

UNIVERSITY OF LONDON

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INSTITUTE OF ADVANCED

LEGAL STUDIES

21,1942

30615

No. 35 of 1941.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of the Estate of MARIA FAMICHA GANONG,
deceased.

BETWEEN

JEANNETTE ROBINSON BELYEA and EDGAR M.
ROBINSON Residuary Legatees (Defendants) - - *Appellants*

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AND

SAMUEL A. McBRIDE, Sole Executor and Trustee of
the Last Will and Testament of MARIA FAMICHA
GANONG, deceased (Plaintiff) - - - - *Respondent*

and

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ARTHUR D. GANONG, KATHERINE L. WHIDDEN,
SUSAN B. GANONG, WILLIAM F. GANONG,
JAMES E. GANONG, GRACE A. CALDWELL,
EDNA DILLENBECK PELLISSIER, MAY
ISABEL WEYMER, EDWIN M. GANONG,
WILLIAM J. GANONG and R. WHIDDEN GANONG
(Defendants) - - - - - *Respondents.*

Case for the Appellants.

RECORD.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 20th December, 1940, which had reversed a judgment of the Appeal Division of the Supreme Court of New Brunswick dated the 19th April, 1940, which had allowed the Appellants' appeal from a judgment of the Chief Justice of New Brunswick dated the 15th January, 1940, upon an originating summons taken out by the respondent executor and trustee to have determined by the Court
- 30 (1) who under the will of Maria Famicha Ganong (hereinafter called

p. 31.

p. 13.

p. 6, 1, 30.

p. 3.

p. 6, 11, 6-11.

"Mrs. Ganong") or the second codicil thereto, are entitled to certain common and preferred shares in the capital stock of Ganong Brothers Limited, and (2) when the beneficiaries of the shares are entitled to delivery thereof.

p. 55, l. 6.

p. 50, l. 10,
to p. 51,
l. 13.

p. 51, l. 3.

p. 50, l. 45,
to p. 51, l. 2.

p. 50,
ll. 28-32.

2. Ganong Brothers Limited (hereinafter called "the company") is a company incorporated under the laws of the Dominion of Canada. The company has preference and common stock. The preference stock (which in the originating summons and other documents is referred to as "preferred" shares or stock) consists of 10,000 shares each of a par value of \$100 and by the company's by-law number 54 it is provided that these 10 shares shall have a fixed cumulative preferential dividend of seven per cent. per annum payable as may be convenient half-yearly and the holders thereof shall be entitled to receive the said dividends and shall hold the shares upon terms which provided that the preference dividends shall run from the 1st July, 1916, and shall be cumulative dividends but if "not paid when due and payable as aforesaid, owing to lack of profits sufficient therefor, the amount so payable and not paid shall bear no interest." The terms also provided that on winding up the holders of the preference shares shall be preferentially entitled "to payment for their stock in full at par (together with any dividends in arrear)". 20

pp. 70-92.

p. 90,
ll. 12-19.
p. 90, l. 27.
pp. 56-70.
p. 91, l. 10.
p. 91, l. 29.

3. Mrs. Ganong had large holdings both of common and preference shares in the company. By her will made on the 25th September, 1924, Mrs. Ganong among many other bequests made specific bequests to various persons of preference stock and left the residue of her estate to the Appellants. By clause 15 she confirmed a trust (revocable in certain circumstances) of preference and common stock of the company. By clause 17 of her will she provided for the payment of succession duties on bequests but not on any benefits under the trust. By clause 20 she directed that the bequeathed shares were to remain part of her estate until the company's first annual meeting after her death and until all 30 dividends accruing on the shares from the business of the year in which her death occurred should have been paid to her estate for the benefit of her estate. Mrs. Ganong declared that she intended by this section of her will to show that both semi-annual dividends on the preference shares that would be paid during the fiscal year subsequent to her decease but which would have been earned during the fiscal year in which her death occurred must be paid to her estate before making any transfers of the stocks and shares devised and bequeathed.

p. 96,
ll. 12-18.
p. 92, l. 15.
p. 93, l. 16.

