

-8 JUL 1953

INSTITUTE OF ADVANCED
LEGAL STUDIES**In the Privy Council.**

21,1942

30616

No. 35 of 1941.

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

RESPONDENTS OTHER THAN SAMUEL A. McBRIDE.

1. This is an appeal from a judgment of the Supreme Court of Canada (Crocker, Davis, Kerwin, Hudson and Taschereau, JJ.) allowing an appeal by the present Respondents from a judgment of the Appeal Division of the Supreme Court of New Brunswick (Harrison and Fairweather, JJ., Grimmer, J., dissenting) which in turn allowed an appeal by the present Appellants from a judgment of Baxter, C.J., in the Chancery Division of the Supreme Court of New Brunswick.

RECORD.

p. 31.

p. 13.

p. 6.

RECORD.

p. 3.

2. The proceedings were commenced by an originating summons taken out by the Respondent Samuel A. McBride as the sole executor and trustee of the last will of Maria Famicha Ganong and addressed to the present Appellants as the residuary legatees under the Will and to the present Respondents (other than Samuel A. McBride) and others as specific legatees under the Will and a second Codicil thereto and are concerned with the construction of such will and codicil.

3. At the hearing no oral evidence was adduced but certain facts and documents were admitted or agreed.

4. The Testatrix Mrs. Ganong died on the 30th November, 1934, 10 leaving a large estate. Her estate included 4890 Preferred Shares and 4036 Common Shares of the Capital Stock of Ganong Bros. Limited (hereinafter referred to as "the Company"); of these, 3790 Preferred Shares and 3600 Common Shares had been bequeathed to her by her husband, who died before March, 1918.

p. 56.

5. On the 15th March, 1918 Mrs. Ganong assigned the shares so bequeathed to her by her husband to the Eastern Trust Company as trustee by a trust Indenture made between herself, the trustee and four nephews of her deceased husband. The Indenture provided for the payment of the dividends on the shares to her and that on her death, 20 provided that there should not have occurred any default, the trustees should transfer to the four nephews, parties to the Indenture, the Common Shares for division among them; and to a sister and fourteen specified nephews and nieces of her deceased husband the Preferred Shares for division as set out in a Schedule. The default above referred to was in effect a failure of the Company to pay its Preference dividend for a full year followed by a claim of default on the part of Mrs. Ganong in which event the trust agreement and the trusts thereby created in favour of the relations of Mrs. Ganong were to come to an end.

p. 70.

6. On the 25th September, 1924 Mrs. Ganong made her Will. 30 By it she expressly confirmed the above-mentioned trust Indenture and declared it to be binding on her and her estate. With regard to the remainder of her shares in the Company she made no specific mention of the Common Shares and consequently they fell into the residue of the estate and she bequeathed the bulk of the Preferred Shares to or on trust for the children of her brother Edgar M. Robinson but she gave blocks of such shares to charitable institutions and others. By Clause 14 of her Will the Testatrix devised and bequeathed her residuary real and personal estate to her sister Jeannette R. Belyea and her brother the said Edgar M. Robinson equally between them. 40

p. 90.

7. The Company failed to pay its Preference dividends in the years 1933 and 1934 and on the 29th September, 1934 Mrs. Ganong made a claim of default under the above-mentioned trust agreement as a result of which the Eastern Trust Company returned the trust shares to the

executor of her estate, Mrs. Ganong herself having died before the return of the shares was actually made.

8. In anticipation of the return to her of the shares in the Company the subject of the trust agreement Mrs. Ganong made the Second Codicil to her Will dated the 13th October, 1934 above referred to. By it she revoked the paragraph of her Will by which she had confirmed the trust agreement; and she bequeathed the said 3790 Preferred Shares among the fourteen nephews and nieces (or in the case of one who had died, his son) named in the Schedule to the trust agreement and the Maria F. Ganong Old Folks Home. With regard to the said 3600 Common Shares she bequeathed six blocks thereof to nephews and grandnephews of her late husband, twenty-one blocks thereof to named officers, representatives and employees of the Company and one block of 50 such shares to be allotted by her executors to such employee or employees of the Company as they might decide. The Testatrix then declared that she realised that at the present time the said Common Shares had no monetary value yet it was her hope that eventually such Common Shares might become of sufficient worth and value to serve as a reward to the recipients for faithful service in the past and as an incentive to greater effort on the part of the recipients for the future. By her said Codicil Mrs. Ganong made no important alteration to the bequests of the Preferred Shares which she had made in her Will.

pp. 100 to 103.

p. 103.

