Gibbons Vs. Mahon

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Appellant : Gibbons

Respondent : Mahon

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Gibbons v. Mahon - 136 U.S. 549 (1890)
U.S. Supreme Court Gibbons v. Mahon, 136 U.S. 549 (1890)

Gibbons v. Mahon

No. 16

Argued December 19-20, 1888

Decided May 19, 1890

136 U.S. 549

APPEAL FROM THE SUPREME COURT

OF THE DISTRICT OF COLUMBIA

SYLLABUS

Under a will bequeathing stock in a corporation and government bonds in trust to pay "the dividends of said stock and the interest of said bonds as they accrue" to a daughter of the testator "during her lifetime, without percentage of commission or diminution of principal," and directing that upon her death, "the said stocks, bonds and income shall revert to the estate" of the trustee, "without encumbrance or impeachment of waste," a stock dividend declared by a corporation which from time to time, before and after the death of the testator, has invested accumulated earnings in its permanent works and plant, and which, since his death, has been authorized by statute to increase its capital stock, is an accretion to capital, and the income thereof only is payable to the tenant for life.

This was a bill in equity by Mary Ann Gibbons against Jane Owen Mahon to compel the transfer to the plaintiff of shares in the Washington Gaslight Company held by the defendant as trustee under the will of Ann W. Smith. The case was heard upon bill and answer by which, and by thee acts of Congress concerning that company, the facts appeared to be as follows.

Mrs. Smith, a widow and the mother of both parties to this suit, died March 26, 1865, owning two hundred and eighty shares in that company, and leaving a last will, dated February 11, 1865, and admitted to probate April 8, 1865, containing the following bequest:

"I hereby give, devise and bequeath to my daughter, Jane Owen Mahon, wife of David W. Mahon, of the City of Washington aforesaid, and to her heirs and assigns, two hundred and eighty shares of stock of the Washington Gaslight Company, also forty-five shares of stock of the Franklin Insurance Company, both in the City of Washington aforesaid; also eight thousand five hundred dollars in government bonds of the government of the United States of America; said stock and bonds or any portion of them remaining at my death a

part of my said estate, to have and to hold the same in and upon the trusts and provisions following, that is to say, in trust for the advantage and behoof of my said daughter, Mary Ann Gibbons, and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause the dividends of said stock and the interest of said bonds as they accrue to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal, and in case of the death of the said Mary Ann Gibbons, then the said stocks, bonds and income shall revert to the estate of my said daughter, Jane Owen Mahon, without encumbrance or impeachment of waste."

The Washington Gaslight Company was incorporated by the Act of Congress of July 8, 1848, c. 96, with a capital of $50,000, divided into shares of $20 each. 9 Stat. 722. It was authorized to increase its capital stock to $350,000 by the Act of August 2, 1852, c. 79, and to $500,000 by the Act of January 3, 1855, c. 22, 10 Stat. 734, 835. At the death of the testatrix, the capital stock amounted to $500,000, consisting of 25,000 shares of $20 each. By the Act of May 24, 1866, c. 97, the capital stock was increased to $1,000,000. 14 Stat. 53.

The company from time to time declared and paid dividends in money upon its stock, and such dividends were paid by the defendant to the plaintiff.

Before and after the death of Mrs. Smith, and before and after the passage of the act of 1866, and before November 1, 1868, the company from time to time invested portions of its net earnings, income, and profits in the enlargement and extension of its permanent works and plant employed in its legitimate business under its charter, and the actual cost of its works and plant, as shown by its construction account, amounted on January 1, 1865, to $842,623.02; on January 1, 1866, to $892,224.08; on January 1, 1867, to $935,039.55; on January 1, 1868, to $963,803.37; on July 1, 1868, to $988,914.84, and on January 1, 1869, to $1,039,287.17, and amounted in fact at the time of the passage of the act of 1866, to not less than $900,000, and on October 1, 1868, to more than $1,000,000.