4. Events happened in which the trust became revocable and it was revoked. A first codicil to Mrs. Ganong's will is immaterial to this 40 appeal. By a second codicil to her will dated the 13th October, 1934, Mrs. Ganong made other provision for the devolution of the company's

shares held by her. She revoked paragraph 15 of her will which had confirmed the agreement establishing the trust and she made a number of specific bequests of preference shares and a number of specific bequests of common shares. She declared that she realised that the common shares had then no monetary value having been issued against goodwill but expressed the hope that they would become of substantial value. By clause 21 of the second codicil she confirmed her will except so far as revoked or altered by this or a former codicil.

p. 96, l. 3.
p. 97, l. 6, to
p. 103, l. 26.
p. 103,
ll. 30-36.
p. 106, l. 42.

5. By clause 20 of the second codicil Mrs. Ganong revoked clause 17 of her will and in substitution therefor directed the payment out of her personal estate of succession duties on all bequests; but she gave an overriding direction that all her shares in the company should remain the property of her estate until all dividends on the preference shares accrued to the date of her death had been paid in full and also until the two half-yearly dividends which should accrue immediately subsequent to the date of her death should have been paid in full to her estate for the benefit thereof. Mrs. Ganong's expressed intention was that all dividends on the preference shares "accrued due" to the date of her death "whether earned or declared or not" together with a full year's dividends accruing due after her death "whether earned or declared or not" should be paid to her estate before the transfer of any of the company's shares which she had bequeathed.

p. 106, l. 10.
p. 106,
ll. 22-41.

6. No dividends have been paid on the company's preference shares since 1933. The dividends on Mrs. Ganong's preference shares which, in the language of by-law number 54, were "not paid when due and payable as aforesaid, owing to lack of profits sufficient therefor", up to and including the two half-yearly dividends payable immediately subsequent to her death, amounted to \$68,460.

p. 108, l. 5.
p. 50, l. 46,
to p. 51, l. 1.

7. Mrs. Ganong died on the 30th November, 1934, possessed of estate which included 4,890 preference shares and 4,036 common shares in the company, and doubts arose concerning the vesting of these shares and the effect of the will and second codicil. Accordingly the respondent executor and trustee by originating summons dated the 1st December, 1939, asked the Court the following questions:

p. 9, l. 44,
to p. 10, l. 3.
pp. 3-6.

"1. Who are entitled to the shares in the capital stock of Ganong Bros. Limited, either common or preferred, bequeathed under any clauses of either the last Will and Testament of Maria Famicha Ganong or the second Codicil thereto?"

p. 6, ll. 6-11.

"2. When are the beneficiaries of the said shares entitled to delivery thereof?"

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p. 8, ll. 33-35. Another question was added during argument :

“ 3. Under the circumstances of the present case, are any
“ dividends and if so, what, apportionable ? ”

p. 6, l. 30. 8. The originating summons was heard on the 19th December, 1939, by the Chief Justice (The Honourable John B. M. Baxter) who by his judgment dated the 15th January, 1940, answered the questions as follows :

“ 1. The persons and institutions named therein.

“ 2. Immediately.

“ 3. No question of apportionment arises.”

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pp. 8-12. 9. In his reasons for judgment the Chief Justice construed clause 20 of the second codicil as only an extension of the rule that the shares would pass to the executor upon the death of the testatrix and that he would not have been bound to hand over the shares until a year after her death. p. 11, l. 1. The Chief Justice thought that Mrs. Ganong's intention had been considerably obscured by the draftsman's confusion between preferential shares per se and the right of preferential shares upon a winding up. p. 11, l. 27. In his view, the words in the will “ whether earned or declared or not ” would be apt with reference to the right of the preferential shares to rank upon the assets of the company upon a winding up but are utterly 20 meaningless in the connection in which they have been introduced as no dividends were due or could lawfully have been declared at the date of Mrs. Ganong's death or in the year immediately succeeding it. In his p. 11, l. 35. opinion the shares vested immediately in the legatees. He rejected the p. 12, l. 3. argument that Mrs. Ganong meant the shares not to vest until after two half-yearly dividends had been declared and paid even though that might not take place in fifty years. The shares vested at Mrs. Ganong's death p. 12, l. 13. but the executor could not transfer them upon the books of the company until certain dividends were paid, but these dividends never accrued and the time fixed by the will having elapsed the legatees are entitled to receive 30 p. 12, l. 6. their legacies and the rule against perpetuities does not come into play.

