1940

* Oct. 21
* Dec. 20.

IN THE MATTER OF THE ESTATE OF MARIA FAMICHA GANONG, DECEASED.

ARTHUR D. GANONG AND OTHERS....APPELLANTS;

AND

JEANNETTE R. BELYEA AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Will—Construction—Bequests of shares in company—Direction that shares remain property of testatrix's estate until certain dividends received for benefit of estate—No dividends earned or declared by company within dividend periods mentioned in the will—Vesting of shares in legatees—Time for delivery of shares to legatees.

A testatrix, in her will and a codicil thereto, made bequests of preferred and common shares of stock in a company, and by the codicil provided that all succession duties payable upon any of her bequests be

* PRESENT:—Crocket, Davis, Kerwin, Hudson and Taschereau JJ.

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paid out of her personal estate and then directed that any and all of the shares in said company bequeathed by her "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 benefit thereof, it being my intention * * * 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 said company, common or preferred, bequeathed by her.

The codicil was made in October, 1934. The testatrix died on November 30, 1934. No dividends were earned or declared by the company in 1934 or 1935. The dividends on the preferred shares were at a fixed rate and cumulative, but payable only out of profits, and there were no profits sufficient to justify any dividend in those years.

Baxter C.J. held (14 M.P.R. 306) that the shares vested in the legatees at the death of the testatrix; that the dividends, until the payment of which the shares were to remain in the estate, had never accrued, and the time fixed by the will for the shares to remain in the estate had elapsed, and the legatees were entitled to receive them. The Appeal Division of the Supreme Court of New Brunswick held (15 M.P.R. 130) that the legatees had a vested interest in the shares subject to a charge thereon in favour of the executors and trustees to the amount of two years' dividends on the preferred shares bequeathed, and that the legatees were entitled to delivery of the shares when the amount of the charge had been paid to the estate or the charge released. The specific legatees of shares appealed to this Court. In this appeal it was not disputed that the shares vested in the legatees on the death of the testatrix; but the respondents (residuary legatees) contended that the judgment of the Appeal Division was right.

Held: The judgment of Baxter C.J. should be restored. No dividends could be said to have "accrued due" or to be "accruing due" within the intendment of the reservation in the codicil. The shareholders acquired no right to payment of any dividends until there were profits and until the directors determined they should be paid (*Bond* v. *Barrow Haematite Steel Co.*, [1902] 1 Ch. 353, at 362; *In re Wakley*, [1920] 2 Ch. 205, at 217). The reservation in the codicil was directed wholly to the payment of dividends on the bequeathed preferred shares during the anticipated period of the administration of the estate and could only apply to the payment of dividends as such to the executors and trustees of the estate, as the registered holders of the shares, by the company itself as a going concern, and clearly excluded any payment in lieu thereof by the beneficiaries, in whom the shares themselves were vested. The executors and trustees, as the registered holders of the shares, had never acquired the right to demand payment from the company of any dividends to cover either the year 1934 or the year 1935. It could not be said that the testatrix intended that the transfer of the

shares to the legatees should be withheld indefinitely until the actual payment of the deferred dividends, which might possibly never happen. If such were the interpretation, the reservation (whether or not the words "whether earned or declared or not" be eliminated as repugnant) would have to be held void for uncertainty. The uncertainty would go, not to the validity of the bequests, but to the validity of the reservation (*Egerton* v. *Earl Brownlow*, 4 H.L.C. 1, at 181; *Hancock* v. *Watson*, [1902] A.C. 14, at 22; *Fyfe* v. *Irwin*, [1939] 2 All E.R. 271). The intention of the testatrix must be taken to be that the executors should not withhold transfer to the legatees beyond a year after her death and to withhold from them their right to receive the unearned and undeclared dividends only in the event of their being paid by the company to the executors, as the registered holders of the shares for the purpose of administering the estate, within a period of one year following the death of the testatrix.