On November 1, 1868, the board of directors of the company adopted the following resolution:

"Whereas the construction account of this company exceeds one million of dollars, and as the capital of the company has been increased by an act of Congress to one million of dollars, therefore be it resolved that the increased stock be awarded among the stockholders, share for share, as they stood on the first of October, 1868."

On September 29, 1868, the defendant surrendered to the company the certificate for the two hundred and eighty shares mentioned in Mrs. Smith's will, and those shares were transferred on the books of the company to the name of the defendant, as trustee, and on November 17, 1868, the company made out and delivered to the defendant, as trustee, a certificate for the five hundred and sixty shares.

The defendant paid to the plaintiff from time to time the dividends afterwards declared on the five hundred and sixty shares, but never transferred to her the two hundred and eighty new shares.

The court dismissed the bill, and delivered an opinion reported in 4 Mackey 130, and the plaintiff appealed to this Court.

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MR. JUSTICE GRAY, after stating the case as above, delivered the opinion of the Court.

The question presented by the claims made in the bill and answer and by the arguments of counsel is whether the two hundred and eighty new shares of stock in the Washington Gaslight Company are to be treated as dividends, to the whole or part of the principal of which the plaintiff is entitled under the will, or are to be treated as an increase of the capital of the trust fund, and the plaintiff therefore entitled to receive only the income thereof. The court below held that the new shares must be treated as capital, the income only of which was payable to the

plaintiff. She contends that the new shares are in the nature of a dividend to the whole of which she is entitled, or, if that position should not be maintained, that so much of the new shares as represents earnings made by the corporation since the death of the testatrix should be held to be income payable to her. Upon full consideration of the case, on reason and authority, this Court is of opinion that the decision below is correct.

The distinction between the title of a corporation and the interest of its members or stockholders in the property of the corporation is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock. The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation after payment of its debts. *Van Allen v. Assessors,* 3 Wall. 573, 70 U. S. 584 ; *Delaware Railroad Tax,* 18 Wall. 206, 85 U. S. 230 ; *Tennessee*

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v. Whitworth, 117 U. S. 129 , 117 U. S. 136 ; *New Orleans v. Houston,* 119 U. S. 265 , 119 U. S. 277 .

Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income, or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years, or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant so as to secure and increase the permanent value of its property.

Which of these courses shall be pursued is to be determined by the directors with due regard to the condition of the company's property and affairs as a whole, and unless in case of fraud or bad faith on their part, their discretion in this respect cannot be controlled by the courts, even at the suit of owners of preferred stock, entitled by express agreement with the corporation to dividends at a certain yearly rate, "in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors." *New York, Lake Erie & Western Railroad v. Nickals,* 119 U. S. 296 , 119 U. S. 304 , 119 U. S. 307 . Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein represented by each share is capital, and not income, of that share as between the tenant for life and the remainderman, legal or equitable, thereof. Whether the gains and profits of a corporation should be so invested and apportioned as to increase the value of each share of stock for the benefit of all persons interested in it, either for a term of life or of years, or by way of remainder in fee, or should be distributed and paid out as income to the tenant for life or for years, excluding the remainderman

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from any participation therein, is a question to be determined by the action of the corporation itself at such times and in such manner as the fair and honest administration of its whole property and business may require or permit, and by a rule applicable to all holders of like shares of its stock, and cannot, without producing great embarrassment and inconvenience, be left open to be tried and determined by the courts as often as it may be litigated between persons claiming successive interests under a trust created by the will of a single shareholder, and by a distinct and separate investigation, through a master in chancery or otherwise, of the affairs and accounts of the corporation, as of the dates when the provisions of the will of that shareholder take effect, and with regard to his shares only.

In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must, of course, control, but when he has given no special

direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares.

Therefore when a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital or a division of profits and income depends upon the substance and intent of the action of the corporation as manifested by its vote or resolution, and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share.

A stock dividend really takes nothing from the property of the corporation and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares, and the proportional interest

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of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones.