p. 12, l. 27. 10. The Appellants appealed to the Appeal Division of the Supreme p. 13. Court of New Brunswick which on the 19th April, 1940, by a majority (Harrison and Fairweather JJ., Grimmer J. dissenting) allowed the appeal.

pp. 14-20. 11. In his reasons for judgment Grimmer J. stated that p. 15, l. 6. Mrs. Ganong's intention was to be discovered from the whole will and that if the Court can arrive at a general result as to what Mrs. Ganong intended that general result will prevail over every particular construction. p. 15, l. 36. In clause 20 of the will the expression “ dividends accruing ” must, in his 40

view, be considered as dividends in the process of being earned and, in view of the trend of Mrs. Ganong's mind as expressed in her will, the words "earned, declared or not" were inconsiderately included in clause 20 of the second codicil. In his view no words are used creating a charge, as the shares are to remain under the control of the executors until certain dividends are paid. Mrs. Ganong could not have intended that before getting the shares the legatees must pay to her estate a sum of money equal to the maximum dividend which the company could pay in respect of the shares, and the natural meaning of her language, in his view, was that she wanted such dividends as there were, whatever the amount might be, to go to her estate and not to the legatees. There cannot be a dividend until it is earned and the use of the words "earned or declared or not" is meaningless except in cases of winding up. Accordingly, he held that the shares vested immediately in the legatees.

12. The reasons for judgment of Harrison and Fairweather JJ. were delivered by Harrison J. The Court must find out Mrs. Ganong's intention as expressed by the words of her will and if the language she used has the effect of depriving the legatees of their legacies, still the duty of the Court is to give effect to the language. Clause 20 of the second codicil states Mrs. Ganong's intention with particular pains and is paramount to any conflicting provisions in the will. Fairweather and Harrison JJ. did not agree with the Appellants' contention that the language prevents any vesting of the shares until the specified dividends are paid and they agreed with the Chief Justice that the shares vested immediately in the legatees but they considered that there was a charge upon the shares. Effect is given to the whole will by an absolute gift of the shares with a postponement of the beneficial enjoyment until the condition was fulfilled. They could not agree that the provision as to accrued dividend is meaningless and they were confirmed in their view by the company's by-law number 54 with its reference to "dividends in arrear" which undoubtedly refers, in the language of the codicil, to dividends whether "earned or declared or not." Accordingly, Fairweather and Harrison JJ. held that the preference and common shares bequeathed by the will and second codicil were charged with the amount of two years' dividends at seven per cent. upon the preference shares, an amount of \$68,460. The legatees were to have the entire beneficial interest in the shares excepting only the amount of two years' dividends on the preference shares. The executors and trustees were therefore to hold the shares until the two years' dividends had been paid, but the shares were in their view vested in the legatees. As the charge on the shares could be paid off at any time, the rule against perpetuities would not apply and in their opinion the proper answers to the questions submitted were :—

"1. The persons and institutions named therein subject to
"a charge upon the shares bequeathed by the will and second

“ codicil in favour of the executors and trustees to the amount
“ of two years’ dividends on the preferred shares so bequeathed
“ namely \$68,460.

“ 2. When the amount of the said charge has been paid to
“ the estate or the said charge released.

