

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 D. F. 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.

Record of Proceedings

MESSRS. McCROSSAN, CAMPBELL &
MEREDITH,
Solicitors for Appellant.
MR. T. G. McLELAN,
Solicitor for Executor of Estate of
James D. Magee.
MESSRS. SAVAGE & KEITH,
Solicitors for Estate of Eliza Jane
Carson, deceased.
MESSRS. LOCKE, LANE & NICHOLSON,
Solicitors for Etta McKibbon.
MESSRS. HARRIS, BULL, WILSON & BULL,
Solicitors for Respondents: Charles
W. Magee, M. I. Magee, Edith D. F.
Magee and C. W. Magee, Executor of
the Estate of Walter E. Magee,
deceased.
MESSRS. WALSH, BULL, HOUSSER, TUPPER,
RAY & CARROLL,
Solicitors for the Respondents: Alfred
W. Bull and Reginald Hibbert Tupper.

MESSRS. WHITE & WASBROUGH
London Agents.

MESSRS. GARD, LYELL & Co.
London Agents.

CHARLES RUSSELL & Co.
London Agents.

I

INDEX

No.	DESCRIPTION OF DOCUMENTS	Date	Page
1	Originating Summons	Oct. 13, 1933.....	1
2	Will of Hugh Magee	Aug. 7, 1903.....	4
3	Codicil to Will of Hugh Magee.....	July 22, 1908.....	6
4	Letters Probate of Will of Hugh Magee	May 21, 1909.....	7
AFFIDAVITS			
5	Affidavit of Maude Louise Magee.....	Aug. 31, 1933.....	8
6	Affidavit of Frederick O. Magee.....	Mar. 12, 1934.....	10
7	Affidavit of Charles W. Magee.....	June 25, 1934.....	11
8	Affidavit of Edith G. V. Magee.....	June 25, 1934.....	12
9	Affidavit of May I. Magee.....	July 3, 1934.....	14
10	Affidavit of Edith G. V. Magee.....	July 3, 1934.....	15
11	Affidavit of William Savage	July 16, 1934.....	17
12	Statement of Amounts Received by Magee Heirs (Exhibit to Affidavit William Savage, July 16, 1934.....	.....	19
<i>JUDGMENTS, Etc.</i> <i>Supreme Court of</i> <i>British Columbia</i>			
13	Reasons for Judgment, Fisher, J.	Aug. 22, 1934.....	20
14	Judgment	Aug. 22, 1934.....	24
15	Notice of Appeal.....	Sept. 5, 1934.....	27
<i>Court of Appeal</i>			
Reasons for Judgment:			
16	The Honourable the Chief Justice.....	Jan. 8, 1935.....	29
17	Martin, J.A.	Jan. 8, 1935.....	31
18	McPhillips, J.A.	Jan. 8, 1935.....	32
19	Macdonald, J.A.	Jan. 8, 1935.....	42
20	McQuarrie, J.A.	Jan. 8, 1935.....	46
21	Judgment	Jan. 8, 1935.....	47

II

INDEX—continued

No.	DESCRIPTION OF DOCUMENTS	Date	Page
22	Order Granting Final Leave to Appeal	Jan. 28, 1935.....	49
23	Registrar's Certificate as to Case.....		51
<i>Privy Council</i>			
24	Order Granting Leave to Appeal Without Security	Dec. 20, 1935.....	52

In the Supreme Court of British Columbia

IN THE MATTER OF THE TRUSTEE ACT

RECORD
 In the Supreme
 Court of British
 Columbia

IN THE MATTER OF THE ESTATE
 OF HUGH MAGEE, DECEASED

No. 1
 Originating
 Summons
 Oct. 13th, 1933

AND

IN THE MATTER OF THE ADMINISTRATION ACT

BETWEEN:

10 HUGH CRAWFORD MAGEE, A LUNATIC, BY
 MAUDE LOUISE MAGEE, HIS COMMITTEE IN
 LUNACY,

Plaintiff

— AND —

20 CHARLES W. MAGEE, JAMES D. MAGEE, M. I.
 MAGEE, EDITH D. F. 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.

No. 1

ORIGINATING SUMMONS

ISSUED OCTOBER 13TH, A.D. 1933.

30 Let the following persons, namely 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 CAR-
 OLINE DESTER and C. W. MAGEE, Executor of the Estate of
 WALTER E. MAGEE, DECEASED, all of Vancouver in the County
 of Vancouver, F. O. MAGEE of Bowen Island in the County of
 Vancouver, ETTA McKIBBON of the City of Winnipeg, in the
 Province of Manitoba, and the Executors named in the Will of the
 said Hugh Magee, deceased, namely, ALFRED BULL of 5550
 Churchill Street in the said City of Vancouver, Barrister-at-law,

RECORD
 In the Supreme
 Court of British
 Columbia
 No. 1
 Originating
 Summons
 Oct. 13th, 1933
 (Cont'd)

Reginald Hibbert Tupper of 1350 15th Avenue West, City of Vancouver, Barrister-at-law, and each of them within eight days after service of this summons upon them respectively, exclusive of the day of such service, cause an appearance to be entered for them to this summons which is issued upon the application of Hugh Crawford Magee of Vancouver, in the County of Vancouver (by Maude Louise Magee, the committee of his estate), who claims to be one of the heirs of the said Hugh Magee, deceased, for the determination of the following questions and matters affecting the interests of the persons aforesaid who are legatees in the will of the said Hugh Magee, 10
 deceased, and *cestuis que trust* under the trusts declared in the said will, namely:—

1. Whether there is a partial intestacy in the will of Hugh Magee, deceased, dated August 7th, 1903, in respect of or to the distribution of the Corpus of said Estate?
2. Whether Intestacy supervened after the death of the widow of the Testator, the said Hugh Magee?
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? 20
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 to?
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?
6. Are the children or heirs, or personal representatives as the case may be, of any legatee named in said will, who may 30
 have died after probate thereof, entitled to receive the share of such deceased legatees so named in said Will?
7. What persons are entitled to share in the ultimate distribution of the Corpus of said Estate, and what amount or share thereof should each such person so entitled receive?
8. What trusts are created in favor of the beneficiaries named in said will, or their heirs, executors or administrators thereof, respectively? And when and how are the Executors compellable to discharge the same—
 - (1) In respect to distribution of Income; 40
 - (2) In respect to distribution of the Corpus of said Estate?

9. If the Executors are not now compellable to distribute the Corpus of said Estate, when are they bound to make the ultimate distribution thereof? And what person or persons are entitled to share in the ultimate distribution thereof?
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?
- 10 11. What discretion, if any, have the Executors in determining or postponing the time and mode of distribution of said Estate among the persons entitled thereto, and what discretion, if any, have the Executors to say what persons are entitled to share in the ultimate distribution of said Estate?

And for a declaration as to the rights of all parties interested under the said Will.

And for such directions to the Executors as to the distribution of the whole or any part of the said Estate as to the Judge may seem meet.

20 And that the costs of this application and costs incidental thereto be paid out of the Estate.

And for such further or other order as to the Judge may seem meet.

DATED this 13th day of October A.D. 1933.

“H. BROWN”

DEP. DISTRICT REGISTRAR.

TAKE NOTICE that in support of the above application will be read the Will of the said Hugh Magee, deceased, the Letters Probate thereof, and the Affidavit of Maude Louise Magee, sworn herein this 31st day of August, A.D. 1933.

30 THIS SUMMONS was taken out by Elmore Meredith of the firm of McCrossan Campbell & Meredith Solicitors for the Applicant whose place of business and address for service is at 800 Hall Building, Vancouver, B. C.

The Defendants may appear hereto by entering appearance either personally or by a solicitor at the Office of the Registrar of this Honourable Court at the Court House, Vancouver, British Columbia.

40 N.B.—If the Defendants do not enter appearance within the time and at the place above mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

RECORD
 In the Supreme
 Court of British
 Columbia
 No. 1
 Originating
 Summons
 Oct. 13th, 1933
 (Cont'd)

RECORD

*In the Supreme
Court of British
Columbia*No. 2
Will of
Hugh Magee
Aug. 7th, 1903

No. 2

WILL OF HUGH MAGEE

THIS is the last will of me HUGH MAGEE of the Municipality of South Vancouver Farmer made this 7th day of August A.D. One thousand nine hundred and three.

I hereby constitute and appoint the Honourable Sir Charles Hibbert Tupper K.C.M.G., K.C. and my son George E. Magee of Vancouver, British Columbia and the survivors and survivor of them executors and executor of this my last Will and Testament.

I devise and bequeath to my wife the high lands of the property 10
whereon I now reside (the said high lands beginning at the first fence from the Orchard below the potato patch together with the dwelling house, orchard and the barns and stable next the dwelling house) the whole of the said land to include twelve (12 acres more or less and the exact boundaries thereof to be defined and delimited by the Executors of this my Will.

Also I bequeath to my wife all my personal property of whatsoever kind or nature and wheresoever situate.

I devise and bequeath my real estate not hereby otherwise disposed 20
of to my son, George E. Magee and Sir Charles Hibbert Tupper aforesaid to hold to them their heirs executors administrators and assigns upon the following trusts to be performed by them or the survivor or survivors of them his heirs, executors or administrators or their or his assigns.

Upon trust to retain manage lease sell or otherwise dispose of 30
the whole or any part thereof as to them may seem fit with the discretion of absolute owners and after paying my funeral and testamentary expenses and debts to invest the proceeds of the said monies of my real estate in or upon any public stocks funds shares or securities of whatsoever nature or kind as to them may seem fit.

Upon trust to pay the income of the trust premises first there-
out 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 discre-
tion 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 unembar-
rassed financially then after the death of my wife my Trustees may
divide the estate among my children then living in such propor- 40
tions 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 necessaries of life supplied or to be supplied to her as to my Trustees shall seem fit.

RECORD
 In the Supreme
 Court of British
 Columbia
 No. 2
 Will of
 Hugh Magee
 Aug. 7th, 1903
 (Cont'd)

10 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 of any portion thereof.

And I declare that one of my executors, Sir Charles Hibbert Tupper being a solicitor may act as solicitor and shall be entitled to charge and be paid all professional charges for any business or act done by him or his firm in connection with the Trust, both he and my other executor George E. Magee may or shall be entitled to charge other charges for any business or acts done by both or either
 20 of them in connection with the Trust including any act which any Executor or Trustee not being a Solicitor could have done personally.

Hugh Magee.

SIGNED by the said Hugh Magee as his last Will in the presence of us being present at the same time who at his request in his presence and in the presence of each other subscribe our names as witnesses.

“W. MARTIN GRIFFIN” of Vancouver Solicitor.

“KNOX WALKEM” of Vancouver Student-at-Law

Re Magee Estate

30 This is the paper writing referred to on Exhibit “B” in the affidavit of Maude Louise Magee Sworn before me this 31st day of August 1933

Leslie C. Ford

A Commissioner for taking affidavits in British Columbia.

Codicil to Will of Hugh Magee

RECORD
In the Supreme
Court of British
Columbia
No. 3
Codicil to Will
of Hugh Magee
July 22nd, 1908

THIS is the First Codicil to the Last Will and Testament of me Hugh Magee of the Municipality of South Vancouver Farmer which Will bears date the 7th day of August 1903.

WHEREAS in my said Will I appointed the Honourable Sir Charles Hibbert Tupper K.C.M.G., K.C. and my son, George E. Magee Executors of my said Will and also devised and bequeathed by real estate not thereby otherwise disposed of to my son, George E. Magee and Sir Charles Hibbert Tupper aforesaid upon the trusts 10 in my said Will mentioned. NOW I hereby revoke the appointment of my son George E. Magee as executor and trustee of my said Will and hereby appoint the said Sir Charles Hibbert Tupper sole executor and trustee of my said Will and in all other respects I hereby confirm my said Will.

IN WITNESS WHEREOF I the said Hugh Magee the Testator have to this Codicil of my said Will set my hand this 22nd day of July 1908.