In *Bailey v. Railroad Co.,* 22 Wall. 604, cited for the plaintiff, the point decided was that certificates, issued by a railroad corporation to its stockholders, as representing earnings which had been used in the construction and equipment of its road, and payable at the option of the company, with dividends like those paid on the stock, were within that provision of the internal revenue laws, which enacted that any railroad company

"that may have declared any dividend in scrip or money due or payable to its stockholders, . . . as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five percentum on the amount of all such . . . dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party of person the same may be payable."

Acts of June 30, 1864, c. 173, 122, 13 Stat. 284; July 13, 1866, c. 184, 9, 14 Stat. 138, 139. The question at issue was not between the owners of successive interests in particular shares, but between the corporation and the government, and depended upon the terms of a statute carefully framed to prevent corporations from evading payment of the tax upon their earnings. The opinion delivered by Mr. Justice Clifford, though containing some general expressions which, taken by themselves, might seem to ignore the settled distinction (affirmed by this Court in earlier and later cases above cited) between the property of the corporation and the interests of the shareholders yet explicitly recognized that "net earnings of such a company may be expended in constructing or equipping the railroad, or in the purchase of real estate or other properties," and "may be distributed in dividends of stock or of scrip or of money;" that "purchasers of stock have a right to claim and receive all dividends subsequently declared, no matter when the fund appropriated for the purpose was earned;" that, "as a general

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rule, stock dividends, even when they represent net earnings, become at once a part of the capital of the company;" and that

"such a dividend, if earned and declared, necessarily increases the value of the old stock if new stock is not issued, and in that mode reaches substantially the same result."

22 Wall. 89 U. S. 635 -637.

In Great Britain, it is well settled that where a corporation, whether authorized or unauthorized by law to increase its capital stock, accumulates and invests part of

its earnings and afterwards apportions them among its shareholders as capital, the amount so apportioned must be deemed an accretion to the capital of each share, the income of which only is payable to a tenant for life. From the beginning of this century, it has been established by decisions of the Court of Chancery in England and of the House of Lords on appeal from Scotland, that where a bank, having no power by law to increase its capital stock, has used its accumulated profits as floating capital, and invested them in securities which can be turned into cash at pleasure, an extraordinary dividend or bonus declared out of such profits is capital, and not income, of each share as between owners of the life interest and of the interest in remainder therein, without inquiring into the time when the profits were actually earned. *Brander v. Brander,* 4 Ves. 800; *Irving v. Houstoun,* 4 Paton 521; *Cuming v. Boswell,* 2 Jurist (N.S.) 1005, 1008, 28 Law Times Rep. 344, and 1 Paterson 652. In *Irving v. Houstoun,* Lord Eldon (Lord Rosslyn and Lord Alvaney concurring) said that if an owner of bank stock

"gives the life interest of his estate to anyone, it can scarcely be his meaning that the life renter should run away with a bonus that may have been accumulating on the floating capital for half a century,"

and that to take an account of the precise amount of profits which had accumulated before and after the commencement of the life-interest in particular shares would lead to inconveniences which would be intolerable. 4 Paton 530-531. In *Cuming v. Boswell,* above cited and relied on by the present plaintiff, the person held entitled to bonuses declared on bank stock was, as stated in the judgment delivered by Lord Cranworth,

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"not a life renter, but an absolute fiar" -- in other words, not a mere tenant for life, but an owner in fee, although his estate was determinable by his death without issue.

It is unnecessary for the purposes of this case to consider how far the English decisions upon the question whether a dividend in money, not declared to be

made out of accumulated earnings, should be considered as capital or as income, can be reconciled with each other or with sound principle. But there are two recent cases of great authority concerning stock dividends which directly bear upon the question before us.

In one of those cases, shares in a steam navigation company were settled by their owner upon trust to pay "the interest, dividends, shares of profits, or annual proceeds" to a woman during her life, and after her death in trust for her children. The directors, acting within the scope of their authority, retained part of a half-year's profits, and applied it to pay for new boats, and the company passed a resolution to issue to existing shareholders new shares representing the money so applied. It was argued that

"the company had no power to compel the tenant for life to risk any more in the venture than the shares originally held, and could not be allowed for themselves, by declaring or withholding a dividend out of the profits, to alter the rights as between tenant for life and remainderman."