“ 3. No question of apportionment arises.”

p. 28. 13. The Respondents other than the executor and trustee appealed
to the Supreme Court of Canada (Crocket, Davis, Kerwin, Hudson and
p. 31. Taschereau, JJ.) which by judgment dated the 20th December, 1940,
restored the judgment of the Chief Justice of New Brunswick. The 10
pp. 32-40. reasons for their judgment were given by Crocket J. who thought that
p. 36, clause 20 of the second codicil indicated clearly enough an intention to
ll. 41-46. postpone the transfer by the executor and trustee of the bequeathed
shares to the various beneficiaries pending the payment to him of dividends
accrued to the date of Mrs. Ganong’s death and two prospective half-yearly
p. 36, l. 46, dividends during the following year. The intended reservation is enshrouded
to p. 37, l. 6. in such apparent ambiguity and uncertainty as in his opinion to endanger
p. 37, ll. 7-41. its entire validity. The words “ accrued due ” and “ accruing due ” can
only, in his opinion, mean dividends which have become payable and
dividends as they become payable by the corporation to the shareholder 20
and the dividends cannot possibly be said to have accrued due or to be
accruing due when no profits have been earned to provide for their
payment and no declaration has been made by the directors fixing any
p. 37, l. 42, date for payment. Crocket J. considered that the clause can only be
to p. 38, l. 5. applied to the payment of dividends by the corporation as a going concern
and clearly excludes the payment of money in lieu thereof by the
p. 38, ll. 5-8. beneficiaries in whom the shares themselves are vested. The qualifying
phrase is, in his opinion, so obviously repugnant to the principal phrase
that one or the other must be disregarded and the whole clause recast
in order to express any such intention as that contended for by the 30
p. 38, ll. 9-25. Appellants. Without the qualifying phrase, the clause contemplates only
the payment of dividends which the directors might legally declare to be
payable on definitely appointed dates and no sufficient profits having
p. 38, been earned no dividends accrued due in 1934 or 1935. Crocket J. then
ll. 26-44. considered how the non-payment of dividends affects the condition
prescribed as a prerequisite to the executor’s right to transfer the shares.
The hypothesis that Mrs. Ganong intended that the condition should
continue unlimited as to time until the actual payment of the deferred
dividends which might possibly never happen, may at once be dismissed,
in his opinion, as wholly inadmissible. The other hypothesis that 40
Mrs. Ganong intended that the executor should not withhold the transfer
to the legatees for more than a year after her death though not entirely
consistent with her intention to vest the shares in the legatees at her

death, may be more reasonably harmonised with this intention. If no limitation of the condition can reasonably be inferred the reservation itself, in the opinion of Crocket J., must be held to be void for uncertainty whether the qualifying phrase be eliminated or not, but this uncertainty goes not to the validity of the bequests but to the validity of the reservation. The majority in the Appeal Division, in order to give some effect to the phrase "whether earned or declared or not," deduced from it and the language of the whole of clause 20 of the codicil and other provisions of the will, an intention to impose a charge in favour of the estate, but while

10 part of the clause would seem to impart no little colour to this view, Crocket J. found himself quite unable to adopt it. There was no direction to the executors to collect the two years' unpaid dividends from the beneficiaries or to fund them for the payment of succession duties, while Mrs. Ganong clearly desired to relieve the bequeathed shares from liability for the payment of succession duties. He could not believe that Mrs. Ganong intended to charge the beneficiaries \$14 a share in the event of the corporation's inability to earn sufficient profits to pay anything on account of the deferred dividends, for no other apparent purpose than that of increasing the value of the residuary estate. He accordingly held

20 that the judgment of the Chief Justice should be restored.

p. 38, l. 45,
to p. 39, l. 6.

p. 39,
ll. 21-40.

p. 39, l. 40,
to p. 40, l. 2.

p. 40, ll. 3-13.

p. 40, l. 14.

