

# 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*

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AND

CHARLES W. MAGEE, JAMES D. MAGEE,  
M. I. MAGEE, EDITH D. F. MAGEE,  
TORONTO GENERAL TRUSTS CORPORA-  
TION, Executors 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.*

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## Case

For Respondents CHARLES W. MAGEE, MAY I. MAGEE, EDITH G. V. MAGEE,  
FREDERICK O. MAGEE and CHARLES W. MAGEE, Executor or  
Administrator of the Estate of Walter E. Magee, deceased.

RECORD.

1. This is an appeal from a Judgment of the Court of Appeal for  
British Columbia allowing the appeal of the Respondents, Charles W.  
Magee, M. I. Magee and Edith G. V. Magee from the judgment of Mr. Justice  
Fisher of the Supreme Court.

2. By originating summons issued on 13th October 1933 the p. 1.  
Appellant applied in the Supreme Court for the interpretation of a portion

CASE FOR RESPONDENTS  
C. W. MAGEE and Others.

p. 4, l. 31. of the Will of the late Hugh Magee, deceased and the Court thereupon  
 p. 24, l. 40. decreed that the estate of the Testator vested at the date of the death of  
 his widow, namely : the 7th day of September 1927, and that his children  
 living at that date were entitled to participate, share and share alike in  
 its distribution and that this distribution should take place at once. Such  
 decree was, on appeal, reversed by the Court of Appeal of British Columbia  
 as hereinafter appears.

3. By his Will dated 7th August 1903 the Testator who died on  
 9th March 1909 after bequest to his wife, devised the remainder of his  
 estate to trustees upon the following trusts that is to say :— 10

p. 4, l. 31  
 to p. 5, l. 13.

“ 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 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 20  
 “ 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 this desire  
 “ is not to affect the absolute discretion hereby vested in my  
 “ Trustees. The money hereinbefore directed to be paid to  
 “ my wife shall be paid by my executors only and when they  
 “ are satisfied the money is required for her maintenance and 30  
 “ support and I give them absolute discretion as to the times  
 “ when payments shall be made and these payments may be  
 “ made direct to her or to the others for her support or for  
 “ necessaries of life supplied or to be supplied to her as to my  
 “ trustees shall seem fit.

“ It is my wish and desire that my executors will retain and  
 “ manage the estate vested in them so long as they profitably can  
 “ disposing of the profits or rentals as aforesaid from time to time  
 “ but this is not to affect the discretion hereby vested in them as  
 “ to the management leasing or sale of the same or any portion 40  
 “ thereof.”

4. These trusts, it is submitted, imposed upon the Trustees four discretions :—

FIRST: After the date of the death of the Testator to pay to his widow such portion of one-half of the income as they are satisfied is required for her maintenance. p. 4, l. 33.

SECOND: After the death of the Testator and both before and after the death of the widow, to divide the "rest" of the income until the time of distribution of the corpus, among those of his children who are most in need. p. 4, l. 34.

10 THIRD: After the death of the widow to determine when the time for distribution of the corpus has come, namely: When all his children living are not in need of assistance and are unembarrassed financially. p. 4, l. 37.

FOURTH: After the death of the widow, when the time for distribution has arrived, to distribute the corpus among all his children then living with the precatory expression that the larger shares be given to those who are not well off. p. 4, l. 40.

5. Both sides were agreed that many of the children of the Testator, apart from and before distribution is made, are now in need of assistance and are embarrassed financially. Since the date of the death of the Testator, the Trustees have distributed the income available under the terms of the Will in accordance with the needs of the children and no question has ever arisen as to the propriety of their distribution. p. 8, l. 32.  
p. 10, l. 36.  
p. 11, l. 25.  
p. 12, l. 15.

6. Upon such originating summons the Appellants contended inter alia that there was no intestacy under the Will and that upon the death of the widow, the children then living took vested interests, that the distribution should take place amongst such children or their issue per stirpes, and that the executors had no power to postpone distribution upon the terms of the Will, namely, until in their opinion none of the children should be in need of financial assistance, and the learned trial Judge so found. p. 47 & 48.

7. From such decree the Respondents appealed to the Court of Appeal which allowed the appeal and by its order dated 8th January 1935 decreed that :—

(1) The Trustees of the Estate of the said Hugh Magee may distribute the said estate among the children of the said Hugh Magee 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. p. 47, l. 34-  
p. 48, l. 5.

(2) That until the time for such distribution shall have arrived the said Trustees shall pay the income from the said estate from time to time to such of the children of the said Hugh Magee as to the said Trustees shall appear most in need.

8. By his Judgment the Chief Justice held that the gifts to the children vested as at the death of testator's wife, but that the time of distribution was left to the absolute discretion of the trustees with which the court should not interfere.