“HUGH MAGEE”

Signed by the said testator as a Codicil to his last Will and Testament in the presence of us both present at the same time who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

“W. M. GRIFFIN”
Vancouver Solicitor

“LEON J. LADNER”
Vancouver Student-at-Law

CERTIFIED AND TRUE
COPY

“J. F. MATHER”

DISTRICT REGISTRAR

VANCOUVER
August 23rd, 1933
REGISTRY

20

30

Re Magee Estate

This is the paper writing referred to as Exhibit “C” in the affidavit of Maude Louise Magee Sworn before me this 31st day of August 1933

Leslie C. Ford

A Commissioner for taking Affidavits within British Columbia. 40

Probate of Will of Hugh Magee.

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN PROBATE
B.C.L.S.
\$1.40

Vancouver
August 23rd, 1933
REGISTRY

RECORD
*In the Supreme
Court of British
Columbia*

No. 4
Letters Probate
of Will of
Hugh Magee
May 21st, 1909

BE IT KNOWN that on the twenty-first day of May in the year of Our Lord One thousand nine hundred and nine, the last
10 Will and Testament and one Codicil of Hugh Magee, late of the Municipality of Point Grey in the Province of British Columbia, deceased, who died at Point Grey aforesaid on or about the ninth day of March, 1909, a true copy whereof is hereunto annexed, hath been exhibited, read and proved, before a Judge of Our Supreme Court of British Columbia and administration of the personal estate, effects and credits of the deceased has been and is hereby granted to
20 Sir Charles Hibbert Tupper, K.C.M.G., K.C. of the City of Vancouver in the Province of British Columbia the Executor in the said Will named, being first sworn faithfully to administer the same, by paying the debts and legacies of the deceased as far as the property will extend and the law binds; and also to exhibit into this Court a true, full and perfect inventory of the said property, and to file a true account of his executorship whenever required by law so to do.

GIVEN under the Seal of the said Supreme Court of British Columbia, this twenty-first day of May, A.D. 1909

J. C. DOCKERILL
Deputy District Registrar
Supreme Court

Seal Supreme
Court of British
Columbia Vancouver Registry
30 Extracted by Messrs. Tupper & Griffin
Barristers-at-Law, etc.

Real Estate	\$61917
Personal Estate	1360.50

Estate sworn under	\$63,277.50	
Probate Duty—Nil; Succession Duty		\$914.04
Re Magee Estate		

This is the paper writing referred to in Exhibit "A" in the affidavit of Maude Louise Magee

40 Sworn before me this 31st day of August 1933

"Leslie C. Ford"

A Commissioner for taking affidavits in British Columbia.

RECORD

No. 5

In the Supreme Court of British Columbia

Affidavit of Maude Louise Magee
August 31st, 1933

No. 5
Affidavit of
Maude Louise
Magee
Aug. 31st, 1933

I, MAUDE LOUISE MAGEE of 1757 Nelson Street in the City of Vancouver, Province of British Columbia, wife of Hugh Crawford Magee, MAKE OATH AND SAY:

1. THAT I am the committee under the Lunacy Act of the assets and effects, real and personal, of my husband, Hugh Crawford Magee of 1757 Nelson Street aforesaid, by virtue of an order of this Honourable Court made the 30th day of August, 1928. 10

2. THAT the paper writings now produced and shown to me and marked as Exhibits "A" "B" and "C" to this my affidavit, as I verily believe, contain true copies of the probate of the will and codicil to the will of Hugh Magee, deceased, who died at Point Grey, British Columbia, on or about the 9th day of March, 1909.

3. THAT my said husband was the lawful son of the said deceased and is one of the beneficiaries under the said Will.

4. THAT the widow of the said Hugh Magee, deceased, died since the date of the said probate.

5. THAT I verily believe that it is in the interest of the beneficiaries named in the will that an order be made for the distribution of the estate so that in the event of the death of any of the said beneficiaries his share of the estate may descend to his legal representatives. 20

6. THAT my said husband was confined in the Hollywood Sanitarium, a Mental Hospital, at New Westminster, British Columbia, and is in a precarious state of health.

7. THAT two of the beneficiaries, namely Walter E. Magee and Eliza Jane Carson are now deceased.

8. THAT all of the sons and daughters of the deceased now living are in excess of the age of 45 years. 30

9. THAT if my said husband, Hugh Crawford Magee should die before distribution of the said estate, Clifford the lawful son of the said Hugh Crawford Magee and this affiant, his lawful wife, would be left in distressed circumstances and I verily believe that in the event of the death of others of the beneficiaries their families would be in similar distressed circumstances.

10. THAT I verily believe that if the said estate is distributed none of the beneficiaries can be said to be in need of assistance and all would be unembarrassed financially. 40

11. THAT upon reference to the account shown in an affidavit

verifying the accounts of the Executors, sworn on the 5th day of January A.D. 1933, the said estate appears to consist of the following assets;—

Mortgages on real property	\$127,430.00
Agreement for Sale	2,174.15
Real Estate	12,975.00
Cash on hand	387.32

RECORD
 In the Supreme
 Court of British
 Columbia
 No. 5
 Affidavit of
 Maude Louise
 Magee
 Aug. 31st, 1933
 (Cont'd)

12. THAT the several beneficiaries now receive monthly payments at the discretion of the Executors out of the income based on
 10 their several urgent necessities

SWORN BEFORE ME at the City)
 of Vancouver, British Columbia, this)
 31st day of August, A.D. 1933.) M. L. Magee
 Leslie C. Ford)

A Commissioner for taking affidavits within British Columbia.

RECORD

No. 6

*In the Supreme
Court of British
Columbia*

Affidavit of F. O. Magee
March 12th, 1934

No. 6
Affidavit of
Frederick O.
Magee
Mar. 12th, 1934

I FREDERICK O. MAGEE of Squamish in the Province of British Columbia, MAKE OATH AND SAY:—

1. THAT I am son of Hugh Magee, deceased, and one of the Defendants herein.

2. THAT I have nine children ranging in age from five to 26 years. My eldest daughter is 26 years of age, and is at present teaching school in the Province of Alberta and supports herself. 10
My second child, a daughter 24 years of age, is a graduate nurse, and is out of employment at present living at my home at Squamish.

3. THAT I am carrying on farming operations on a small farm at Squamish and make a business of retailing milk there from three milk cows which I own.

4. THAT my only assets in addition to the said three milk cows and my furniture and certain farming machinery and dairy equipment and some lots at Squamish is a small bush farm, which I own on Bowen Island, and I also have one cow at that place.

5. THAT my third child, a son, age 22 years, works with me 20
in my farming operations, and he and my wife and my other six children are all depending upon me for support. Some of my said children are resident with me at Squamish and some of them on my place on Bowen Island.

6. THAT I pay \$20.00 per month as rental for the premises occupied by me at Squamish and I have great difficulty in making payment of this rental and the same is now three months in arrear.

7. THAT I have been obliged to borrow the sum of \$1,000.00 from the Trustees of my father's estate and on this loan I pay interest at the rate of 8%, which is deducted from any payments 30
which the Trustees may make to me from time to time.

8. THAT I have great difficulty in providing a livelihood for my said wife and family and was obliged to borrow sufficient money to come to Vancouver to attend the funeral of my brother James D. Magee, on March 12th 1934.

9. THAT without substantial assistance rendered to me by the Trustees of my late father's estate, it would be absolutely impossible for me to provide a living for myself and my wife, and my said children and I am now very much financially embarrassed.

10. THAT I desire that no division of the estate of my said 40
father be made at this time, but it is my desire that payments be made from time to time by the Trustees of his said estate as directed

in his said will, to myself and to such other of my brothers and sisters as may be financially embarrassed and be in need of assistance.

SWORN BEFORE ME at the City)
of Vancouver, in the Province of)
British Columbia, this 12th day of)
March A.D. 1934.)

F. O. Magee

RECORD
In the Supreme
Court of British
Columbia
No. 6
Affidavit of
Frederick O.
Magee
Mar. 12th, 1934
(Cont'd)

E A BURNETT

A COMMISSIONER FOR TAKING AFFIDAVITS WITHIN
BRITISH COLUMBIA.

10

No. 7

Affidavit of C. W. Magee
June 25 1934

No. 7
Affidavit of
Charles W.
Magee
June 25th, 1934

I CHARLES WESLEY MAGEE of the town of Kamloops, in the Province of British Columbia, prospector, MAKE OATH AND SAY:

1. THAT I am a son of Hugh Magee, deceased, one of the Defendants herein.

2. THAT I was confined to the hospital in the year 1930 for a period of seven months and underwent a very serious operation at that time. My physician, Dr. G. E. Gilles, of the City of Vancouver, in the Province of British Columbia, advised me that I will never fully recover from the disability suffered as a result of this illness and that I will always remain unable to perform any but the lightest of physical work.

3. THAT I was born on the 15th day of May 1870.

4. THAT I have no means of livelihood other than the payments from time to time made to me by the Trustees of my late father's estate.

5. THAT I desire that no division of the corpus of the estate of my said father be made at this time, but it is my desire that payments from income be made from time to time by the Trustees of his said estate as directed in his said will to myself and to such other of my brothers and sisters as may be financially embarrassed and be in need of assistance.

30 SWORN BEFORE ME at the City)
of Vancouver, in the Province of)
British Columbia, this 25th day of)
June A.D. 1934.)

C. W. Magee

Bruce Boyd

40 A COMMISSIONER FOR TAKING AFFIDAVITS WITHIN
BRITISH COLUMBIA.

RECORD

*In the Supreme
Court of British
Columbia*

No. 8
Affidavit of
Edith G. V.
Magee
June 25th, 1934

No. 8

Affidavit of Edith G. V. Magee
June 25th, 1934

I EDITH GERTRUDE VICTORIA MAGEE, of the City of Vancouver, in the Province of British Columbia, spinster, MAKE OATH AND SAY:

1. THAT I am a daughter of Hugh Magee, deceased and one of the Defendants herein, wrongfully described as Edith D. F. Magee.

2. THAT I have for a number of years past for reasons of economy been living together with my sister May Isabella Magee. 10

3. THAT my sister and I are both unmarried. I was born on the 16th day of April 1874 and she was born on the 10th day of May 1872.

4. THAT both my said sister and myself are out of employment and have no means of livelihood other than the payments from time to time made to us by the trustees of my late father's estate.

5. THAT I desire that no division of the corpus of the estate of my said father be made at this time, but it is my desire that payments from income be made from time to time by the Trustees of said estate as directed in his said will to myself and to such other of my brothers and sisters as may be financially embarrassed and be in need of assistance. 20

6. The Following is a summary of the facts relating to all the children of my said father Hugh Magee who have shared in his said estate, and which I have prepared from various sources of information, including the Statement of Accounts rendered from time to time by the trustees of my father's estate, and which I verily believe to be substantially correct.

NAME	Date of Birth	Date of Death	Children	Total moneys Received from Trustees to Dec. 31st, 1933	RECORD <i>In the Supreme Court of British Columbia</i>
Eliza Jane Carson	Dec. 7th 1852	May 2nd, 1931	8 over 33 years of age all married	\$ 6,997.60	No. 8 Affidavit of Edith G. V. Magee June 25th, 1934 (Cont'd)
Hugh Crawford Magee	Aug. 13th, 1858		1 son 26 years, married	18,928.61	
10 James Douglas Magee	April 17th, 1861	March 8th, 1934	1 daughter 17 years	12,943.01	
Mary Caroline Dester	July 22nd, 1868		1 daughter 36 years divorced	23,372.17	
Charles Wesley Magee	May 15th, 1870			11,485.56	
20 May Isabella Magee	May 10th, 1872			18,269.26	
Edith Gert-rude Magee	Apr. Victoria 16, 1874			18,269.87	
Frederick Osborne Magee	March 29th, 1876		9 children 5 under age	12,351.26	
30 Walter Egbert Magee	Oct. 23rd, 1878	Aug. 23rd, 1928		771.15	
Etta Flor-ence McKibbin	Mar. Maude 14, 1880		6 some under age, 1 married	800.00	

SWORN BEFORE ME at the City)
of Vancouver, in the Province of)
British Columbia, this 25th day of) Edith G. V. Magee
June A.D. 1934)
Bruce Boyd)

40 A COMMISSIONER FOR TAKING AFFIDAVITS WITHIN
BRITISH COLUMBIA.

RECORD

*In the Supreme
Court of British
Columbia*

No. 9
Affidavit of
May I. Magee
July 3rd, 1934

No. 9

Affidavit of May I. Magee
July 3rd 1934

I MAY ISABELLA MAGEE of the City of Vancouver, in the Province of British Columbia, spinster, MAKE OATH AND SAY:

1. THAT I am a daughter of Hugh Magee, deceased, and one of the defendants herein.

2. THAT I have been ill and unable to work since 1907 except for short periods which in all have not totaled one year since that time.

