

In the Privy Council.

No. 96 of 1936

10 ON APPEAL FROM THE COURT OF KING'S BENCH
(APPEAL SIDE) FOR THE PROVINCE OF QUEBEC.

BETWEEN

GEORGIANA LAVERDURE (*Plaintiff*) *Appellant,*

AND

20 Hon. PAMPHILE R. DU TREMBLAY & AL (*Defendants*) *Respondents,*

AND

LA PRESSE PUBLISHING COMPANY LIMITED, *Mis en cause.*

APPELLANT'S CASE.

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1. This is an appeal from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec, dated the 28th day of April 1936, reversing by a majority a judgment of the Superior Court for the Province of Quebec, district of Montreal, dated the 10th day of January 1935, declaring that the Appellant, as universal legatee of her husband, was entitled to the fruits and revenues or dividends of La Presse Publishing Company Limited earned at the time of her husband's death, the 24th day of December 1933, and ordering to the testamentary executor and the trustee appointed by the late Treffle Berthiaume, to pay to the Appellant the sum of \$13,335.42, being her husband's share in the dividends accrued up to the 24th day of December 1933 but declared on the 27th day of December of the same year.

Record.
p. 59, l. 15.
p. 23, l. 30.

2. The questions raised are:--

1. Whether the fruits or revenues of La Presse Publishing Company Limited, or in other terms the dividends are civil fruits.

Record.

2. Whether said revenues exist only when the dividends are declared or paid by the company or if they are accruing from day to day to the usufructuary and are apportionable in respect of time accordingly.

3. Whether the said dividends, if they do not exist before being declared or paid by the company, do become fruits and revenues in the hands of the testamentary executor and in the hands of the trustees and then are apportionable. 10

4. Whether the intention of the donor and testator was to make the fruits and revenues given to his children apportionable.

3. The following articles of the Civil Code of Quebec, are the most material:—

447. “The usufructuary has the right to enjoy every kind of “fruits, whether natural, industrial or civil, which the thing subject “to the usufruct can produce. 20

449 “Civil fruits are the rent of houses, interest of sums “due and arrears of rents. The rent due for the lease of farms is “also included in the class of civil fruits.

450. “Natural and industrial fruits attached by branches “or roots, at the moment when the usufruct is open, belong to the “usufructuary.

“Those in the same condition at the moment when the usufruct ceases, belong to the proprietor, without recompense on “either side for ploughing or sowing, but also without prejudice “to the portion of the fruits which may be acquired by a farmer on “shares, if there be one at the commencement or at termination of “the usufruct. 30

451. “Civil fruits are considered to be acquired day by day, “and belong to the usufructuary in proportion to the duration of “his usufruct.

“This rule applies to rent from the lease of farms, as it does “to the rent of houses and to other civil fruits.” 40

4. The respondents are the trustees administering the trust created by the late Treffle Berthiaume on the 26th day of December 1914, by notarial deed passed before Joseph L. Girouard, notary. One of the respondents, Pamphile R. DuTremblay, is also the testamentary executor and trustee instead of Arthur Berthiaume duly appointed as such by the Will of the said Treffle Berthiaume, dated the 23rd of June 1913, and passed before J. L. Mainville, Notary.

p. 99. l. 30.

p. 93. l. 20.

5. At the time, La Presse Publishing Company Limited was a one man's company, the late Treffle Berthiaume possessing all the preferential and common shares of the company except four or five which were in the name of other persons to qualify them as directors but were endorsed to himself. And by the Deed of Trust he gave to the respondents 7400 common shares of the capital stock of the company to the trustees and he gave by his Will the remaining balance of the common stock, 100 shares, to his testamentary executor and trustee and also a certain amount of preferential shares.

6. By these two documents, the late Treffle Berthiaume has ordered that the fruits and revenues coming from his estate must be distributed between his children at the day and in the manner fixed by the trustees; the said fruits and revenues were given as alimentary allowance, and in the case of death of one of the heirs, it was provided that his share would return to his own children and if he was without issue, the said share should be distributed between his brothers and sisters.

7. The Appellant's husband, Edouard Berthiaume, was one of the sons of the late Treffle Berthiaume, and during his lifetime received his share of the fruits and revenues of his father's estate.

8. Edouard Berthiaume died on the 24th day of December 1933 without issue leaving his wife as universal legatee and testamentary executor, and in the said quality the appellant claimed from the respondents the fruits and revenues accrued up to the time of the death, to wit the amount of dividend which was declared on the 27th day of December 1933.

