

In the Privy Council.

No. 40 of 1936.

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

BETWEEN

HUGH CRAWFORD MAGEE, a Lunatic, by Maud 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, 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 RESPONDENTS****ALFRED BULL and REGINALD HIBBERT TUPPER.**

1. This is an Appeal from a judgment of the Court of Appeal for British Columbia dated the 8th January 1935 (Macdonald, Martin and McQuarrie J J A.; Macdonald C J. and McPhillips J A. dissenting), allowing an Appeal from a judgment of Fisher J. in the Supreme Court of British Columbia dated the 22nd August 1934. RECC
p. 47.
p. 24.

2. The Appellant is a son of Hugh Magee deceased (hereinafter called the testator) and the Respondents (other than the Respondents Alfred Bull and Reginald Hibbert Tupper) are six surviving children and the personal representatives of three deceased children of the testator. The Respondents Alfred Bull and Reginald Hibbert Tupper are the present executors and trustees of the will of the testator which was made on the 7th August 1903.

RECORD.
p. 4, l. 31.

3. By his will the testator devised and bequeathed his real estate not otherwise disposed of to trustees upon the following trusts:—
 “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 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 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 necessities of life supplied or to be supplied to her as to my Trustees shall seem fit”.

pp. 8-18.

4. The testator died on the 9th March 1909, leaving surviving him a widow and ten children of whom three are deceased. The widow of the testator died on the 7th September 1927. The value of the estate of the testator at his death was \$63,277.50 and, according to the accounts passed by the Registrar on the 31st December 1933, the value of the said estate was \$141,479.15.

p. 19.

5. These Respondents since the death of the widow of the testator have acted on the view that the income from the estate should be available for distribution amongst the children of the testator until the time arrived when none of them was in need of assistance and all were unembarrassed financially, and that meanwhile the corpus of the estate should not be divided between them. It has not at any time appeared to these Respondents that none of the said children was in need of assistance or that all were unembarrassed financially. The total of the amounts distributed to the children of the testator between 1911 and 1933 is \$124,518.99.

p. 2.

6. On the 13th October 1933 the Appellant commenced proceedings in the Supreme Court of British Columbia by originating summons for determination of, *inter alia*, the following questions arising under the clause of the testator's will hereinbefore set out in paragraph 3:—

3. Whether the beneficiaries and legatees named in said Will are not entitled as of right to immediate distribution of the Corpus of the said Estate?

4. What persons are entitled to share in the distribution of the Corpus of said Estate, and to what extent or share therein is each person entitled? RECORD.

5. Whether the executors and trustees have the right to postpone indefinitely the distribution of the Corpus of said Estate. If not, at what time should such distribution take place? and when are the said executors compellable to distribute same?

10 10. Are the executors required to distribute the Corpus of said Estate, if upon such distribution none of the legatees would otherwise be in need of assistance and the said legatees would all be unembarrassed financially?

7. By his judgment dated the 22nd August 1934 Fisher J. held that the children of the testator living at the time of the death of his widow took immediately vested interests in the Corpus of the estate and that they were entitled to immediate distribution of the Corpus. pp. 20, 24.

8. By its judgment dated the 8th January 1935 the Court of Appeal for British Columbia by a majority, held that the estate did not vest in the children of the testator upon the death of his widow; that the estate vested in the children only when the time for distribution arrived; and that such time would not arrive so long as it appeared to the trustees that a surviving child was in need. pp. 29-46.
p. 47.

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9. These Respondents have interpreted the clause of the will of the testator hereinbefore set out in paragraph 3 in the sense adopted by the majority of the Judges of the Court of Appeal for British Columbia and have made payments to the children of the testator accordingly. These Respondents humbly submit themselves to the judgment of the Lords of the Judicial Committee of the Privy Council.

T. MATHEW.

In the Privy Council.

No. 40 of 1936

*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) Appellants

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 Hibbert Tupper and C. W. Magee,
Executor of the Estate of Walter E. Magee
deceased - - - *(Defendants) Respondents*

CASE FOR THE RESPONDENTS

ALFRED BULL and REGINALD HIBBERT TUPPER

CHARLES RUSSELL & CO.,
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*Solicitors for the Respondents Alfred Bull
and Reginald Hibbert Tupper.*