3. THAT I underwent a major operation in 1913.

4. THAT on the 25th day of December 1933 I suffered a severe automobile accident as a result of which I was confined in the Virginia Mason Hospital, in Seattle, for three weeks and confined to my bed at my home for a further period of two weeks.

5. THAT in connection with the services rendered me by the said Hospital I have paid the sum of \$147.30 and am still indebted to the said Hospital in the sum of \$75.00 which up to the present time I have been unable to pay. 20

6. THAT owing to my physical condition it is absolutely impossible for me to do any work at the present time.

SWORN BEFORE ME at the City)
of Vancouver, in the Province of)
British Columbia this 3rd day of) May Isabella Magee
July 1934.)
D Donaghy)

A COMMISSIONER FOR TAKING AFFIDAVITS WITHIN
BRITISH COLUMBIA.

Affidavit of E. G. V. Magee
July 3rd, 1934.

RECORD
*In the Supreme
Court of British
Columbia*

No. 10
Affidavit of
E. G. V. Magee
July 3rd, 1934

I, EDITH GERTRUDE VICTORIA MAGEE, of the City of Vancouver, Province of British Columbia, Spinster, MAKE OATH AND SAY:—

1. That I am a daughter of Hugh Magee deceased, and one of the Defendants herein, wrongfully described as Edith D. F. Magee.

2. That in the statement of accounts of the Trustees in the 10 estate of the said Hugh Magee, deceased, filed on the 5th day of January 1934 the following items appear among the list of mortgages held by the Trustees as at January 1st 1934:

MORTGAGE	AMOUNT	INTEREST RATE	DUE DATE
P. G. Drost	\$20,000.00	7%	Receiver in possession and Drost is managing property without charge: rent received applied in rennovation and upon taxes in arrears.
20 Morgan & Tracy	8,500.00	7%	Interest fell into arrears but is being picked up; part of half-year's interest due 1st Oct 1933 in arrears.
A. Ridley	\$ 800.00 \$ 600.00	8% 8%	Interest in arrears Since 15th April 1933; receiver in possession and house listed for a tenant.
30 E. J. Blumberger Mainland Investment	\$4,000.00 500.00	7½% 8%	Final Order of foreclosure being withheld in hope mortgagor's widow will redeem; in meantime rents being collected
40 John Sell	\$ 750.00	8%	Interest in arrears since Nov. 1933; collecting rent and applying on taxes

RECORD	MORTGAGE	AMOUNT	INTEREST RATE	DUE DATE
<i>In the Supreme Court of British Columbia</i> No. 10 Affidavit of E. G. V. Magee July 3rd, 1934 (Cont'd)	C. G. Peterson	\$ 600.00	8%	Interest in arrears since June 1933
	McKelvie	\$3,500.00	7%	In possession and collecting rents
	Olsen	\$1,200.00	7½%	Collecting an occupa- tion rent

3. From the same accounts it appears that the Trustees held at that date ten parcels of real estate in the City of Vancouver, Province of British Columbia, which they have been compelled to take over by foreclosure proceedings and which they valued at \$16,700.00. 10

4. That the summary of the estate shown in said account appears as follows:—

Mortgages in realty	\$124,279.15
Agreement for Sale	500.00
Real estate	16,700.00
TOTAL	\$141,479.15

And it appears by the said accounts that the capital account was then overdrawn in the sum of \$126.79. 20

4. That I verily believe that the assets of the said estate could not be realized upon and divided at this time except at a great sacrifice, and if the said estate were so realized upon and divided among the seven children of Hugh Magee deceased, now living the result would be that myself and others of my brothers and sisters who like myself have no other assets, would not have sufficient income to properly maintain us, and I verily believe that in the interests of myself and my said brothers and sisters it is not desirable that a division should be made at this time.

5. THAT my brother Hugh Crawford Magee is confined in the Provincial Mental Hospital at Essondale, British Columbia, and has been confined in said Hospital since the 2nd day of July 1929. 30

6. That I have been informed by G. S. MacGowan, Bursar of said Hospital and verily believe that up to the 29th day of March 1934 no moneys had been paid for the maintenance of my said brother as a patient in said Hospital, other than the sum of \$91.00 on the 10th day of October 1929.

7. That I have been informed by my solicitor and verily

believe that in the petition of the said Maude Louise Magee filed in the Supreme Court of British Columbia in 1928 upon her application to be appointed Committee of the estate of the said Hugh Crawford Magee, and verified by her affidavit filed, it appears that the assets of the said Hugh Magee at that time were in excess of \$16,500.00.

8. That my brother William James Magee died on the 10th day of September 1893 and left him surviving his widow and one daughter Hazel Ireta Magee who was a very young child at that time. That from any information that I have ever received as to the financial circumstances of the said widow and said Hazel Ireta Magee I verily believe that their means were of small amount and when the said Hazel Ireta Magee attained about the age of twenty years she taught in a public school in Ontario for her livelihood.

SWORN BEFORE ME at the City)
of Vancouver, in the Province of)
British Columbia, this 3rd day of) Edith G. V. Magee
July A.D. 1934)
D. Donaghy)

20 A COMMISSIONER FOR TAKING AFFIDAVITS WITHIN
BRITISH COLUMBIA.

RECORD
In the Supreme Court of British Columbia
No. 10
Affidavit of E. G. V. Magee
July 3rd, 1934
(Cont'd)

No. 11
Affidavit of William Savage
July 16th, 1934

No. 11
Affidavit of William Savage
July 16th, 1934

I, WILLIAM SAVAGE, of the City of Vancouver, in the Province of British Columbia, Barrister and Solicitor, MAKE OATH AND SAY AS FOLLOWS:—

1. I am a member of the firm of Savage & Keith, Solicitors for the Toronto General Trusts Corporation, and have personal knowledge of the matters hereinafter deposed to.

2. Eliza Jane Carson, One of the daughters and heirs at law and beneficiary named in the last Will and Testament of Hugh Magee deceased, died in the City of Vancouver, on the 2nd day of May 1931, having made her last Will and Testament dated the 7th day of October 1930. Letters Probate of the said last Will and Testament of Eliza Jane Carson deceased were issued out of this Honourable Court to The Toronto General Trusts Corporation on the 27th day of April, 1932.

RECORD
*In the Supreme
 Court of British
 Columbia*

No. 11
 Affidavit of
 William
 Savage
 July 16th, 1934
 (Cont'd)

3. The heirs at law and beneficiaries named in the said last Will and Testament of Eliza Jane Carson are the following persons, namely:—

Robert Henry Carson	Son	
Ernest Crawford Carson	Son	
Eliza Jane Avery	Daughter	
Helen Mary McGuire	Daughter	
Minnie Isabel Bryson	Daughter	
Edith Linda Pollard	Daughter	
Fred John Carson	Son	10
Edith Ruth Morris	Daughter	
William George Carson	Grandson of William George Carson deceased	
Robert Carson	Grandson-son of Fred John Carson living	

4. That now produced and shown to me and marked as Exhibit "A" to this my affidavit is a statement in detail of the amounts paid out by the Executors and Trustees of the last Will and Testament and Estate of Hugh Magee deceased from the years 1911 to 1933, inclusive. The said Exhibit "A" shows the dates on which each one of the children of the late Hugh Magee deceased became dependent upon his estate and the extent of such dependency during the said period. 20

5. The estate of Hugh Magee deceased as sworn at the date of Probate on the 21st day of May 1909 was \$63,277.50. The value of the said Estate as passed by the District Registrar of this Court as of the 31st day of December 1933 was \$141,479.15.

Sworn before me at the City)
 of Vancouver, in the Province of)
 British Columbia this 16th day of) Wm. Savage 30
 July, A.D. 1934.)

G. G. McGeer)
 A Commissioner for taking affidavits within British Columbia.

No. 12 STATEMENT OF AMOUNTS RECEIVED BY MAGEE ESTATE HEIRS

	Mrs. Dester	Miss E. Magee	Miss I. Magee	H. C. Magee	Mrs. Carson	J. D. Magee	F. O. Magee	Mrs. Etta McKibbon	W. E. Magee	C. W. Magee	E. C. Magee
1911	-\$1,500.65	\$ 400.00	\$ 400.00	\$ 200.00							
1912	825.00	550.00	550.00								
1913	900.00	600.00	600.00	100.00							
1914	900.00	600.00	600.00	400.00							
1915	1,100.00	800.00	800.00	1,000.00							
1916	675.36	577.50	577.50	770.00							
10 1917	659.16	494.37	494.36	639.16							
1918	660.00	495.00	494.40	723.75							
1919	494.00	370.50	370.50	494.00							
1920	1,050.00	787.50	787.50	1,050.00							
1921	1,200.00	900.00	900.00	1,200.00							
1922	1,200.00	900.00	900.00	1,200.00							
1923	927.00	802.00	802.00	913.00							
1924	732.00	732.00	732.00	728.00							
1925	732.00	732.00	732.00	578.00							
1926	1,232.00	1,232.00	1,232.00	1,082.00							
20 1927	772.00	767.00	767.00	790.00							
1928	1,560.00	1,380.00	1,380.00	1,620.00							
1929	1,430.00	1,265.00	1,265.00	2,000.00							
1930	1,300.00	1,035.00	1,035.00	720.00							
1931	1,430.00	1,380.00	1,380.00	1,165.00							
1932	1,057.00	810.00	810.00	835.70							
1933	1,045.00	660.00	660.00	720.00							
	\$23,381.67	\$18,269.87	\$18,269.26	\$18,968.61	\$6,997.60	\$11,333.01	\$12,351.26	\$800.00	\$771.15	\$11,766.56	\$1,610.00
			\$ 23,381.67								
			18,269.87								
			18,269.26								
			18,968.61								
			6,997.60								
			11,333.01								
			12,351.26								
			771.15								
			11,766.56								
			1,610.00								
			800.00								

This is Exhibit "A" referred to in the affidavit of William Savage. Sworn before me this 16th day of July A.D. 1934

"G. G. McGeer,"

A Commissioner for taking affidavits within the Province of British Columbia

RECORD

*In the Supreme
Court of British
Columbia*

No. 13
Reasons for
Judgment
Fisher, J.
Aug. 22nd, 1934

No. 13

Reasons for Judgment
Hon. Mr. Justice Fisher
August 22nd, 1934

In this matter I have to say in the first place that it would seem from the material before me that so long as any of the children of the testator survive, some one or more of them may appear to the trustees using their honest, practical judgment, to be in need of assistance or to be embarrassed financially if their financial condition is to be considered apart from what it would be if distribution of the corpus were to take place. It might be argued that a time might come when none of the children living should appear to be in need of assistance but all unembarrassed financially if their financial condition is to be considered in the light of, or as it would be after, the assistance that would be given by a fair distribution of the corpus. On this phase of the matter, however, I would say that, though it might be contended that the testator has not made his intention as clear as it might have been, I think the words used can only be reasonably interpreted as meaning that the time for distribution has to be determined if it can by reference to the condition of the children as it stands before such distribution. It then becomes apparent that distribution by the trustees may never take place, as the last surviving child may be one who would always appear to be in need of assistance and embarrassed financially. I pause here to say that I do not think that it can be said that the time of distribution must come in any event even if it would come only after the death of all the children, when it must at last appear that none of them are in need of financial assistance, for I cannot conceive that the testator intended any such absurd meaning to be given to the words he used, however vague and indefinite they may be.