APPEAL by certain legatees under the will, or codicil thereto, of Maria Famicha Ganong, deceased, from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), which allowed (*per* Harrison and Fairweather JJ.; Grimmer J. dissenting) an appeal by the residuary legatees (the present respondents) from the judgment of Baxter C.J. (2).

The material facts of the case are sufficiently stated in the reasons for judgment in this Court now reported and also in the reasons for judgment in the Courts below. Proceedings were begun by originating summons dated December 1st, 1939, for the determination of the 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?

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

Baxter C.J. held that the shares vested in the legatees at the death of the testatrix but that the executor could not transfer them upon the books of the company until certain dividends were paid; that no such dividends ever accrued; that the time fixed by the will had elapsed and that the legatees were entitled to receive their legacies. The Appeal Division of the Supreme Court of New Bruns-

(1) 15 M.P.R. 130; [1940] 4 D.L.R. 4.

(2) 14 M.P.R. 306; and (in abridged form) [1940] 1 D.L.R. 790.

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wick held that the legatees had a vested interest in the shares subject to a charge thereon in favour of the executors and trustees to the amount of two years' dividends on the preferred shares bequeathed and that the legatees were entitled to delivery of the shares when the amount of the charge had been paid to the estate or the charge released. (Grimmer J. dissented, agreeing with the judgment of Baxter C.J.). From that judgment the present appellants, who were legatees of shares in the said company under specific bequests thereof in the will or codicil appealed to this Court.

J. H. Drummie for the appellants.

O. M. Biggar K.C., C. F. Inches K.C. and *W. J. West* for the respondents, residuary legatees.

R. B. Hanson K.C. for the executor and trustee (respondent).

The judgment of the Court was delivered by

CROCKET J.—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick, varying the judgment of Baxter, C.J., on an originating summons taken out by the sole executor of the estate of Maria Famicha Ganong, late of the town of St. Stephen, N.B., widow, deceased, for the interpretation of certain provisions of a codicil to her will concerning the disposition of some 4,800 and odd preferred shares and 4,000 and odd common shares of the capital stock of Ganong Bros. Ltd.

Thirty-seven hundred and ninety (3,790) of these preferred shares and 3,600 of the common shares had been bequeathed to her by her late husband, Gilbert W. Ganong, who died as Lieutenant-Governor of New Brunswick in the year 1916. All these shares she assigned to the Eastern Trust Company on March 15th, 1918, by a trust indenture made between herself as party of the first part, the said Trust Company as party of the second part, and William F. Ganong, James E. Ganong, Walter K. Ganong and Arthur D. Ganong, four nephews of her late husband, as parties of the third part. The indenture provided that all dividends payable thereon should be paid direct by the company to her "under a sufficient

order or orders therefor to be deposited by the trustee with the company," and that upon her death, provided there should not theretofore have occurred any default thereunder, the trustee should assign and transfer to the said four nephews all the said common shares to be divided amongst them as they should think proper, and the preference shares to a sister and fourteen nephews and nieces, including the said four nephews of her late husband, in the numbers respectively specified in a schedule annexed to the trust indenture, or to their legal representatives in the event of the death of any of them.

This indenture Mrs. Ganong expressly confirmed by par. 15 of her will, executed on September 25th, 1924, and declared to be binding on herself and her estate. At this time she was possessed of several hundred additional preferred and common shares of the capital stock of Ganong Bros. Ltd., of which she bequeathed 600 preferred shares to her brother, Edgar M. Robinson, in trust for his three children and 200 more to the children themselves. One hundred more preferred shares were to go to an Old Folks Home fund, 20 to the Chipman Memorial Hospital, while a further number of 120 were to be distributed as bequests to four named beneficiaries. No specific mention is made in the will of her common shares, and they would consequently fall into the residue of the estate, which was devised and bequeathed to her brother and sister in equal shares.

