his children as survived the testator's widow.
- (2) BECAUSE upon the death of the testator's widow the power conferred on the executors to pay the income of such real estate to such of the children as should appear most in need determined.

- (3) BECAUSE the power conferred on the trustees of the said Will to divide the estate among the testator's children then living was a power merely to determine the proportions in which the testator's children (surviving the testator's widow) should take such real estate.
- (4) BECAUSE such last-mentioned power is void for uncertainty and the said original gift to such of the testator's children as survived his widow accordingly takes effect free from its exercise.
- 10 (5) BECAUSE such last-mentioned power if valid ceased upon the true construction of the said Will to be exercisable upon the death of any child of the testator who survived the testator's widow.
- (6) BECAUSE all of the testator's children who survived the testator's widow became entitled to the said residuary real estate for absolute interests by reason of an indefinite gift to them of the income thereof.
- (7) Alternatively BECAUSE the said real estate vested indefeasibly in such of the testator's children who survived the testator's widow subject only to the exercise of the power conferred upon the executors to pay the income thereof to such of the testator's children from time to time as to the executors appear to be most in need.
- 20 (8) BECAUSE the reasons given by Fisher, J., upon the hearing, and by McPhillips, J.A., in his dissenting judgment, were right, and that the reasons given by the learned Chief Justice declaring that the estate vested on the death of the widow were right, and the decisions of M. A. MacDonald, Archer Martin and McQuarrie, J.J.A., and the reasons given therefor were wrong.
- 30

CHARLES R. R. ROMER.

CHARLES RUSSELL.

In the Privy Council.

ON APPEAL

*From the Court of Appeal for the Province
of British Columbia.*

BETWEEN

HUGH CRAWFORD MAGEE, a lunatic,
by **Maude Louise Magee**, his Committee
in Lunacy (Plaintiff) - - - *Appellant*

AND

**CHARLES W. MAGEE, JAMES D.
MAGEE, M. I. MAGEE, EDITH G.
V. MAGEE, TORONTO GENERAL
TRUSTS CORPORATION**, Executors of
the Estate of **Eliza Jane Carson**,
deceased, **MARY CAROLINE DESTER**,
F. O. MAGEE, ETTA McKIBBON,
**ALFRED BULL, REGINALD HIB-
BERT TUPPER** and **C. W. MAGEE**,
Executor of the Estate of **Walter E.
Magee, deceased** (Defendants) - - *Respondents.*

Case for the Appellant.

WHITE AND WASBROUGH,
12 Great Marlborough Street, W.1,
Solicitors for the Appellant.