9. Clauses 17 and 20 of Mrs. Ganong's Will are as follows:—

“ 17. I do hereby will and declare that my Executors shall pay out of my personal estate all Succession Duties which at my death may become payable upon the bequests hereby made, it being clearly understood that my estate shall not be liable and nothing herein shall make my estate liable for any Succession Duties or other dues, duties, taxes or other charges or expenses of any kind payable or which may be or become payable upon or in respect of any moneys, stocks, shares of stock, gifts or other benefits which have passed or which may hereafter pass under the provisions of the said Trust Agreement dated the 15th day of March A.D. 1918 mentioned in said Paragraph fifteen (15) of this my Will.”

p. 91.

“ 20. I hereby further will and declare that it is my intention and purpose that any and all of the shares of Ganong Bros. Limited, so hereby bequeathed as aforesaid, shall be and remain the property of my estate and be held by my Executors and Trustees as part of my estate until after the first annual meeting of Ganong Bros. Limited, shall have been held subsequent to my decease and until all dividends accruing on said shares of stock from the business of the year in which my decease may occur shall have been paid to my estate for the benefit of my estate intending by this

RECORD.

Section of my Will to show that both semi-annual dividends on the Preferred Shares that will be paid during the fiscal year subsequent to my decease but which will have been earned during the fiscal year my decease may occur must be paid to my estate before making any transfers of the stock, shares devised and bequeathed as aforesaid."

10. Clause 20 of the Second Codicil is as follows:—

p. 106.

" 20. I hereby revoke and make void Paragraph 17 of my said last Will and Testament dated the twenty-fifth of September, 1924 and in lieu thereof and in substitution therefor I Will and Declare 10 that my Executors and Trustees shall pay out of my personal estate any and all Succession Duties which may at my death become payable upon any of the bequests made in my said last Will and Testament or in any Codicil thereto including this Codicil, it being my intention that all gifts and bequests, including gifts of shares in the Capital Stock of Ganong Bros. Limited, either Preferred or Common, to any nephew or niece of my late husband shall be free from Succession Duty.

" But while I make the foregoing provision with respect to Succession Duty it is my express will and intention and I hereby 20 direct that notwithstanding anything hereinbefore contained any and all of the shares of the Capital Stock of Ganong Bros. Limited, in and by my said last Will and Testament and in and by this Second Codicil to my said last Will and Testament bequeathed by me, shall be and remain the property of my estate and be held by my Executors and Trustees as part of my estate until all dividends on the Preferred Shares accrued to the date of my death have been paid in full and also until the two half-yearly dividends which shall accrue immediately subsequent to the date of my death shall have been paid in full to my estate for the 30 benefit thereof, it being my intention by this paragraph of this Second Codicil to my Will that all dividends on said Preferred Shares accrued due to the date of my death, whether earned or declared or not, together with a full year's dividends accruing due after my death, whether earned or declared or not, shall be paid to my Executors and Trustees for the benefit of my estate before making any transfers of the stock or shares of Ganong Bros. Limited, Common or Preferred, devised and bequeathed under my said last Will and Testament and under this Second Codicil thereto." 40.

p. 108.

11. Since the year 1933 the Company has not made any profit or had any fund out of which a dividend could have been paid and by the end of the year 1938 its accumulated deficit amounted to \$101,364.04. The relevant By-laws of the Company and a specimen Preference Share certificate are set out on pages 43 and 55 respectively of the Exhibits to the Record.

By-law No. 48 provides that the Directors may declare dividends out of the net profits of the Company whenever and so often as in their opinion the state of the Company will permit. By-law No. 54 provides for the creation and issue of Preferred Shares having fixed cumulative Preference dividends of 7 per cent. per annum and having priority in any division of the assets of the Company to the extent of their repayment in full at par together with any dividends thereon then accrued due and remaining unpaid. It further provides that the fixed dividend shall be payable only out of the net profits of the Company but if not earned
 10 fully and paid in each year, the amount of such dividend or any portion thereof remaining unpaid from time to time shall be paid out of the first net profits of the Company accumulated or earned thereafter.