The trust deed provided for its revocation in the event of default in payment of the dividends, and, the company having failed in the years 1933 and 1934 to earn and declare the customary dividend upon the preferred shares, Mrs. Ganong, on September 29th, 1934, gave the necessary notice of default and of her intention to revoke the trust. Two weeks later, in anticipation of the reversion to her or her estate of these trust shares, she executed the codicil, which created the difficulty it became necessary to submit to the Supreme Court of New Brunswick for solution. Shortly after doing so Mrs. Ganong went to Florida, where it had been her custom for some years to spend the winter months, and there contracted pneumonia, from which she died on November 30th, 1934, and the Trust Company some time later returned the trust shares to the executors of her estate.

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The principal change the codicil made concerning the disposition of the 3,790 preferred and 3,600 common shares, which were still in the hands of the Eastern Trust Company at that time, was the revocation of par. 15 of the will, by which the testatrix had confirmed the trust assignment of March 15th, 1918, and their distribution among the beneficiaries named in pars. 14, 15 and 16 of the codicil. Of the 3,790 preferred shares, which were allotted by the schedule of the trust deed to the testatrix's deceased husband's sister, seven nephews and seven nieces, 3,290 were apportioned by par. 14 among the same nephews and nieces, except that one of the nephews, Frank Ganong, was replaced by his son, Edwin M. Ganong. The sister, Mrs. Perkins, to whom 583 shares had been allotted by the schedule of 1918, was not named. Par. 15 of the codicil, however, provided for the handing over of the remaining 500 of the 3,790 preferred shares to the Trustees of the Maria F. Ganong Old Folks' Home, as an additional endowment, when that institution should be incorporated by a proposed provincial statute, as "The Gilbert White Ganong Memorial." Thus did pars. 14 and 15 of the codicil provide for the disposition of the full 3,790 preferred shares, then in the hands of the Trust Company. Two thousand of them were divided between the nephew Arthur D. Ganong and three of the surviving nieces, Mrs. Hyslop, Mrs. Christmas and Mrs. Caldwell, the last named being a daughter of Mrs. Perkins, and the remaining 1,290 among the other surviving nephews and nieces in varying lots of from 200 to 90 shares.

Par. 16 of the codicil provided for the disposition of the common shares, then in the hands of the Trust Company. Of these the testatrix bequeathed 2,694 shares to the four nephews, who joined her in the execution of the trust deed of 1918, and 250 to Arthur D. Ganong's son. The remainder of the 3,600 shares were bequeathed to old employees and representatives of the company throughout Canada.

As regards the 1,040 additional preferred shares, which the testatrix held independently of the trust, the codicil made no material alteration in the provisions of her will of September 25th, 1924, for their disposition, except that she expressly revoked one of the bequests for 50 of these shares and directed her executors to purchase in lieu there-

of a government annuity sufficient to yield an annual income to the legatee named of $400 for the term of her natural life.

The rights and interests of every beneficiary, to whom any lot of either the preferred or the common stock of the company was bequeathed, whether by the original will or by the codicil, are, however, materially affected by the provisions of par. 20 of the codicil. This paragraph revokes par. 17 of the will of September 25th, 1924, and provides in lieu thereof that her 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.

Par. 17 of the original will, while providing that her executors should pay out of her personal estate all succession duties payable upon the bequests made thereby, distinctly provided that her estate should not be liable

> for any succession duties or other dues, duties, taxes or other charges or expenses of any kind payable * * * upon or in respect of any moneys, stocks, shares of stocks, gifts or other benefits which have passed or which may hereafter pass under the provisions of the said trust agreement

of March 15th, 1918. Having thus declared that all bequests of shares in the capital stock of Ganong Bros. Ltd., either preferred or common, to any nephew or niece of her late husband should be free from succession duty, as well as all other bequests, whether made by the original will or by the codicil, par. 20 of the codicil goes on to say:

> But while I make the aforegoing provision with respect to succession duty it is my express will and intention and I hereby 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 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

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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.