But Vice-Chancellor Wood (afterwards Lord Chancellor Hatherley) held otherwise, and said:

"As long as the company have the profit of the half year in their hands, it is for them to say what they will do with it, subject, of course, to the rules and regulations of the company. . . . The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half year's earnings to the capital account and turn it into capital, it is competent for them, I apprehend, to do so, and when this is done, everybody is bound by it, and the tenant for life of those shares cannot complain. The only mode in which a tenant for life could act would be to use his influence with his

trustees as to their votes with reference to the proposed arrangement. . . . If a man has his shares placed in settlement, he gives his trustees, in whose names they

stand, a power of voting, and he must use his influence to get them to vote as he wishes. But where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle, and I must hold that these additional shares formed part of the capital fund under the settlement, and went to the children, and not to the tenant for life (their mother)."

Barton's Trust, L.R. 5 Eq. 238, 243-245.

In the most recent English case on the subject, William Bouch bequeathed to his executor, in trust for his widow for life, and after her death to the executor, his personal estate, including shares in an iron company, whose directors had power, before recommending a dividend, to set apart out of the profits such sums as they thought proper as a reserved fund for meeting contingencies, equalizing dividends, or repairing or maintaining the works. Four years after the testator's death, the company, upon the recommendation of the directors and out of a fund so reserved in the testator's lifetime, and of undivided profits, about half of which accrued before his death, made a bonus dividend, and an allotment of new shares, with liberty to each shareholder to apply the bonus dividend in payment for the new shares. Bouch's executor took the new shares, and applied the bonus dividend in payment therefor. The House of Lords, reversing the judgment of the Court of Appeal and restoring an order of Mr. Justice Kay, held that the corporation did not pay or intend to pay any sum as a dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock; that the bonus dividend was therefore capital of the testator's estate, and the widow was not entitled either to the bonus or to the new shares. The difference of opinion was not as to the general principle which should govern, but only as to its application to the action of the corporation in the particular case. The House of Lords fully approved the statements of the general principle by Vice-Chancellor Wood in *Barton's Trust,* above

cited, and by Lord Justice Fry, in delivering the judgment of the Court of Appeal, as follows:

"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company, which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital. . . . In most if not in all cases, the inquiry as to the time when the profits were earned by the company is an immaterial one as between the tenant for life and remainderman. Their rights have been made dependent on the legitimate action of the company, and [subject to any rights arising from the law of apportionment, which was not in question] are determined by the time, not at which the profits are earned by the company, but at [by] the time at which they are by the action of the company made divisible amongst its members."

Sproule v. Bouch, 29 Ch.D. 635, 653, 658-659; *Bouch v. Sproule,* 12 App.Cas. 385, 397, 402, 407-408.

The same principle was established in Massachusetts before the case of *Sproule v. Bouch* had come before the courts of England. *Atkins v. Albree,* 12 Allen 359; *Minot v. Paine,* 99 Mass. 101; *Daland v. Williams,* 101 Mass. 571; *Leland v. Hayden,* 102 Mass. 542; *Rand v. Hubbell,* 115 Mass. 461; *Gifford v. Thompson,* 115 Mass. 478. And in Connecticut, Rhode Island, and Maine, a dividend of new shares, representing accumulated earnings, is held to be capital, and not income. *Brinley v. Grou,* 50 Conn. 66; *In re Brown,* 14 R.I. 371; *Richardson v. Richardson,* 75 Me. 570, 574.

In New York, the recent judgments of the Court of Appeals appear to have practically overruled the decisions of the lower courts in *Clarkson v. Clarkson,* 18 Barb. 646; *Simpson v.*

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Moore, 30 Barb. 637; *Woodruff's Estate,* Tucker 58, and *In re Pollock,* 3 Redfield 100, cited in behalf of the plaintiff, and to have settled the law of that state in accordance with that of England and of Massachusetts.