9. Mr. Justice Macdonald, with whose judgment Mr. Justice Martin and Mr. Justice McQuarrie, concurred, was of the opinion that no vesting occurred until the time of distribution occurred and that upon a proper interpretation it was the testator's intention to provide for the needs of his children and to protect them against improvidence by providing them with an income so long as they might be alive and in need. He therefore found the children did not acquire vested interests upon the death of the wife but only when the time for distribution, in the opinion of the trustees, arrived, although in one event this might give rise to a partial intestacy. 10

10. Mr. Justice McPhillips found that there was no discretion in the trustees to postpone distribution and that the only absolute discretion was as to the division of the estate, as to proportion. He then proceeded apparently to hold as he was of the opinion that the appeal should be dismissed, that the estate was divisible amongst the children living upon the death of the testator equally per stirpes, despite the "absolute discretion" of the trustees as to "individual proportion." 20

11. The Respondents submit that there are two conditions precedent to the distribution of the corpus. The corpus was to be distributed not "at" or "from" or "on" but "after" the death of the widow. This is the first condition. At what time after the widow's death is this distribution to be made? It is to be made, it is submitted, when all the testator's children then living are not in need of assistance and are all unembarrassed financially. The arrival of that time is the second condition. 30

12. Until this distribution of the corpus the trustees have a discretion to distribute the "rest" of the income among the children at their "absolute discretion." Under these circumstances the rule that a gift of the income from a fund carries with it a gift of the corpus does not apply, in the Respondents' submission, especially as such a construction would defeat the testator's intention that his children should be succoured from income by the trustees according to their needs. 36

13. The time when all of the children are not in need of assistance but are all unembarrassed financially means a time before and not after distribution, otherwise there is no reason for the use of the word "if" in the Will. It therefore refers to financial condition irrespective of any prospective share of the estate.

14. The class who will share in the distribution is composed of the Testator's children "living" at the date of distribution. The first "then" refers to the event viz. the time when none of the children are in need of assistance and the second "then" likewise refers to that event.

10 Gill v. Barrett (1860), 29 Bevan 371, 54 E.R. 671.

15. There is no uncertainty in ascertaining the class when the date of distribution has arrived and until that date no class can be ascertained.

16. The time for distribution has not yet arrived and it cannot be foretold when, if ever it will arrive. Consequently the class to share in the distribution is not yet ascertainable and no vesting has yet taken place nor can take place until the time for distribution has arrived.

17. The distribution is to be made among the then living children of the Testator at the discretion of the trustees. Grandchildren are not mentioned. From this it clearly appears that no vesting was intended  
20 by the Testator until the time for distribution had arrived. p. 4, l. 40.

*Re Rispin* (1912), 25 O.L.R. 633, 46 S.C.R. 649; *Cowper v. Mantell* (1856) 22 Bevan 231, 52 E.R. 1097.

18. It is argued that if this interpretation is maintained it will work a hardship in the case of children of the testator who died before the date of distribution by depriving the children of those children of any share in the testator's bounty. The Will, however, makes no provision for any one other than the testator's widow and his children. If it were permitted, it might be surmised that the testator wished no distribution to take place until all his children have demonstrated an ability to maintain financial  
30 independence. So long as one child remains who has not made this demonstration, the income remains available in the discretion of the Trustees to make provision for his needs.

19. All necessary parties are not before the court. The son George Magee is named in the Will. The son William James Magee died on the 10th September 1893 leaving his widow and one child. No representative  
p. 5, l. 18.  
p. 17, l. 7.

20. The Respondents humbly submit that the appeal should be dismissed and the judgment of the Court of Appeal confirmed for the following amongst other

### **REASONS.**

- (1) BECAUSE the intention of the Testator was that the corpus should remain intact and the whole income be available so long as any of his children should need financial assistance.
- (2) BECAUSE the Will did not provide for vesting upon the death of the Testator's wife. 10
- (3) BECAUSE the testator gave an absolute discretion to the trustees to fix the time of distribution.
- (4) BECAUSE the testator gave to his trustees an absolute discretion to divide the corpus amongst his children according to their, the trustees, estimate of their needs and for as long as any of the children should be in needy circumstances and because the intention of the testator would be defeated by any earlier distribution.
- (5) BECAUSE the testator gave his trustees an absolute power to postpone distribution so long as any of his 20 children should need financial assistance.
- (6) BECAUSE the children of the Testator have not any vested interest under the said will and because the time for distribution has not arrived.
- (7) BECAUSE the Judgments of the majority of the Court of Appeal are right for the reasons set out.

J. W. DE B. FARRIS.

WILFRID BARTON.

**In the Privy Council.**

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**ON APPEAL**

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

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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 D.  
F. 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.***

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**Case**

For Respondents CHARLES W. MAGEE,  
MAY I. MAGEE, EDITH G. V. MAGEE,  
FREDERICK O. MAGEE and CHARLES  
W. MAGEE, Executor or Administrator of  
the Estate of Walter E. Magee, deceased.

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