Mr. T. E. Wilson of Counsel on behalf of some of the children, refers to Cowper v. Mantell, 22 Beav. 231, and a statement in Jarman on Wills, 7th Edition at p. 865, citing such case as authority for the proposition that "If the object of a discretionary trust dies before the fund is expended, his personal representatives have no claims to it." Reference is also made to the case of Re Rispin (1912) 25 O.L.R. 633, and it is contended that no interest in the corpus vests until the trustees have exercised their discretion and that the court should not interfere with the exercise of the discretion which it is argued has been given to the trustees here. In the Rispin case, however, it may be noted that Boyd, C. said in part as follows:

"Upon the language of this Will, it is plain that the testator gave no property in this fund to his son, but only a direction to the executor to apply such part as he thought fit for

the benefit of the son The subject was discussed by Romilly, M.R. in *Cowper v. Mantell* (1856) 22 Beav. 231, 233, who marks the distinction between the cases where a legacy is given to a person for a particular purpose, which fails, and yet he has been held entitled to the legacy, and those in which there is no gift of a legacy, but only a discretion is confided in trustees which not having been exercised, the possible legacy fails altogether."

RECORD
 In the Supreme
 Court of British
 Columbia
 No. 13
 Reasons for
 Judgment
 Fisher, J.
 Aug. 22nd, 1934
 (Cont'd)

Upon the language of the will in the present case I would say
 10 it is plain that the testator gave the whole of his estate to his children living at the time of the death of the widow, which occurred in 1927, to be divided among them, and not simply a direction to his executors to apply such part as they thought fit for the benefit of the children. I agree that the testator has given and defined sufficiently a class amongst the members of which he intended to allow his trustees to divide the corpus of said estate "In such proportions as to them shall seem fit." If, however, I am right in the view already
 20 intimated that the words apparently providing for the exercise of this discretionary power are so vague and indefinite that under the existing circumstances no period of distribution will ever arrive, either by lapse of time or the happening of an event, then my view would also be that if the Court now intervenes to distribute equally it would not be interfering with the exercise of the discretionary power of the trustees to regulate the distribution but would simply be enforcing the trust created in favour of the class subject to such power when it becomes apparent that no definite time has been set or will ever come for its exercise. What I mean is that if no period of distribution has been fixed and the matter has been left so that if
 30 the trustees go on paying the income to the end, all the children will be dead before any distribution, then there being no gift over and no power in the trustees as an alternative to distribute where the contingency so vaguely defined has never arisen, it follows that the testator has left his directions so vague that every member of the class pointed out by the testator as the objects of his bounty will be disappointed of his bounty, not through dying before the trustees had exercised a discretionary power when they were able to exercise it, but through no time having been set for its exercise. I think the presumption is that the testator could not have intended any such result and that the present case is one where it can be said
 40 that under the circumstances the trustees have really no discretion in connection with the distribution of the corpus of the estate. If I follow the argument of Mr. Wilson correctly, he argues that the trustees might distribute all of the corpus at any time to some one or more of the last surviving children, but I do not agree, as if this were the effect of the will then this would be a case where the testator has not made any will himself but has allowed some one else to make

RECORD
 In the Supreme
 Court of British
 Columbia
 No. 13
 Reasons for
 Judgment
 Fisher, J.
 Aug. 22nd, 1934
 (Cont'd)

a will for him after his death, and that the law will not allow. See *Grimond v. Grimond* (1905) A.C. 124 at p. 126.

According to the will before me I think the children of the testator living at the time of the death of the widow in 1927, took vested interests at such time. There are many cases, however, where children have taken an immediately vested interest in their shares subject to the diminution of those shares, i.e., to their being divested *pro tanto*. See Jarman, *supra*, p. 1642. In the present case Mr. R. L. Reid of Counsel on behalf of one of the children, argues that the vesting was not an absolute vesting but a vesting subject to the right of the surviving children to receive the income at the discretion of the trustees. It is apparent that the difficulty in connection with the will arises not from a lack of definition of the persons entitled to share in the ultimate distribution of the corpus of the estate, but in the lack of a sufficient definition of the time for and consequently of the method of distribution. I must say that at first I inclined to the view put forward by Mr. Reid, but upon further consideration I have reached the conclusion already indicated, viz., that no discretion in connection with the distribution of the corpus has really been given to the trustees, as no definite time has been set for its exercise, so that in my opinion the trustees have no discretionary power to determine the interests which each child is to take, or to postpone the distribution of the vested interests in order to pay the income of the corpus to some of the children in the meantime. My view is that the testator, having effectually provided for his wife and children during the lifetime of the former by making one-half of the income payable to his wife and the rest to such of his children as might appear to be most in need at the absolute discretion of his executors, then manifested an intention and wish to benefit his children living at the death of his wife, and made them the only persons interested in either the corpus or income thereafter. He failed to sufficiently define or fix the period or manner of distribution of the corpus amongst the children but he made no gift over so as to benefit other persons besides the children. As already intimated I think there was an express or at least an implied gift in trust for the children living at the time of the death of the widow. I would not say that a case of partial intestacy has arisen but I would hold that the Court should intervene to enforce the trust by distributing the corpus now equally among the children as aforesaid and thus prevent such a postponement of the distribution as might under the circumstances amount to absolutely divesting all of the said children of their vested interests in the corpus.

I would therefore answer the questions as follows:

(1) and (2): I would not say there is a partial intestacy but a trust and that the children of the testator living at the

time of the death of the widow took immediately vested interests at such time in the corpus of said estate and the Court should intervene in order to distribute such corpus now among the said children or their representatives as hereinafter indicated and thus enforce the trust.

- 10 (3) They are entitled to immediate distribution of the corpus.
- (4) The children of the testator living at the time of the death of the widow in 1927 are entitled to share equally and in case any of such children have died since then, the children or heirs or personal representatives as the case may be of the deceased child are entitled to receive the share of such deceased child of the testator.
- (5) No. Distribution should take place now or so soon as it can take place without any unnecessary sacrifice of any of the assets of the estate.
- (6) See Answer 4.
- (7) See Answer 4.
- (8) See Answers 1, 2, 3, 4 and 5.
- (9) See Answers 3, 4 and 5.
- 20 (10) Think my other answers make it unnecessary for me to answer this question specifically.
- (11) None.

RECORD

*In the Supreme
Court of British
Columbia*

No. 13
Reasons for
Judgment
Fisher, J.
Aug. 22nd, 1934
(Cont'd)

RECORD

No. 14

*In the Supreme
Court of British
Columbia*

Judgment
Mr. Justice Fisher

No. 14
Judgment
Aug. 22nd, 1934

B.C.L.S.
10c

VANCOUVER
OCT. 1/34
REGISTRY

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL

BEFORE THE HONOURABLE)
MR. JUSTICE FISHER) Wednesday the 22nd day of
August A.D. 1934 10

THIS APPLICATION by way of Originating Summons for the determination of certain questions and matters arising out of the last Will and Testament of Hugh Magee, Deceased, coming on for hearing on the 28th and 29th days of June and the 4th and 16th days of July, A.D. 1934, and Judgment having been reserved until this day; UPON READING the Originating Summons issued herein, dated the 13th day of October A.D. 1933 and filed, and the Affidavit of Maude Louise Magee, sworn herein the 31st day of August A.D. 1933 and filed, and the Exhibits therein referred to and the Affidavits of Edith G. F. Magee, sworn herein the 25th day of June, 20 and the 3rd day of July, A.D. 1934 respectively, and filed and the Affidavit of Charles W. Magee, sworn herein the 25th day of June A.D. 1934, and filed and the Affidavit of Frederick O. Magee, sworn herein the 12th day of March A.D. 1934 and filed, and the Affidavit of May I. Magee sworn herein the 3rd day of July A.D. 1934 and filed; and the Affidavit of William Savage sworn herein the 16th day of July A.D. 1934 and filed, AND UPON HEARING Mr. Geo. E. McCrossan, K.C. of Counsel for Hugh Crawford Magee (by Maude Louise Magee his Committee in Lunacy); Mr. Reginald Tupper of Counsel for the Executors of the estate of said 30 Hugh Magee Deceased; Mr. R. I. Reid, K.C. of Counsel for Mrs. Mary Caroline Dester; Mr. Stuart Lane of Counsel for Mrs. Etta McKibbon; Mr. William Savage of Counsel for the Executors of Estate of Eliza Jane Carson, deceased; Mr. T. Edgar Wilson of Counsel for Edith G. Magee, May I Magee, Charles W. Magee, F. O. Magee, and the Estate of Walter E. Magee, Deceased; Mr. T. G. McLelan of Counsel for the Estate of J. D. Magee, Deceased, and Mr. E. K. DeBeck of Counsel for Robert Carson and certain other children of said Eliza Jane Carson, Deceased;

THIS COURT DOTH ORDER AND ADJUDGE that the 40 children of the said Hugh Magee, deceased, who were living at the death of the widow of the said Hugh Magee, namely, on the 7th day of September A.D. 1927, are entitled share and share alike to

distribution of the estate of said Hugh Magee, deceased, remaining undistributed, excepting such income of the Estate which shall have accrued up to the 22nd day of August, A.D. 1934, which said income shall be distributed in accordance with the discretion of the Trustees pursuant to the said Will, and that in the case of those children of the said Hugh Magee who have died since the 7th day of September, A.D. 1927, the share to which each would have been entitled had he or she survived shall form part of the estate of such deceased child or children.

RECORD
 In the Supreme
 Court of British
 Columbia
 No. 14
 Judgment
 Aug. 22nd, 1934
 (Cont'd)

10 THIS COURT DOTH ORDER AND ADJUDGE THAT the Executors of the Estate of the said Hugh Magee, deceased, namely, Alfred Bull, Esq., K.C., and Reginald Hibbert Tupper, Esq., do divide the income from the said estate and the proceeds of the capital of the said estate as the said proceeds become available in cash at such times as may be convenient to the said Executors into Ten (10) equal shares and do distribute One share to each of the following persons, namely:—

Maude Louise Magee, Committee of Hugh Crawford Magee.

Charles W. Magee

20 Executrix of the Estate of James D. Magee, deceased

May Isabella Magee

Edith Gertrude V. Magee

Toronto General Trusts Corporation, Executor of Estate of
 Eliza Jane Carson, deceased.

Mary Caroline Dester

Frederick O. Magee

Etta McKibbin

Charles W. Magee, Administrator of the Estate of Walter E.
 Magee, deceased

30 THIS COURT DOTH ORDER AND DIRECT that in such calling in and conversion the said Executors do act as in their discretion to serve the best interests of the said estate and shall not be deemed to be under obligation to make any sacrifice of any asset of the estate to effect such calling and conversion.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that costs of all parties hereto be paid out of the capital of the Estate on the scale of solicitor and client after taxation other than those represented by Mr. E. K. DeBeck.

RECORD
 In the Supreme
 Court of British
 Columbia
 No. 14
 Judgment
 Aug. 22nd, 1934
 (Cont'd)

THIS COURT DOTH FURTHER ORDER that the costs of all parties, excepting the costs of Hugh Crawford Magee, the Petitioner, to whom costs were occasioned by reason of the Originating Summons, issued out of the Supreme Court of British Columbia, numbered 279-29, dated the 25th February 1929, in which Hugh Crawford Magee was Plaintiff and Charles W. Magee, James D. Magee, M. I. Magee, Edith D. F. Magee, Eliza Jane Carson, Mary Carolina Dester, F. O. Magee, Etta McKibbon, Alfred Bull and Reginald Tupper were Defendants, be paid out of the capital of the Estate after taxation.

10

CHECKED

"S. V. L."

Settled

"H. B."

"D. D. R."

Minutes

filed.

BY THE COURT

"A. I. F. J."

per "A. M.C. J."

"J. F. Mather"

"D. R."

ENTERED

Oct. 1 - 1934

Order Book Vol. 91, Fol. 94

per "L. J. B."