14. The Appellants respectfully submit that in her second codicil Mrs. Ganong expressed her intention in clear language, free from inconsistencies and that there is no ground for holding that she was confusing the rights attaching to the company's preference shares on a winding-up with the rights in respect of dividends. Her language is apt to deal with the dividend rights laid down in by-law number 54; and in view of the terms of that by-law the words "whether earned or declared or not" cannot, in the Appellants' submission, properly be considered "utterly meaningless" or of no effect because of inconsistency with other provisions of the will or codicil. Accordingly the Appellants put forward the following contentions: The proper answer to the questions put to the Court will depend on whether Mrs. Ganong's intention as shown by the words she used is defeated by an infringement of the rule against perpetuities. If it is so defeated, the proper answer to the first question is "the residuary legatees" and to the second question "when the executor in the due course of administration transfers the residue of the estate to the residuary legatees." If, on the other hand, Mrs. Ganong's intention may lawfully take effect, the proper answer to the first question would be "The executor and trustee for the benefit of the estate until such time as Ganong Brothers

30 Limited shall have paid on the preference shares held by Mrs. Ganong arrears of dividend amounting to \$68,460 and thereafter the persons and institutions named as ultimate legatees of the company's shares in the will and second codicil." The second question should then be answered "The said persons and institutions are entitled to delivery forthwith on the payment in full of the said arrears." No question of apportionment

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would arise but if the amount paid in respect of arrears of dividend before the transfer of the shares should exceed \$68,460 the specified legatees would be entitled to the excess.

15. When Mrs. Ganong's intention as shown by the terms of her will and second codicil are applied to the events which have happened, it is plain, in the Appellants' submission, that Mrs. Ganong intended her executor to retain the shares until her estate received payment of arrears of preference dividend amounting to \$68,460. Practical effect is given to this intention if her estate is assured of receiving \$68,460 by a charge on the shares. When the Appeal Division held that such a charge could be implied the Appellants were content with a result which carried out Mrs. Ganong's intention and in the Supreme Court of Canada they did not seek to have the decision reversed. The Appellants, however, respectfully submit that it is difficult or impossible to find in the words of the will and codicil anything to create or to justify the implication of a charge upon the shares. 10

16. The Appellants also respectfully submit that the Supreme Court of Canada fell into error by considering too exclusively the validity of the reasoning on which the majority of the Appeal Division rested their decision, and in failing to give due effect to the words of the will and codicil in their natural and ordinary meaning. The Appellants submit that the judgment of the Supreme Court of Canada was wrong and should be reversed for the following amongst other 20

REASONS.

1. BECAUSE by an overriding provision of the second codicil to her will Mrs. Ganong directed that the shares held by her in the company should be held by her executors for the benefit of her estate until the happening of an event.
2. BECAUSE the event on which alone the legatees of the company's shares were to be entitled to the shares was (in the events which have happened) the payment to Mrs. Ganong's executor of arrears of dividend on her preference shares amounting to \$68,460. 30
3. BECAUSE the bequests of shares to the legatees are void under the rule against perpetuities.
4. BECAUSE the language used by Mrs. Ganong is clear and unambiguous and not in whole or in part meaningless or inapt.
5. BECAUSE the Supreme Court of Canada misconstrued clause 20 of the second codicil. 40

FRANK GAHAN.

In the Privy Council.

ON APPEAL
From The Supreme Court of Canada.

IN THE MATTER of the Estate of MARIA
FAMICHA GANONG, deceased.

BETWEEN
JEANNETTE ROBINSON BELYEA and
EDGAR M. ROBINSON, Residuary Legatees
(Defendants) - - - - *Appellants*

AND

SAMUEL A. McBRIDE, sole Executor and
Trustee of the Last Will and Testament of
MARIA FAMICHA GANONG, deceased (Plaintiff)
Respondent

and

ARTHUR D. GANONG, KATHERINE L.
WHIDDEN, SUSAN B. GANONG, WILLIAM
F. GANONG, JAMES E. GANONG, GRACE
A. CALDWELL, EDNA DILLENBECK
PELLISSIER, MAY ISABEL WEYMER,
EDWIN M. GANONG, WILLIAM J. GANONG,
and R. WHIDDEN GANONG (Defendants)
Respondents.

Case for the Appellants.

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