12. By his originating summons the Respondent Samuel A. McBride asked the Court to determine the two following questions:—

“ 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.

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

At the hearing in the Chancery Division of the Supreme Court of New Brunswick a third question was added namely:—

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

13. At the hearing before Chief Justice Baxter the first Appellants
 contended that there was no vesting of the shares in the persons to whom
 they were bequeathed until after the payment of the full Preference
 dividend on the Preferred Shares up to the date of the death of
 Mrs. Ganong and for the year following and that as the dividend had
 30 not been paid and might never be paid the rule against perpetuities
 applied and the shares passed into residue. In the alternative they
 contended that the shares bequeathed were subject to a charge equal
 to the amount of dividend thereon for two years. The Chief Justice
 rejected these contentions and answered the questions set out above
 as follows:—

1. The persons and institutions named therein.
2. Immediately.
3. No question of apportionment arises.

14. In the Appeal Division of the Supreme Court of New Brunswick
 40 Mr. Justice Grimmer accepted and adopted the judgment of Chief
 Justice Baxter. Mr. Justice Harrison and Mr. Justice Fairweather
 rejected the contention of the present Appellants that the shares did p. 14.

RECORD.

not vest in the beneficiaries until the arrears of dividend should be paid but were of opinion that the provision in the Codicil had the effect of charging the Common and Preferred Shares bequeathed by the Will and Codicil with the amount of two years' dividends on the Preferred Shares amounting to \$68,460. They answered the questions set out above as follows:—

p. 28.

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 10 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.

pp. 32, 36,
ll. 28 to 36.

15. In the Supreme Court of Canada it was conceded by the present Appellants that the shares vested in the beneficiaries to whom they were bequeathed on the death of the Testatrix but contended that the construction of the Codicil adopted by the majority of the Appeal Division of the Supreme Court of New Brunswick was right. Mr. Justice Crocker, whose judgment was concurred in by the other members of the 20 Court, held that the intention of the Will and Codicil was that the executors should not withhold the transfer of the shares to the legatees for more than a year after the death of the Testatrix in the event of the failure of the Company up to that time to earn the necessary profits to enable it to declare dividends to cover the arrears for the years 1934 and 1935 or alternatively that if no limitation of the prescribed condition for the transfer of the shares to the legatees could reasonably be inferred from Clause 20 of the Codicil the reservation itself must be held to be void for uncertainty. The uncertainty did not, in his opinion, go to the validity of the bequests as had been argued by the 30 present Appellants before Chief Justice Baxter but to the validity of the reservation. Accordingly the judgment of Chief Justice Baxter was restored.

16. These Respondents humbly submit that this Appeal should be dismissed for the following (amongst other)

REASONS.

1. Because on the true construction of the Testatrix's Will and Second Codicil neither the Preferred nor the Common Shares of the Company thereby bequeathed were charged with payment of any sum in favour of the Testatrix's general 40 estate or of the persons entitled thereto.

2. Because on such construction as aforesaid the Testatrix reserved to her general estate only such part of the profit of the Company as might have been earned by the Company prior to her death, or might be earned during the year immediately following her death, and as was available and properly applicable to the payment of dividends on her Preferred Shares.
3. Because, subject to such reservation, the bequests contained in the said Will and Codicil of the Testatrix's Preferred and Common Shares of the Company were absolute and unqualified and vested upon the Testatrix's death in the persons to whom such shares were respectively bequeathed; and because in the events which have happened such persons have become entitled to have transferred to them, free of any charge or condition, the shares so bequeathed to them respectively.
4. Because the judgments of Chief Justice Baxter, Mr. Justice Grimmer and the Supreme Court of Canada are right for the reasons therein given.

CHARLES ROMER.

VALENTINE HOLMES.

In the Priny Council.

No. 35 of 1941.

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 RESPONDENTS other than
SAMUEL A. McBRIDE.

CHARLES RUSSELL & CO.,
22, Rutland Gate,
S.W.7,
Solicitors for the said Respondents.