20

NOTICE OF APPEAL

RECORD

*In the Supreme
Court of British
Columbia*No. 15
Notice of
Appeal
Sept. 5th, 1934

NOTICE IS HEREBY GIVEN that Charles W. Magee, Edith G. V. Magee and May I Magee DO HEREBY APPEAL to the Court of Appeal from the Order of the Honourable Mr. Justice Fisher herein, made the 22nd day of August A.D. 1934, declaring and construing the will of the said Hugh Magee, deceased, upon the Originating Summons issued herein on the 13th day of October A.D. 1933 upon the Application of Hugh Crawford Magee,
10 a lunatic, applying by Maude Louise Magee, his Committee in Lunacy.

NOTICE IS FURTHER GIVEN that Counsel on behalf of the above-named Charles W. Magee, Edith G. V. Magee and May I. Magee will move the Court of Appeal at the sittings thereof to be held at the City of Vancouver on the 2nd day of October A.D. 1934, at the hour of 11 o'clock in the forenoon, or so soon thereafter as Counsel can be heard for a Judgment or Order setting aside the said Order appealed from herein.

The GROUNDS OF APPEAL ARE as follows:—

- 20 1. That the Order appealed from is against the law and facts.
2. That the Learned Judge erred in finding as a fact that so long as any child or children of the testator survived, some of such children would be embarrassed financially or in need of assistance.
3. That the Learned Judge erred in holding that an interest in the corpus of the estate of the testator vested at the death of the widow of the testator in those of the testator's children living at the date of the death of his widow, and should have held that no interest in the Corpus of the said estate vested until the executors should exercise their discretion under the will of the testator and
30 divide the corpus of the estate, or failing such division then until the death of the last surviving child of the testator.
4. That the Learned Judge erred in holding that the class among which the corpus of the estate should be distributed was constituted of those living at the date of the death of the widow of the testator, and should have held that the class among which distribution of the corpus should be made was constituted of those living at the date of distribution.
5. That the Learned Judge erred in holding that the words in the will of the testator providing for the exercise of a discretion
40 by the trustee are so vague that no period for distribution will ever arrive.
6. That the Learned Judge erred in holding that the executors had no discretion in connection with the distribution of the corpus.
7. That the Learned Judge erred in holding that the executors

RECORD
 In the Supreme
 Court of British
 Columbia
 No. 15
 Notice of
 Appeal
 Sept. 5th, 1934
 (Cont'd)

could not distribute the corpus of the said estate at any time among one or more of the surviving children of the testator.

8. That the Learned Judge should have held that the executors had a discretion to exercise:

- (a) To allocate the income of the estate among the children of the testator living from time to time until the date of the distribution of the corpus;
- (b) To determine when the proper date for distribution of the corpus has arrived when all of the children living are not in need of assistance, but are unembarrassed financially; 10
- (c) To divide the corpus among those children living when the date for distribution has arrived.

9. That the Learned Judge has failed to answer Question 6 to cover the case of a child dying after Probate and before the date of the death of the widow.

10. All parties interested are not before the Court.

11. That the Learned Judge should have held that after the death of the widow of the testator, the executors in their discretion should allocate the income of the said estate among the children of the said deceased living from time to time until such time as all the children living are not in need of assistance but are unembarrassed financially, and should thereupon divide the corpus in the discretion of the executors among the children of the testator living at the date of such distribution. 20

12. That the Learned Judge should have held that in the event that all the children of the testator die before the executors are able to divide the corpus, then an intestacy ensues as from the date of the death of the testator

DATED at Vancouver, British Columbia, this 5th day of September A.D. 1934. 30

A. E. BULL
 Appellants' Solicitor

To: Hugh Crawford Magee
 and to his solicitor Elmore Meredith,
 To: The Executors of the Estate of James D. Magee,
 and to his Solicitor, T. G. McLelan,
 To: The Toronto General Trusts Corporation, Executors of the
 Estate of Eliza Jane Carson, deceased, and to their solicitor,
 William Savage,
 To: Mary Caroline Dester, 40
 and to her solicitor, R. L. Reid, K.C.,
 To: F. O. Magee
 To: Etta McKibbon
 and to her solicitor W. S. Lane,
 To: Alfred Bull and Reginald Hibbert Tupper,
 and to their solicitor Reginald Hibbert Tupper.

No. 16
COURT OF APPEAL

RECORD
Court of Appeal
No. 16
Reasons for
Judgment
The Honour-
able The Chief
Justice
Jan. 8th, 1935

ON APPEAL FROM THE SUPREME COURT OF BRITISH
COLUMBIA FROM THE JUDGMENT OF THE HONOUR-
ABLE MR. JUSTICE FISHER DATED THE 22ND DAY
OF AUGUST A.D. 1934.

IN THE MATTER OF THE TRUSTEE ACT
IN THE MATTER OF THE ESTATE OF
HUGH MAGEE DECEASED

10

AND

IN THE MATTER OF THE ADMINISTRATION ACT

BETWEEN:

HUGH CRAWFORD MAGEE, A LUNATIC
BY MAUDE LOUISE MAGEE, HIS COM-
MITTEE IN LUNACY,

Plaintiff
(Respondent)

— and —

20

JAMES D. MAGEE, TORONTO GENERAL
TRUSTS CORPORATION, EXECUTORS OF
THE ESTATE OF ELIZA JANE CARSON,
DECEASED, MARY CAROLINE DESTER,
F. O. MAGEE, ETTA McKIBBON, ALFRED
BULL and REGINALD HIBBERT TUPPER,

Defendants
(Respondents)

— and —

30

CHARLES W. MAGEE, M. I. MAGEE, EDITH
D. F. MAGEE, and C. W. MAGEE, EXECUTOR
OF THE ESTATE OF WALTER E. MAGEE,
DECEASED,

Defendants
(Appellants)

RECORD

COURT OF APPEAL

Court of Appeal

No. 16
Reasons for
Judgment
The Honour-
able The Chief
Justice
Jan. 8th, 1935
(Cont'd)

IN THE MATTER OF THE) JUDGMENT OF
ESTATE OF HUGH MAGEE,) THE HONOURABLE
DECEASED.) THE CHIEF JUSTICE.

This involves the construction of a will. In my opinion the Testator gave to his wife *inter alia* one-half of the income of his estate subject to a discretionary variation appearing subsequently in the will and which does not in my opinion affect the construction of it. The rest of his estate (interest and principal) is disposed of as follows:—

10

To such of my children including the said George G. 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 share 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.

20

Arguments were submitted by opposing counsel as to the time vesting of the interest given to the children and as to the time or times of payment to them having due regard to the needs of the poorer beneficiaries. In my opinion the gifts vested in interest at the death of the wife. There is no other definite period to be inferred from the will and that time, I think, is clearly enough indicated. The time or times of distribution was left absolutely to the discretion of the trustees and with that discretion we cannot interfere. Children living on the death of the wife would take *per capita*, and the children of those who died after that date would take *per stirpes*. The Trustees may make such distribution whenever they please and are not bound to wait as was suggested until the needs of every beneficiary becomes apparent.

30

I see no need to express any further opinion. It remains for the trustees to exercise their discretionary powers on this construction, or if the Court should put a different construction on it in accordance with such construction.

The costs of all parties should be paid out of the estate. 40

(Sgd.) "J. A. Macdonald,"

VICTORIA, B. C.,
8th Jany. 1935.

C.J.B.C.

COURT OF APPEAL

RECORD
Court of Appeal
No. 17
Reasons for
Judgment
Martin, J.A.
Jan. 8th, 1935

RE MAGEE ESTATE) JUDGMENT OF
) THE HONOURABLE
) MR. JUSTICE MARTIN.

Victoria, B. C., 8th January, 1935.

I agree with the judgment of my learned Brother M. A. Macdonald.

(Sgd.) "Archer Martin,"

J. A.

RECORD

Court of Appeal

No. 18
Reasons for
Judgment
McPhillips,
J. A.
Jan. 8th, 1935

COURT OF APPEAL

	)	JUDGMENT
	)	OF THE
RE MAGEE ESTATE	)	HONOURABLE
	)	MR. JUSTICE
	)	McPILLIPS.

This is an appeal from the judgment of Fisher, J. following an application made by way of Originating Summons for the determination of certain questions and matters arising out of the last will and testament of Hugh Magee. 10

The will requiring construction reads as follows:—

This is the last will of me Hugh Magee of the Municipality of South Vancouver Farmer made this 7th day of August A.D. One thousand nine hundred and three.

I hereby constitute and appoint the Honourable Sir Charles Hibbert ~~Magee, K.C.~~^{Tupper}, K.C.M.G.,^{K.C.} and my son George E. Magee of Vancouver, British Columbia and the survivors and survivor of them executors and executor of this my last Will and Testament. 20

I devise and bequeath to my wife the high lands of the property whereon I now reside (the said high lands beginning at the first fence from the Orchard below the potato patch together with the dwelling house, orchard and the barns and stable next the dwelling house) the whole of the said land to include twelve (12) acres more or less and the exact boundaries thereof to be defined and delimited by the Executors of this my Will.

Also I bequeath to my wife all my personal property of whatsoever kind or nature and wheresoever situate. 30

I devise and bequeath my real estate not hereby otherwise disposed of to my son, George E. Magee and Sir Charles Hibbert Tupper aforesaid to hold to them their heirs executors administrators and assigns upon the following trusts to be performed by them or the survivor or survivors of them his heirs executors or administrators or their or his assigns.

Upon trust to retain manage lease sell or otherwise dispose of the whole or any part thereof as to them may seem fit with the discretion of absolute owners and after 40

paying my funeral and testamentary expenses and debts to invest the proceeds of the said monies of my real estate in or upon any public stocks funds shares or securities of whatsoever nature or kind as to them may seem fit.

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 share 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 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 is not to affect the discretion hereby vested in them as to the management leasing or sale of the same or of any portion thereof.

And I declare that one of my executors, Sir Charles Hibbert Tupper being a Solicitor may act as Solicitor and shall be entitled to charge and be paid all professional charges for any business or act done by him or his firm in connection with the Trust, both he and my other executor George E. Magee may or shall be entitled to charge other charges for any business or acts done by both or either of them in connection with the trust including any act which any Executor or Trustee not being a Solicitor could have done personally.

RECORD
Court of Appeal
 No. 18
 Reasons for
 Judgment
 McPhillips,
 J. A.
 Jan. 8th, 1935
 (Cont'd)

“Hugh Magee.”

RECORD
 Court of Appeal
 No. 18
 Reasons for
 Judgment
 McPhillips,
 J. A.
 Jan. 8th, 1935
 (Cont'd)

Signed by the said Hugh Magee as his last Will in the presence of us being present at the same time who at his request in his presence and in the presence of each other subscribe our names as witnesses.

“W. Martin Griffin” of Vancouver Solicitor.
 “Knox Walkem” of Vancouver, Student-at-law.

The following questions were submitted on the 13th of October, 1933, to the learned Judge—the fact being that the widow of the testator had then been dead some seven or more years:—

1. Whether there is a partial intestacy in the Will of Hugh Magee, deceased, dated August 7th, 1903, in respect of or to the distribution of the Corpus of said estate? 10
2. Whether Intestacy supervened after the death of the widow of the Testator, the said Hugh Magee?
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 to? 20
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?
6. Are the children or heirs, or personal representatives as the case may be, of any legatee named in said will, who may have died after probate thereof, entitled to receive the share of such deceased legatee so named in said will?
7. What persons are entitled to share in the ultimate distribution of the Corpus of said Estate, and what amount or share thereof should each such person so entitled receive? 30
8. What trusts are created in favour of the beneficiaries named in said will, or their heirs, executors or administrators thereof, respectively? And when and how are the Executors compellable to discharge the same?
 - (1) In respect to distribution of Income;
 - (2) In respect to distribution of the Corpus of said estate?
9. If the Executors are not now compellable to distribute the Corpus of said Estate, when are they bound to make the ultimate distribution thereof? And what person or persons are entitled to share in the ultimate distribution thereof? 40

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?
11. What discretion, if any, have the Executors in determining or postponing the time and mode of distribution of said Estate among the persons entitled thereto? And what discretion, if any, have the Executors to say what persons are entitled to share in the ultimate distribution of said Estate?

10 And for a declaration as to the rights of all parties interested under the said Will.

And for such directions to the Executors as to the distribution of the whole or any part of the said estate as to the Judge may seem meet.