These last provisions of par. 20 of the codicil were clearly intended as a substitution for par. 20 of the original will, which applied to "any and all of the shares of Ganong Bros. Limited," bequeathed by the will, and not to any of the shares which the testatrix had assigned to the Trust Company six years before she made the will. The codicil, however, did not expressly revoke par. 20 of the will, the provisions of which must be examined closely for the purpose of determining whether any and what portions thereof are inconsistent with and consequently replaced by the provisions of clause 20 of the codicil, the testatrix having declared by the concluding paragraph of the codicil that she ratified and confirmed her said last will and testament "save in so far as any part thereof shall be revoked or altered by this codicil thereto or any previous codicil." Par. 20 of the will read as follows:

> 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 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.

When one compares the language of these provisions of the codicil with that of par. 20 of the will, it is not surprising that the sole remaining executor and trustee, who was responsible for the administration of this estate and who more than five years after the death of the testatrix still held in his possession all the bequeathed preferred and common shares of Ganong Bros. Ltd., should have sought the intervention of the Supreme Court to straighten out the apparent confusion, and proposed the following questions on his application for an originating summons:

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

During the argument another question was added as follows:

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

On the hearing, which took place before the learned Chief Justice on documentary evidence only, it was contended in behalf of the residuary legatees that there was no vesting of the shares in the persons to whom they were given until after the payment of two years' dividends, and that, no dividends having yet been paid and as no one could tell that any ever would be paid, the rule against perpetuities applied and the shares consequently passed into residue. The Chief Justice, however, held that this contention could not prevail and that the persons and institutions named in the will and codicil were entitled to delivery of the shares immediately. He also held that no question of apportionment arose.

On an appeal from this judgment to the Appeal Division of the Supreme Court, which was heard by Grimmer, Harrison and Fairweather, JJ., all three of the learned justices agreed that the shares vested in the beneficiaries on the death of the testatrix; but Harrison and Fairweather, JJ., Grimmer J. dissenting, held that the Chief Justice was in error in holding that the beneficiaries, to whom the shares had been bequeathed, were entitled to their delivery immediately. They took the view that par. 20 of the codicil created a charge upon these shares in favour of the executor and trustee to the amount of a sum of money representing two years' dividends at 7% on the bequeathed preferred shares, which they calculated at $68,460, and that the beneficiaries were not entitled to their delivery until that amount of money had been paid to the estate or the charge released.

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No contention is now made on this appeal that the shares did not vest in the beneficiaries, to whom they were bequeathed, but the respondent residuary legatees contend that in the light of other provisions of the will and of the circumstances, as they existed at the time of the execution of the codicil, no other construction can consistently be placed upon the relevant language of the codicil than that adopted by Harrison, J., in the majority judgment of the Appeal Division. Having conceded that all the shares vested in the several beneficiaries on the death of the testatrix, it is obvious that this is the only position they could possibly take.

There is no ambiguity whatever regarding the bequests of the preferred shares as made in pars. 14 and 15 of the codicil or of the common shares as made in par. 16. Each one of them is distinct and definite as to the number of shares bequeathed and the persons and institutions to whom the shares are given. The whole difficulty has been created by the language of par. 20 of the codicil, which, while indicating clearly enough an intention to 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 the testatrix's death and two prospective half-yearly dividends during the following year, enshrouds the intended reservation in such apparent ambiguity and uncertainty as to endanger its entire validity. The difficulty arises primarily from the insertion of the phrase "whether earned or declared or not" in reference first to the payment of "all dividends on said preferred shares accrued due" to the date of the testatrix's death, and its repetition in reference to "a full year's dividends accruing due" after her death.

The words "all dividends accrued due" can surely only mean dividends which have become payable by the corporation to the shareholder, as the words "dividends accruing due" during any stated period can only mean dividends as they become payable by the corporation to the shareholder. The share certificates by a condition endorsed thereon state that the holders shall be entitled out of the net profits whenever ascertained to a fixed cumulative preference dividend at the rate of 7% per annum in priority to any payment of dividend upon the common stock,

such dividend to be paid at such times as the directors may determine but to be payable only out of the profits, and the holders shall not be entitled to participate in further dividends or profits.