In *Hyatt v. Allen,* 56 N.Y. 553, the defendant, by a contract made August 11, 1871, under which he transferred to the plaintiffs certain stock in a manufacturing corporation, agreed to pay them "all profits and dividends of and upon the stock up to the first day of January, 1872." In April, 1872, the corporation declared a dividend of fifteen dollars a share, five-sixteenths of which were found by a referee to have been derived from the increase in value of its property between August 11, 1871, and January 1, 1872, and the court below gave judgment for the plaintiff for that proportion of the dividend. But the Court of Appeals reversed the judgment, and said:

"A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made. . . . When, therefore, a contract is made in relation to dividends or profits, it must be deemed to have reference to dividends or profits to be ascertained and declared by the particular company, and not to growing profits from day to day, or month to month, to be ascertained upon an investigation by third persons, or courts of justice, into the accounts and transactions of the company."

56 N.Y. 557-558.

In *Williams v. Western Union Telegraph Co.,* 93 N.Y. 162, the Court of Appeals, in the course of an elaborate discussion of the right of a corporation, when unrestrained by statute, to make a stock dividend , said:

"When a corporation has a surplus, whether a dividend shall be made, and, if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts. . . . Whether they shall be made in cash or property must also rest in the discretion of the directors. . . . Desiring to use the surplus and add it to the permanent capital of the company, and having lawfully created shares of stock, they could issue to the stockholders such shares to represent their respective interests in such surplus. . . . After a stock dividend, a corporation has just as

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much property as it had before. It is just as solvent, and just as capable of meeting all demands upon it. After such a dividend, the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before."

93 N.Y. 189, 192.

Finally, in *Kernochan's Case,* 104 N.Y. 618, the Court of Appeals applied the same rules as between the remainderman and the person entitled for life to the income of shares bequeathed in trust; rejected the test of determining what part of a cash dividend should be deemed principal and what part income by ascertaining how much was earned before and how much after the death of the testator; approved the general principle laid down in the cases of *Barton's Trust,* L.R. 5 Eq. 238, 245, and *Sproule v. Bouch,* 29 Ch.D. 635, 653, above cited, and said:

"From the shares in question no income could accrue, no profits arise to the holder, until ascertained and declared by the company and allotted to the shareholder, and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court, upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise. . . . The rule is a reasonable and

proper one, which limits the rights of a stockholder to profits by the action of the managers of a corporation or company. It is their sole and exclusive duty to divide profits and declare dividends whenever, in their judgment, the condition of the affairs of the corporation renders it expedient, and it would lead to great embarrassment and confusion if a court should undertake to interfere with their discretion so long as they do not go beyond the scope of their powers and authority."

104 N.Y. 628, 629.

In *Earp's Appeal,* 28 Penn.Stat. 368, on the other hand, the Supreme Court of Pennsylvania declined to follow the early English cases, and adopted the rule that, where a corporation,

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after having accumulated large surplus profits for many years before and since the death of the testator, increased its capital stock, and issued additional shares to the stockholders, so much of the surplus profits as had accumulated in the lifetime of the testator should be deemed capital, and so much as had accumulated since his death should be deemed income, and in *Wiltbank's Appeal,* 64 Penn.Stat. 256, where a corporation voted to increase its capital stock by an issue of new shares to be subscribed and paid for by the stockholders, and a trustee holding shares sold the right to take some new shares, and took others and sold them at an advance, that rule was carried so far as to hold that the sums so received by the trustee were income of the old shares, for the reason that the right to subscribe to new shares, the court thought, "was not a part of the capital of the old stock, but a mere product of an advantage belonging to it," "a right incidental to the stock, and therefore income." The rule upon which those two cases proceeded has since been treated as settled in Pennsylvania, although there has been some difficulty, if not inconsistency, in applying it, and in one case Mr. Justice Paxson, now Chief Justice of Pennsylvania, spoke of both those cases as exceptional and depending on peculiar circumstances. *Moss' Appeal,* 83 Penn.St. 264, 269-270; *Biddle's Appeal,* 99 Penn.St. 278; *Vinton's Appeal,* 99 Penn.St. 434. The only other