And that the costs of this application and costs incidental thereto be paid out of the estate.

And for such further or other order as to the Judge may seem meet.

20 The learned Judge on the 22nd of August, 1934, made answer as follows:—

(1) and (2): I would not say there is a partial intestacy but a trust and that the children of the testator living at the time of the death of the widow took immediately vested interests at such time in the corpus of said estate and the Court should intervene in order to distribute such corpus now among the said children or their representatives as hereinafter indicated and thus enforce the trust.

(3) They are entitled to immediate distribution of the corpus.

30 (4) The children of the testator living at the time of the death of the widow in 1927 are entitled to share equally and in case any of such children have died since then, the children or heirs or personal representatives as the case may be of the deceased child are entitled to receive the share of such deceased child of the testator.

(5) No. Distribution should take place now or so soon as it can take place without any unnecessary sacrifice of any of the assets of the estate.

(6) See Answer 4.

(7) See Answer 4.

40 (8) See Answers 1, 2, 3, 4 and 5.

(9) See answers 3, 4 and 5.

(10) Think my other answers make it unnecessary for me to answer this question specifically.

(11) None.

RECORD
Court of Appeal

No. 18
 Reasons for
 Judgment
 McPhillips,
 J. A.
 Jan. 8th, 1935
 (Cont'd)

Thereupon a formal Order was taken out under date, October 1st, 1934, as follows:—

THIS COURT DOTH ORDER AND ADJUDGE that the children of the said Hugh Magee, deceased, who were living at the death of the widow of the said Hugh Magee, namely, on the 7th day of September, A.D. 1927, are entitled share and share alike to distribution of the estate of said Hugh Magee, deceased, remaining undistributed, excepting such income of the Estate which shall have accrued up to the 22nd day of August, A.D. 1934, which said income shall be distributed in accordance with the discretion of the Trustees pursuant to the said Will, and that in the case of those children of the said Hugh Magee who have died since the 7th day of September, A.D. 1927, the share to which each would have been entitled had he or she survived shall form part of the estate of such deceased child or children. 10

THIS COURT DOTH ORDER AND ADJUDGE THAT the Executors of the Estate of the said Hugh Magee, deceased, namely, Alfred Bull, Esq., K.C., and Reginald Hibbert Tupper, Esq., do divide the income from the said estate and the proceeds of the capital of the said estate as the said proceeds become available in cash at such times as may be convenient to the said Executors into Ten (10) equal shares and do distribute One share to each of the following persons, namely:— 20

Maude Louise Magee, Committee of Hugh Crawford Magee.
 Charles W. Magee.
 Executrix of the Estate of James D. Magee, deceased
 May Isabella Magee.
 Edith Gertrude V. Magee.
 Toronto General Trusts Corporation, Executor of Estate of
 Eliza Jane Carson, deceased. 30
 Mary Carolina Dester.
 Frederick O. Magee.
 Etta McKibbon
 Charles W. Magee, Administrator of the Estate of Walter E.
 Magee deceased.

THIS COURT DOTH ORDER AND DIRECT that in such calling in and conversion the said Executors do act as in their discretion to serve the best interests of the said estate and shall not be deemed to be under obligation to make any sacrifice of any asset of the estate to effect such calling and conversion. 40

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that costs of all parties hereto be paid out of the capital of the Estate on the scale of Solicitor and Client after taxation, other than those represented by Mr. E. K. DeBeck.

THIS COURT DOTH FURTHER ORDER that the costs of all parties, excepting the costs of Hugh Crawford Magee, the Petitioner, to whom costs were occasioned by reason of the Originating Summons, issued out of the Supreme Court of British Columbia, numbered 279-29, dated the 25th February, 1929, in which Hugh Crawford Magee was Plaintiff and Charles W. Magee, James D. Magee, M. I. Magee, Edith D. F. Magee, Eliza Jane Carson, Mary Carolina Dester, F. O. Magee, Etta McKibbon, Alfred Bull and Reginald Tupper were Defendants, be paid out of the capital of the

10 Estate after taxation.

An appeal was taken to this Court by Charles W. Magee, Edith G. V. Magee and May I. Magee from the Order of Fisher J., of the 22nd of August 1934 asking that the judgment or order of Fisher, J., hereinbefore set forth be set aside—alleging error generally in decreeing that the corpus of the estate of the testator vested at the date of the death of the widow in those of the testator's children living at the date of the death of the widow but should have held that no interest in the corpus of the estate vested until the executors should exercise their discretion under the will of the testator and divide

20 the corpus of the estate or failing such division then until the death of the last surviving child of the testator—and holding that the class among which the corpus of the estate should be distributed was constituted of those living at the date of the death of the widow of the testator but should have held that the class among which distribution of the corpus should be made would be constituted of those living at the date of the distribution—and that there was error in the holding that the executors had no absolute discretion as to distribution and that distribution should now take place but should have held that the only and proper time for distribution of the corpus

30 would be when all the children living are not in need of assistance but are unembarrassed financially and that the distribution when made would be among those children living when the date for distribution has arrived. I have set forth the main questions argued and advanced by the appellants upon this appeal and if these contentions must be given effect as being the true application of the law in the carrying out of this will, it means as it occurs to me a slow process of complete disinheritance of all those intended to benefit by the terms of the will of the testator. At the outset—it may be said—as I view the authorities that vague provisions in wills cannot stand—the policy of the law is all in favour of early distribution of the estate. What is contended for here by the appellants

40 offends in every way, in my opinion, and deprives the testator's children of ever benefitting in the corpus of the estate—the executors always being enabled to say—feeling compelled to say—that one or more of the children living need assistance—embarrassed financially. This is what is advanced today and prevents distribution—the execu-

RECORD
 Court of Appeal
 No. 18
 Reasons for
 Judgment
 McPhillips,
 J. A.
 Jan. 8th, 1935
 (Cont'd)

RECORD
 Court of Appeal
 No. 18
 Reasons for
 Judgment
 McPhillips,
 J. A.
 Jan. 8th, 1935
 (Cont'd)

tors having this contention pressed upon them by these appellants. One consideration that immediately flashes upon the mind is this— if that be so—distribution now will put people in affluence whilst today they are in penury. Can it be said in view of this that it could ever have been the intention of the testator in his will to bring about such a happening? I do not consider that the law is so ineffective—that a situation of this kind is not capable of being removed. It may be said rightly and fairly in this case that the executors and their successors have been good and careful custodians of the estate and have greatly increased the value of the estate. I think 10 it was stated during the argument that it is of the value of considerably over one hundred thousand dollars. In view of this it would be reasonable from every point of view that distribution should take place—unless it is that intractable law stands in the way.

It is clear here that it was the intention of the testator that the corpus was to go to and be distributed “among my children then living”—but when was the distribution to be? “Then after the death of my wife.” It is true we have these words prefaced by “if at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially,” the Trustees were 20 to be at liberty to divide the estate. Further my view is that there is no absolute discretion given to the Trustees to postpone distribution as they may see fit. The portion of the Will that really needs close study is in the following terms:—

“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 30 as to give the larger share to those of my children who are not so well off as the others nevertheless this desire is not to affect the absolute discretion thereby vested in my Trustees.”

The absolute discretion there given must be confined to the division of the estate—as to individual proportion—that is that the absolute discretion is so limited and not a discretion at large.

Clearly the distribution is to be made to the testator’s children “then after the death of my wife my Trustees may divide the estate—among my children then living,” this punctuated the time of 40 vesting and who shall participate in the distribution. It is here contended though—that the Trustees at their sweet will may postpone the distribution to such time as there will be few or none of the children living—this is the length to which the argument goes as advanced by counsel for the appellants. To give effect to any such contention would naturally be abhorrent to any Court and I do not

think the Court is powerless to prevent any such injustice being done, and defeating the manifest intention of the testator that all his children living at the date of the death of his wife should participate in the division of the corpus of the estate and further that the heirs of any of the children of the testator living at the date of the death of his wife should also participate in the distribution of the corpus of the estate.

Now it is advanced and pressed strongly that the time for distribution has not yet arrived because of the fact that it is not shown
 10 that none of the children are in need of assistance or unembarrassed financially, I do not think that there is any hindrance here because in my view the law will not admit of this provision in the will constituting any obstacle. The provision in itself is too vague, and, in my opinion, wholly inoperative and of no effect and in regard thereto I rely strongly upon the line of reasoning expressed by the then Chief Justice of Canada—Sir Henry Strong—in Ross v. Ross (1894) 25 S.C.R. 307, at p. 330, where that learned Judge said this:—

20 “ ‘Poor relations’ must be interpreted as meaning ‘heirs at law.’ The word ‘poor’ is too vague and uncertain to have any meaning attached to it, and must therefore be rejected.”

If it is that any of the persons entitled in the distribution of the corpus of the estate are in need of assistance and are embarrassed financially, then all the greater reason for the immediate distribution of the estate. Is it to be permitted to the Trustees to say “some of them are in need of assistance and are embarrassed financially—therefore we will not distribute”. If the position is one of intractable law of course nothing can be said but, in my opinion, it is not; to give effect to this contention as here made would be a travesty of the law. Here is a case where to me it is apparent
 30 that the non-action of the Trustees failing to distribute the corpus of the estate amounts to defeating the trust. The law undoubtedly is that where in the view of the Court there is failure to make a distribution the Court will interfere and direct a distribution to be made. No doubt the case must be made that that is the duty of the Trustees under the trust. It is for the Court to interpret the will, but in so doing it is the province of the Court to arrive at what the testator meant and has said it is not conceivable that the testator meant—in effect that so long as some of his children—living at the date of the death of his wife are financially embarrassed
 40 there will be no distribution—to so construe the will means disinheritance. That view I cannot agree with—with distribution taking place it is patent the financial embarrassment becomes at end. In any case I look upon this provision in the will that where there is need of assistance and financial embarrassment—is in the language of Sir Henry Strong in Ross v. Ross supra—“Too vague and uncer-

RECORD
 Court of Appeal
 No. 18
 Reasons for
 Judgment
 McPhillips,
 J. A.
 Jan. 8th, 1935
 (Cont'd)

RECORD
Court of Appeal

No. 18
Reasons for
Judgment
McPhillips,
J. A.
Jan. 8th, 1935
(Cont'd)

tain to have any meaning attached to it, and must therefore be rejected."

I might further upon this point refer to what the Earl of Halsbury, L.C., in Grimond v. Grimond (1905) A.C. 126 said—"Where the directions are so extremely vague that you cannot say what it is that the testator meant." Can it reasonably be said that the testator meant to bring about what is here taking place—persons intended to benefit under the will—because they are poor are disinherited—the others in affluence object to distribution and hope to be the final gainers by reason of longevity—a monstrous thing—as the persons 10 entitled and desiring distribution are growing old.

The condition here—of need of assistance and financial embarrassment—is too uncertain for the court to ascertain its meaning. It is a well known rule of law that heirs at law are not to be deemed disinherited unless by express words—the procedure adopted here—is bringing about that result and the appellants are pressing for that result—that is a few only will be the participants when the distribution takes place—those in need are not to share (Doe v. Hick and Dring (1814) 2 M. & S. 448, per Lord Ellenborough, C.J., at p. 454; Hall v. Warner, 9 H.L. Cas. 420., 436; Martells v. Holloway (1872) 20 L.R. 5 H.L. 532., 548; Re Pounder (1886) 56 L.J. Ch. 113., 114; Leach v. Leach (1843) 2 Y. & C. Ch. Cas. 495 per Knight Bruce, V.C., at p.499; Coward v. Larkman (1889) 60 L.J., 1., (H.L.) at p. 2—2nd Col. Halsbury, L.C.)

As to the time of the vesting of the estate I have no hesitancy—it is abundantly clear that under the will the vesting took place upon the death of the widow—that is to say became vested in the testator's children then living.