This condition is in accordance with the provisions of the by-law of June 28th, 1916, under which these shares were issued. This by-law provides that the preference shares shall have a fixed cumulative preference dividend of 7% per annum, payable as may be convenient half yearly, and that such dividend

shall be payable only out of the net profits of the company, but they shall be cumulative dividends, that is to say, if not earned 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.

The by-law also provides that the said dividend shall begin to run from July 1st, 1916.

A preferential dividend at a fixed rate may be said, of course, to be always running between fixed dividend periods and perhaps in that sense to be accruing from day to day, but how can these dividends in the face of the express terms of the share certificates and of the by-law, in pursuance of which they were issued, 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 date therefor? The shareholders acquire no right to payment of any dividends until there are net profits, out of which alone they can be paid, and until such time as the directors determine they shall be paid. See judgment of Farwell, J., in *Bond* v. *Barrow Haematite Steel Co.* (1); also judgment of Lord Sterndale, M.R., in *In re Wakley* (2).

That the clause is directed wholly to the payment of dividends on the bequeathed preferred shares during the anticipated period of the administration of the estate cannot be doubted, now that it is conceded that it was the testatrix's intention that the shares themselves should vest in the various legatees at her death. This can only apply to the payment of dividends as such to the executors and trustees of the estate, as the registered holders of the bequeathed preferred shares, by the corporation itself as a going concern, and clearly excludes, to my mind, the pay-

(1) [1902] 1 Ch. 353, at 362. (2) [1920] 2 Ch. 205, at 217.

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ment of any sum or sums of money in lieu thereof by or in behalf of the beneficiaries, in whom the shares themselves were vested. The qualifying phrase is 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 residuary legatees.

If the clause be read without the qualifying phrase, and the words

> all dividends on said preferred shares accrued due to the date of my death * * * together with a full year's dividends accruing due after my death * * * shall be paid to my executors and trustees for the benefit of my estate before making any transfers * * *

be given their ordinary meaning, they clearly contemplate only the payment of dividends which the directors of the corporation might legally declare to be payable thereon on definitely appointed dates. The corporation admittedly never having since earned sufficient profits to justify the declaration of any dividend to cover 7% of the par value of the preferred shares remaining unpaid at the time of the testatrix's death in November, 1934, or any part thereof or any proportion of the two half-yearly dividends, which ordinarily would have matured during the following year, the executors and trustees of her estate, as the registered holders of all the bequeathed shares, have never acquired the right to demand payment from the corporation of any dividends thereon to cover either the year 1934 or the year 1935. They have consequently never "accrued due" within the intendment of the reservation.

But how upon this basis does the non-payment of the dividends affect the condition prescribed by the concluding lines of the paragraph as a prerequisite to the executors' right to transfer the shares? Did the testatrix intend that the executors should not withhold their transfer to the legatees for more than a year after her death in the event of the company's failure up to that time to earn the necessary profits to enable them to declare dividends to cover the arrears for the two years 1934 and 1935, or did she intend that the condition should continue, unlimited as to time, with the inevitable result of indefinitely tying up the administration of her estate until the actual payment of the deferred dividends, which might possibly never happen? The latter hypothesis may at once be

dismissed, I think, as wholly inadmissible. The former, though not entirely consistent with the testatrix's undisputed intention to vest the shares in the various legatees at her death, may surely be more reasonably harmonized with it as a modification of the absolute bequests to the extent of withholding from the legatees their right to receive the deferred dividends for the two years in question in the event, and only in the event, of their being paid by the corporation to the executors and trustees as the registered holders of the shares for the purpose of administering the estate, within a period of one year following the death of the testatrix.