states, so far as we are informed, in which the Pennsylvania rule prevails are New Jersey and New Hampshire. *Van Doren v. Olden,* 19 N.J.Eq. 176; *Ashhurst v. Field,* 26 N.J.Eq. 1; *Van Blarcom v. Dager,* 31 N.J.Eq. 783, 793; *Lord v. Brooks,* 52 N.H. 72; *Peirce v. Burroughs,* 58 N.H. 302, 303. Upon the grounds already stated, that rule appears to us to be open to grave objections, both in principle and in application, as well as opposed to the weight of authority.

In the case at bar, the testatrix bequeathed to her daughter, Jane Owen Mahon, two hundred and eighty shares of stock in the Washington Gaslight Company, as well as some shares in an insurance company, and bonds of the United States, "in trust for the advantage and behoof of" her daughter, Mary Ann Gibbons, and directed that after the decease of the testatrix,

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the trustee should

"cause the dividends of said stock and the interest of said bonds, as they accrue, to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission, or diminution of principal. And in case of the death of the said Mary Ann Gibbons, then the said stock, bonds, and income shall revert to the estate of my said daughter, Jane Owen Mahon, without encumbrance or impeachment of waste."

Upon the face of the will, it is manifest that the testatrix used the word "dividends" as having the same scope and meaning as "income" and "interest," and nothing more, and intended that the plaintiff, as equitable legatee for life, should take the income, and the income only, of the shares owned by the testatrix at the time of her death, and that the whole capital of those shares, unimpaired, should go to the defendant, as legatee in remainder.

The admitted facts present the following state of things: the accumulated earnings of the company were kept undivided, and actually added to the capital of the corporation, by investing them from time to time in its permanent works and plant until the value of the works and plant amounted to $1,000,000; no owner of

particular shares, or of any interest therein, had the right to compel the company to divide or apportion those earnings, and while they remained so undivided and invested the capital stock of the company was increased to the same amount by the act of Congress of May 24, 1866. The greater part of the earnings in question had been so invested before the making of the will and the death of the testatrix in 1865, a still larger proportion before the passage of the act of Congress of 1866, and the whole before the resolution of the directors of November 1, 1868, under which the new shares were issued to the defendant, and in which it was recited, in accordance with the truth, that the construction account of the company exceeded $1,000,000, and that its capital had been increased by act of Congress to that amount, and it was therefore "resolved, that the increased stock be awarded among the stockholders, share for share, as they stood on the 1st of October, 1868."

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To hold the plaintiff to be entitled to the whole of the new shares issued to the defendant would be to allow the plaintiff the exclusive benefit of earnings, the greater part of which had accrued and had been invested by the company as capital before her interest began, and would be contrary to all the authorities. To award to her a proportion of those shares, based upon an account of how much of those earnings actually accrued after the death of the testatrix, would be to substitute the estimate of the court for the discretion of the corporation, lawfully exercised through its directors, and would be open to the practical inconveniences already stated.

The resolution is clearly an apportionment of the new shares as representing capital, and not a distribution or division of income. As well observed by Mr. Justice James, delivering the opinion of the court below:

"Certificates of stock are simply the representative of the interest which the stockholder has in the capital of the corporation. Before the issue of these two hundred and eighty new shares, this trustee held precisely the same interest in

this increased plant in the capital of the corporation that she held afterwards. She merely had a new representative of an interest that she already owned, and which was not increased by the issue of the new shares. A dividend is something with which the corporation parts, but it parted with nothing in issuing this new stock. It simply gave a new evidence of ownership which already existed. They were not in any sense, therefore, dividends for which this trustee had to account to the *cestui que trust.* She stood, after the issue of the new shares, just as she had stood before, and the trustee was obliged to treat them just as she did -- namely as a part of the original, and to pay the dividends to the *cestui que trust.* "

4 Mackey 136.

Decree affirmed.

MR. JUSTICE BREWER, not having been a member of the Court when this case was argued, took no part in the decision.