In Re Estate of J. D. Helmcken, deceased—Helmcken v. Bullen (1924) 34 B.C.R. 184, Macdonald, J., considered the point and refer- 30 red to the leading cases (Hickling v. Fair (1889) A.C. 15—at pp. 26-7; Taylor v. Graham (1878) 3 App. Cas. 1287 at p. 1297; Craddock v. Craddock (1858) 4 Tur. (N.S.) 626—at p. 628; Swan v. Bawden (1842) 11 L.J. Ch. 156; Martin v. Holgate, L.R., 1., H.L. 175, 184, 186, 188-9). There is this principle to be remembered in this case—that the Court prefers in considering the terms of the will that

construction which in its application will most benefit the testator's whole family on the ground that that must have been his intention and construes the will so as to embrace all or as many of the children as possible (Re Hamlet, Stephen v. Cunningham (1888) 39 Ch. D. 426, 433, 434, C.A.; Bouverie v. Bouverie (1847) 2 Ph. 349, 351; Lee v. Lee (1860) 1 Drew & Sm. 85, 87; White v. Hill (1867) L.R. 4 Eq. 265, 271; Williams v. Hysthorne, Williams v. Williams (1871) 6 Ch. App. 782, 785).

RECORD
Court of Appeal
 No. 18
 Reasons for
 Judgment
 McPhillips,
 J. A.
 Jan. 8th, 1935
 (Cont'd)

I would further consider and my opinion is that the heirs of
 10 any one of the testator's children—the parent living at the time of
 the death of the widow—will be entitled to participate in the distribution of the corpus of the estate.

I would dismiss the appeal.

(Sgd.) "A. E. McPhillips,"
 J. A.

VICTORIA, B. C.
 8th January, 1935.

RECORD

No. 19

Court of Appeal

COURT OF APPEAL

No. 19
Reasons for
Judgment
M. A.
Macdonald,
J. A.

IN THE MATTER OF THE	)	JUDGMENT OF
TRUSTEE ACT AND THE	)	THE HONOURABLE
ESTATE OF HUGH MAGEE,	)	MR. JUSTICE
DECEASED	)	M. A. MACDONALD.

Appeal from an order of Mr. Justice Fisher on the construction of a will which, after devising an estate to trustees, provided that they should

“pay the income of the trust premises first thereout, dis- 10
 charging all liabilities in respect to my estate as follows:
 One-half thereof to my wife during her life in manner here-
 inafter described and the rest as follows: To such of my
 children including the said George E. Magee (one of the
 trustees) from time to time as to my executors shall appear
 to be most in need, the payments to be at the absolute discre-
 tion of my executors. If at any time it appears to my Trus-
 tees 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 child- 20
 ren 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 share to those of my child-
 ren 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 testator died twenty-five years ago and the estate has been
 administered by trustees who distributed the income, first, in respect
 to one-half thereof to the widow (subject to the decision in Re Magee
 (1925) 36 B.C.R. 195) until her death in 1927 and in respect to the 30
 other half (and the whole after the death of the wife) to the child-
 ren according to their need. Distribution of income was made, first,
 to a number of children of the testator and on the death of some of
 them to the survivors. The Trustees acted on the view that all the
 income (less the share going to the wife during her lifetime) should
 be available for distribution among needy children without disposal
 of the corpus until the time arrived, if at all, when, in their view,
 none of the children should require assistance. The corpus, it is
 submitted, is subject to distribution not on the death of the wife but
 at some period after her death when it is ascertained by the trustees 40
 that none of the children are embarrassed financially. The pre-
 requisites for distribution of the corpus therefore are (1) the death
 of the wife, (2) ascertainment that none of the surviving child-

ren are in need of assistance or are embarrassed financially. When these pre-requisites are satisfied the estate vests in the surviving children, the division to be made by the trustees as directed. It follows that the children of any deceased son or daughter do not share in the estate.

From all that has been said upon the construction of wills, it is enough to refer to the wholesome observations of the Earl of Halsbury in the House of Lords in *Inderwick v. Tatchell* H.L. (1903) 72 L.J.C.D. (N.S.) 393 at 394. His Lordship said:—

10 “I confess I approach the interpretation of a will with the greatest possible hesitation as to adopting any supposed fixed rule for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction; and if I cannot, then I think one must read the whole instrument as well as one can, and conclude what really its effect is intended to be by looking at the instrument as a whole. By the hypothesis it does not speak for itself, but you must arrive at some interpretation which will make it speak, and make it speak intelligibly.

20 I so far go with the contention of the appellants here, that I think it is quite possible—nay, I may go further and say I think it is probable—that if the testator had contemplated the particular event that has happened in this case he would have provided for it. But with that single observation I am not at liberty, because an event has happened which I think has not been provided for, to conjecture what the testator would have provided if he had thought of it beforehand. I am not at liberty to disregard the application of the ordinary rule of construction of every document—

30 namely, that you must look at the whole document, and, if you can, you must read the words according to their natural and reasonable meaning.”

In this case the whole difficulty arises because of the plight of grandchildren whose deceased parents were beneficiaries while living. If, as stated in the judgment referred to the testator had contemplated this event he might (or on the other hand might not) have provided for it. We are not permitted however to indulge conjectures as an aid to interpretation.

40 The testator’s plan, as disclosed by the instrument fairly read, was to preserve the estate until the death of the wife. After her death, a further reason remained for deferring distribution and for keeping the estate vested in the trustees, *vis.*, that needy children could best be provided for in that way. Earlier distribution might result in dissipation of her or his portion by the improvident, hence

RECORD
 Court of Appeal
 No. 19
 Reasons for
 Judgment
 M. A.
 Macdonald,
 J. A.
 (Cont'd)

RECORD
 Court of Appeal

No. 19
 Reasons for
 Judgment
 M. A.
 Macdonald,
 J. A.
 (Cont'd)

the direction to keep the corpus intact so that income would be available so long as any child remained in need. This condition might continue until one child only survives. The class, however, to whom distribution should be made, if at all, cannot be determined until the time for distribution arises. The children then living will form the class entitled to the corpus. This, as I view it, is the meaning of the instrument reasonably interpreted. We cannot apply the rule that a disposition of the income carries with it the capital; that rule does not apply where there is another disposition of the capital or a clear intent that it shall be preserved for special purposes. 10

After the death of the wife the trustees were obliged to inquire if the time had arrived when no children were in need. If a negative answer was given to that question they had no power to distribute the corpus involving the sequitur that as yet no class was ascertained. If some years later on making the same inquiry, the Trustees should come to the conclusion that no child was then in need they should distribute the corpus among the children living at that time. No doubt this view creates the hardship already referred to prejudicially affecting the children of deceased sons and daughters—and possibly the court could make a better will if permitted—but that was the will the testator made. His view may have been, as already intimated, that by this scheme he provided that an income would be available for children as long as they were alive and in need, concerning himself only with his own children and not with the second generation. He may have thought that some among his children would prove to be improvident and require this protection. The impecunious son would be prevented from squandering his portion leaving him without any income at all. That would appear to be the substantial consideration the testator had in mind. 20

I cannot agree, therefore, that the estate vested in the beneficiaries upon the death of the wife. That would mean the selection of an arbitrary date for distribution without regard to the injunction not to do so while any child was in need. Even if it did, another alleged injustice would arise, *vis.*, children of sons or daughters of the testator dying between his death and that of the wife would not share in the estate. The property vests at the time the trustees are given the right to distribute it. There is a perfectly good devise to trustees upon trusts that can be carried out. 30

Mr. Reid submitted that the estate vested in the children living at the date of the wife's death but that the trustees might defer distribution until a future date when none of the children were in need. At that time the estate would go to the children living at the death of the wife or to the heirs of any who died in the meantime. He read the first "then" as meaning "in that case" and the second 40

“then” (both in italics) as referring to the date of the wife’s death. I must confess there is some force in this submission, but if Counsel who revised the will had instructions of that nature relating to so important a matter as the date of vesting it would not be expressed in this loose fashion leaving it open to a doubtful and highly speculative interpretation. I think we should interpret the second word “then” in the natural sense in which it is used, *vis.*, as referring to the children living at the time it should be determined that no one was in need. That event determines the class, *vis.*, those living at
 10 that time.

My conclusion, therefore, is that the estate vests only when the time for distribution arrives. That time may never arrive and will not if it should appear to the trustees that the last surviving child is in need. That in itself is a conclusive argument against earlier vesting. Where a devise is made to one payable at a time that *must* arrive it is at once a vested legacy. Where however the devise is upon an uncertain event (one that may or may not happen) no vesting can take place before its occurrence, and if the beneficiary dies in the meantime the legacy lapses. If no distribution should be
 20 made before the death of the last survivor a partial intestacy will ensue in which event a resultant trust will arise in favour of the donor and distribution would be made according to law. However, it is not necessary at this stage to express a final opinion on this point and I will not do so.

It was urged that the words “in need of assistance” and “all unembarrassed financially” are vague and uncertain phrases and should be disregarded. That is not so. The phrases are easily understood. It is only when no class at all is fixed that uncertainty arises. If, however, the suggestion of vagueness is based upon the view that
 30 because of ever present need a time for distribution may never arise the answer is that such a contingency is provided for. The testator did not want distribution to take place while any were in need. The word “If” should not be overlooked “if at any time it appears etc.” That is a *sine qua non* to distribution by the deliberate selection of words. It is not at all vague.

I may add that it is not possible for the trustees to make distribution merely to relieve financial embarrassment and thus enable them to say that no one is in need. Nor may the trustees conclude that if a share of the corpus would take away financial embarrass-
 40 ment they may consider that the time for a division of the capital has arrived. They must first fairly conclude that the beneficiary, from income received from the estate or from other sources is reasonably able to provide for his or her ordinary personal and domestic

RECORD
 Court of Appeal
 No. 19
 Reasons for
 Judgment
 M. A.
 Macdonald,
 J. A.
 (Cont'd)

RECORD obligations. That course must be followed unless all parties agree to
Court of Appeal a division of the corpus or unless the legislature intervenes.

No. 19
Reasons for
Judgment
M. A.
Macdonald,
J. A.
(Cont'd)

I would allow the appeal.

(Sgd.) "M. A. Macdonald."

VICTORIA, B. C.,
8th January, 1935.



No. 20
Reasons for
Judgment
McQuarrie,
J. A.
Jan. 8th, 1935

No. 20

COURT OF APPEAL

IN THE MATTER OF THE) JUDGMENT OF
ESTATE OF HUGH MAGEE,) THE HONOURABLE
DECEASED.) MR. JUSTICE McQUARRIE 10

I agree that the appeal should be allowed. I have had the privilege of reading the reasons for judgment of my learned brother M. A. Macdonald, and agree with same. As he has expressed my own views in the matter so clearly and logically, I feel that it is unnecessary for me to say anything further.

(Sgd.) W. G. McQuarrie,
J. A.

VICTORIA, B. C.
8th January, 1935.

COURT OF APPEAL

RECORD

Court of Appeal

No. 21

Judgment
Jan. 8th, 1935BC
LS
\$1.10Vancouver
Mar 23/1935
Register

JUDGMENT

CORAM:

THE HONOURABLE THE CHIEF JUSTICE OF BRITISH
COLUMBIA

THE HONOURABLE MR. JUSTICE MARTIN
 10 THE HONOURABLE MR. JUSTICE McPHILLIPS
 THE HONOURABLE MR. JUSTICE MACDONALD
 THE HONOURABLE MR. JUSTICE McQUARRIE

Vancouver, B. C. the 8th day of January A.D. 1935.

THIS APPEAL from the Order of the Honourable Mr. Justice Fisher of the Supreme Court, pronounced on the 22nd day of August A.D. 1934 coming on for hearing on the 19th, 20th and 21st days of November 1934, and upon hearing Mr. J. W. deB. Farris, K.C. and Mr. T. Edgar Wilson of Counsel for the appellants; Mr. G. E. McCrossan, K.C. of Counsel for the Respondent Hugh Crawford Magee; Mr. R. L. Reid, K.C. of Counsel for the Respondent Mary
 20 Caroline Dester; Mr. C. H. Locke, K.C. of Counsel for the Respondent Etta McKibbon; Mr. Alfred Bull, K.C. and Mr. C. C. I. Merrit of Counsel for the Respondents Alfred Bull and Reginald Hibbert Tupper; Mr. T. Edgar Wilson of Counsel for the Respondent F. O. Magee; Mr. William Savage of Counsel for the Respondent Toronto General Trusts Corporation; and Mr. T. G. McLelan of Counsel for the Respondent James D. Magee; and upon reading the Appeal Book herein and judgment being reserved thereupon:

THIS COURT DOTH ORDER AND ADJUDGE that the said appeal be and the same is hereby allowed, and that the said
 30 Order of the Honourable Mr. Justice Fisher be and the same is hereby set aside.