If no limitation of the prescribed condition for the transfer of the shares to the legatees can reasonably be inferred from the clause as framed, the reservation itself, in my opinion, must be held to be void for uncertainty, whether the alleged qualifying phrase be eliminated or not. As already pointed out, the residuary legatees contended before the learned Chief Justice below that the bequests of the shares were themselves void for uncertainty for the reason that no one could tell when the dividends would be paid or indeed whether they ever would be paid at all. This uncertainty, however, goes, not to the validity of the bequests, but to the validity of the reservation. As Lord Truro expressed it in *Egerton* v. *Earl Brownlow* (1),

> Where a gift is good in itself, but is followed by an unlawful or repugnant condition or qualification in a distinct clause, the gift is upheld and the condition or qualification, which alone is obnoxious, is rejected.

In *Hancock* v. *Watson* (2), Lord Davey said:

> It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be.

This statement was expressly reaffirmed by the House of Lords in *Fyfe* v. *Irwin* (3).

The learned majority judges in the Appeal Division apparently agreed with the Chief Justice and Grimmer, J., that the clause should be read as indicating that the condition was intended to lapse upon the expiration of one year after the death of the testatrix, but in their natural

(1) (1853) 4 H.L.C. 1, at 181. (2) [1902] A.C. 14, at 22.
(3) [1939] 2 All Eng. Rep. 271.

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anxiety to give some effect to the phrase, "whether earned or declared or not," sought very properly to solve the perplexing problem by deducing from it and the language of the entire par. 20 of the codicil and other provisions of the will an intention to impose a charge in favour of the estate, either upon the bequeathed preferred shares themselves, or upon the donees, to the amount of the unpaid dividends for the years 1934 and 1935. They relied especially upon the change made by the opening clause of the paragraph, providing for the payment out of the testatrix's personal estate of all succession duties in respect of the gifts of all shares in the capital stock of the corporation as evidencing an intention to accumulate a fund, equal to two years' dividends on all the bequeathed preferred shares, for the special purpose of compensating the estate for relieving them of the payment of succession duties.

While the opening lines of the long clause immediately following the succession duties provision would seem to impart no little colour to this view, I find myself, after anxious consideration of the entire will and codicil, quite unable to adopt it. In the first place, par. 20 of the codicil contains nothing in the nature of a direction to the executors and trustees to collect the two years' unpaid dividends from the beneficiaries, in whom the shares were vested, or to fund them, if and when collected, for any such purpose. The creation of such a charge seems to me to be wholly inconsistent with her wish to relieve all gifts and bequests made in both the will and the codicil from any and all succession duties at the expense of her personal estate, including gifts of shares in the capital stock of Ganong Bros. Limited, either preferred or common, as so explicitly stated in the opening clause of the paragraph. Having thus clearly indicated her desire to relieve the bequeathed shares from any and all liability for the payment of succession duties and thus place them on a footing of equality with all other gifts provided for in the will and codicil, I cannot believe that she intended by the succeeding clause, not only to immediately cancel this additional bounty to the specific legatees of the preferred shares, including her late husband's nearest relatives, and her own brother and his wife and children and such institutions as the Old Folks Home and the Chipman

Memorial Hospital, but to charge them $14 a share in the event of the corporation's inability to earn sufficient profits to pay anything on account of the deferred dividends, and this for no other apparent purpose than that of increasing the value of the residuary estate.

The appeal should be allowed and the judgment of the learned Chief Justice on the originating summons restored. We were informed that practically all the estate had been distributed apart from the shares of the company. We think in the circumstances the costs of the appellants on this appeal and of the executor should be paid by the executor and charged by him against the residue of the estate and not against the specific legatees, those of the executor as between solicitor and client; the disposition of costs of the appeal to the Appeal Division to stand as unanimously directed by that court.

Appeal allowed with costs.

Solicitor for the appellants: *J. H. Drummie.*

Solicitor for the residuary legatees, respondents: *W. J. West.*

Solicitor for the Executor and Trustee, respondent: *R. B. Hanson.*