THIS COURT DOTH FURTHER ORDER AND DECLARE the true intent and meaning of the Will of the said Hugh Magee to be as follows:—

(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
 40 unembarrassed financially.

RECORD
 Court of Appeal
 No. 21
 Judgment
 Jan. 8th, 1935
 (Cont'd)

- (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 Trustee shall appear most in need.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of all parties of this appeal and in the Court below shall be taxed by the Registrar pursuant to Appendix "M" of the Rules of the Supreme Court, and shall be paid out of the said estate, either capital or income. 10

THIS COURT DOTH FURTHER ORDER that the costs of all parties, excepting the costs of Hugh Crawford Magee, the Petitioner, to whom costs were occasioned by reason of the Originating Summons, issued out of the Supreme Court of British Columbia, numbered 279-29, dated the 25th February 1929, in which Hugh Crawford Magee was Plaintiff and Charles W. Magee, James D. Magee, M. I. Magee, Edith D. F. Magee, Eliza Jane Carson, Mary Carolina Dester, F. O. Magee, Etta McKibbon, Alfred Bull and Reginald Tupper were Defendants, be paid out of the capital of the Estate after taxation. 20

(Seal)

BY THE COURT:

COURT OF APPEAL
 BRITISH COLUMBIA

H. BROWN
 Dep. Registrar.

W.S.	R.L.R.	J.F.M.R.
R.H.T.	C.H.L.	Entered Mar. 23 1935
T.G.McL.		ORDER BOOK, Vol. 10 Fol. 54
G.E.McC.		Per A.L.R. A.M.J.A.

COURT OF APPEAL

BC Vancouver
 LS. April 6/1935
 \$1.10 Register

RECORD
 Court of Appeal
 No. 22
 Order Granting
 Final Leave to
 Appeal
 Jan. 28th, 1935

ORDER GRANTING FINAL LEAVE TO APPEAL

CORAM:

THE HONOURABLE THE CHIEF JUSTICE OF BRITISH
 COLUMBIA

- 10 THE HONOURABLE MR. JUSTICE McPHILLIPS
 THE HONOURABLE MR. JUSTICE MACDONALD
 THE HONOURABLE MR. JUSTICE McQUARRIE

VICTORIA, B. C. the 28th day of
 January, A.D. 1935.

- ON MOTION made this day to this Court sitting at Victoria,
 B. C., on behalf of the above mentioned Plaintiff (Respondent) for
 leave to appeal to His Majesty in his Privy Council from the judg-
 ment of this Honourable Court pronounced herein on the 8th day of
 January, A.D. 1935; AND UPON HEARING Mr. George E. Mc-
 20 Crossan, K.C. of Counsel for the Plaintiff (Respondent) and Mr.
 J. W. de B. Farris, K.C. of Counsel for the Defendants (Appellants)
 and Mr. Alfred Bull, K.C. of Counsel for Alfred Bull and Reginald
 Hibbert Tupper, Defendants (Respondents) and no one appearing
 for the Defendants (Respondents) other than the said Alfred Bull
 and Reginald Hibbert Tupper;

- THIS COURT DOTH ORDER that subject to the perform-
 ance by the said Plaintiff (Respondent) of the conditions herein-
 after mentioned and subject to the final order of this Court upon
 the due performance thereof, leave to appeal to His Majesty in his
 30 Privy Council against the said judgment of this Honourable Court
 be granted to the Plaintiff (Respondent);

- AND THIS COURT DOTH FURTHER ORDER that the
 said Plaintiff (Respondent) do within three months from the date
 hereof provide security to the satisfaction of this Honourable Court
 in the sum of £200/-/- sterling for the due prosecution of the said
 appeal and for the payment of all such costs as may be payable to
 the Defendants (Appellants) in the event of the Plaintiff (Respond-
 ent) not obtaining an order granting it final leave to appeal or of
 the appeal being dismissed for non-prosecution and for the payment
 40 of such costs as may be awarded by His Majesty, his heirs and suc-
 cessors, or by the Judicial Committee of the Privy Council to the
 said Defendants (Appellants) on such appeal;

RECORD
 Court of Appeal
 No. 22
 Order Granting
 Final Leave to
 Appeal
 Jan. 28th, 1935
 (Cont'd)

AND THIS COURT DOTH FURTHER ORDER that the Plaintiff (Respondent) do within three months from the date of this order in due course take out all appointments that may be necessary for settling the transcript record on such appeal to enable the Registrar to certify that the transcript record has been settled and that the provisions of this order on the part of the Plaintiff (Respondent) have been complied with;

AND THIS COURT DOTH FURTHER ORDER that the costs of the transcript record on appeal and of all necessary certificates and all costs of and occasioned by the said appeal shall abide the decision of the Privy Council with respect to the costs of appeal; 10

AND THIS COURT DOTH FURTHER ORDER that the Plaintiff (Respondent) be at liberty within three months from the date of this order to apply for an order for leave to appeal as aforesaid on production of a Certificate under the hand of the Registrar of due compliance on its part with the terms of this order.

Approved

as amended

J. W. deB. F.

AB

JAMc

CJ.

Seal

Court of Appeal
 British Columbia

BY THE COURT

O.B.

D.R.

B. H. Tyrwhitt Drake

REGISTRAR.

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ENTERED
 APR -6 1935
 Order Book, Vol. 10 Fol. 62
 Per ALR

No. 23
 COURT OF APPEAL
 CERTIFICATE OF REGISTRAR

RECORD
Court of Appeal
 No. 23
 Registrar's
 Certificate
 as to Case
 March 23, 1936

I, the undersigned Registrar at Vancouver of the Court of Appeal, DO HEREBY CERTIFY, that the foregoing is a transcript of the Record of Proceedings in this action for the purpose of appeal to His Majesty in Privy Council herein as prepared and settled by this Court.

I FURTHER CERTIFY THAT the said Record of Proceedings contains the Reasons for Judgment of The HONOURABLE MR. JUSTICE FISHER, (Trial Judge) and of The HONOURABLE the CHIEF JUSTICE of the Court of Appeal, The Honourable Mr. Justice Martin, the Honourable Mr. Justice McPhillips, the Honourable Mr. Justice Macdonald and the Honourable Mr. Justice McQuarrie being all of the Judges before whom the trial and appeal herein were heard who have delivered Reasons for Judgment herein.

AND I FURTHER CERTIFY that the said Record of Proceeding contains an Index of all the papers and Exhibits in the case.

DATED at Vancouver, B. C., this 23rd day of March, A.D. 1936.

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J. F. MATHER

Registrar.

RECORD

No. 24

*In the Privy
Council*

PRIVY COUNCIL

ORDER GRANTING LEAVE TO APPEAL
WITHOUT SECURITYNo. 24
Order Granting
Leave to
Appeal Without
Security
Dec. 20th, 1935Vancouver
Jan. 17, 1936
RegistryBCLS
10c

C.A 45/34

1861/33
S.C.

At the Court at Buckingham Palace

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The 20th day of December, 1935

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT

SIR LANCELOT SANDERSON

LORD COLEBROOKE

SIR KINGSLEY WOOD

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of November 1935 in the words following viz.:—

“WHEREAS by virtue of His late Majesty King Edward the Seventh’s Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Hugh Crawford Magee a Lunatic by Maude Louise Magee his Committee in Lunacy in the matter of an Appeal from the Court of Appeal of British Columbia between the Petitioner 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 Hibbert Tupper and C. W. Magee Executor of the estate of Walter E. Magee deceased Respondents setting forth (amongst other matters) that the Appellant instituted an Action in the Supreme Court of British Columbia by Originating Summons on the 13th October A.D. 1933 to determine certain questions arising out of the will of Hugh Magee deceased the father of the Appellant thereafter referred to as ‘the testator’: that Hugh Magee died on the 9th March A.D. 1909 leaving him surviving his wife and the following children:—Charles W. Magee, James D. Magee, May I Magee, Edith D. F. Magee, Eliza Jane Carson, Mary Caroline Dester, Walter E. Magee, F. O. Magee, Etta McKibbon and Hugh Crawford Magee: that the wife of the testator died on the 9th day of August 1927: that of the children surviv-

ing the testator Walter E. Magee died on the 23rd August 1928 Eliza Jane Carson died on the 2nd May 1931 and James D. Magee died on the 8th March 1934: that evidence upon affidavit adduced upon the return of the Summons shewed as follows: (a) that the estate of Hugh Magee has a value of approximately \$142,966.47; (b) that a Committee was appointed in the estate of the Appellant in 1928: and that the Appellant is confined in a mental hospital and that he is in a precarious state of health; (c) that the income of the estate since the death of the widow has been disbursed by the trustees to such of the children of the tes-

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tator as in the discretion of the trustees seemed to them most in need; (d) that all of the surviving children (excepting Etta McKibbon) are dependent on the estate for their maintenance and support and have no other sufficient estate or means with which to maintain themselves including those children of the testator who oppose distribution of the estate and who assert as a reason therefor their dependence on the estate; (e) that the ages of the surviving children are respectively as follows:—Petitioner, Hugh Crawford Magee, 77 years Mary Caroline Dester, 67 years Charles Wesley Magee, 65 years May Isabella Magee, 63 years Edith Gertrude Magee, 61 years Fred O. Magee, 59 years Etta F. McKibbon, 55 years (f) that none of the surviving children (excepting Etta McKibbon as to whose financial status there was no evidence) are ‘financially unembarrassed’ but all are in needy circumstances and having no other expectancy will continue to be during their life time; (g) that the Respondents therein opposing distribution namely Charles W., May I., Edith D. F. and F. O. Magee, themselves deposed that they are wholly dependent on the estate for their support and maintenance and have no other means of livelihood or prospects of any; (h) that until and unless the estate be distributed no time can or will arrive when all of the children of the said testator will be ‘unembarrassed financially’: that the return of the summons came on before Fisher J. of the Supreme Court which ordered distribution of the estate to the children living at the death of the widow: that the Respondents C. W. Magee, M. I. Magee, Edith D. F. Magee and C. W. Magee executor of the estate of Walter E. Magee deceased appealed to the Court of Appeal: that the Court held reversing the Order of Fisher J. that the trustees may distribute the estate among the children living at the time of such distribution but only if and when it appears to the trustees that none of the children are in need of assistance but all are unembarrassed financially: that the Appellant obtained leave to appeal to Your Majesty in Council: that the Court of Appeal ordered that security be provided by the Appellant in the sum of £200: that the Appellant is unable to

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RECORD

In the Privy Council

No. 24

Order Granting
Leave to
Appeal Without
Security
Dec. 20th, 1935
(Cont'd)

RECORD

*In the Privy
Council*

No. 24

Order Granting
Leave to
Appeal Without
Security
Dec. 20th, 1935
(Cont'd)

provide security in this sum or in any sum and desires to appeal without the necessity of providing security for costs or alternatively *in forma pauperis*: that the Appellant is not worth £25 in the World except his wearing apparel and his interest in the subject matter of this Appeal and that he is unable to provide sureties: that the Appellant has been confined as a patient in a hospital for the insane at New Westminster British Columbia since 1928 and has for some considerable time been ill and that he and his family are wholly dependent upon the estate herein for support and maintenance: And humbly praying Your Majesty in Council to grant him leave to Appeal from the Judgment of the Court of Appeal of the 8th January 1935 without security for costs or alternatively *in forma pauperis* or for such Order as to Your Majesty in Council may seem fit: 10

“THE LORDS OF THE COMMITTEE in obedience to His late Majesty’s said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Court of Appeal of British Columbia dated the 8th day of January 1935 without depositing in the Registry of the Privy Council any sum as security for costs: 20

“And Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same.” 30

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Lieutenant-Governor of British Columbia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.