9. In this case it is admitted in the evidence of the secretary of the company mis-en-cause, that there is no apportionment to make, because the dividends declared on the 27th day of December 1933 were earned on the 24th. It results from this evidence that if the appellant's claim is well founded, it is founded for the whole.

10. The judgment of the Superior Court (Duclos J.) delivered on the 10th day of January 1935, maintained the appellant's claim in full.

11. On appeal to the Court of King's Bench (Appeal Side) judgment (Bond, Galipeault and St-Jacques JJ., Dorion and St-Germain JJ., dissenting) was delivered on the 28th day of April 1936 reversing the judgment of the Superior Court. The judgment is based entirely on the interpretation of the Will and the Deed of Trust, and concludes that it was the late Treffle Berthiaume's intention to keep his fortune in his family and to exclude the widows or the estate of his children dying without issue. The reasons contained in the formal judgment are given as follows:—

Record.
p. 60, l. 3.

“ CONSIDERANT qu’il y a lieu tout d’abord de rechercher l’intention
“ du donateur-testateur, tel qu’il résulte des termes dont il s’est servi dans
“ les deux actes sus-mentionnés;

“ CONSIDERANT qu’il apparaît à la fiducie donation que feu Trefflé
“ Berthiaume a cédé, transporté et donné aux trois fiduciaires nommés, la
“ plus grande partie des actions ordinaires de la Compagnie de Publica- 10
“ tion de la Presse Ltée, et qu’il s’est réservé “sa vie durant l’usufruit
“ et la jouissance des biens ainsi donnés, ainsi que le droit de vote sur
“ les dites actions”, la fiducie devant se terminer à la mort du dernier des
“ enfants du donateur au premier degré;

“ CONSIDERANT qu’aux termes de la donation il ne saurait y avoir dis-
“ tribution qu’après encaissement par les fiduciaires, et que si cette dis-
“ tribution peut être retardée par eux, elle ne doit se faire qu’aux descen-
“ dants du donateur;

“ CONSIDERANT qu’aux termes du dit acte, le droit des enfants ne
“ prend naissance qu’au moment où les fiduciaires ont perçu les reve- 20
“ nus, et que ces mêmes revenus sont payables entièrement aux enfants et
“ non pas aux successions des enfants décédés;

“ CONSIDERANT qu’il apparaît dans l’acte de donation que le donateur
“ a voulu favoriser sa descendance, ses enfants vivants ou leurs représen-
“ tants, et non leurs héritiers testamentaires;

“ CONSIDERANT que le donateur veut que les biens restent propres
“ aux bénéficiaires, ne forment partie d’aucune communauté de biens et
“ soient considérés comme aliments;

“ CONSIDERANT qu’aux termes du testament, il est pourvu que le fi- 30
“ duciaire recevra tous les biens de la succession en fiducie, que les revenus
“ devront être partagés entre tous les enfants du testateur qui, s’ils pré-
“ décèdent et laissent des enfants, seront représentés par ces derniers et
“ par souche;

“ CONSIDERANT qu’il y a lieu d’appliquer la même règle d’interpré-
“ tation aux deux actes;

“ CONSIDERANT que vu les termes des actes susdits et l’intention y
“ exprimée du donateur testateur, il n’y a pas lieu de décider si les fruits 40
“ et revenus dont il est question dans les dits actes, à savoir, les divi-
“ dendes en l’espèce, sont bien des fruits civils suivant les dispositions de
“ l’article 451 du C.C.;

“ CONSIDERANT qu’il y a erreur dans le jugement a quo;

“ FAIT DROIT à l’appel avec dépens, et prononçant à nouveau, MAIN-
“ TIENT le plaidoyer des défendeurs-appelants, et REJETTE avec dé-
“ pens l’action de la demanderesse-intimée.

“ MM. les Juges Dorion et St. Germain, dissidents.

12. Messrs. justices Dorion and St-Germain who dissented from their colleagues held that the dividends declared on the 27th day of December 1933 were fruits and revenues apportionable coming from the late Treffle Berthiaume's estate, were apportionable day by day and were accrued to Edouard Berthiaume at the time of his death, and that the amount claimed by the appellant was not a personal claim against the estate, that her claim was for the fruits and revenues accrued to her husband before his death, and due to her in her quality of universal legatee.

Record.
p. 98, l. 1.

13. The Appellant submits that the dissenting opinions of Messrs. Justices Dorion and St-Germain were right and that the judgment of the majority of the Court of King's Bench is erroneous in the following among other respects:—

p. 61, l. 10.
p. 67, l. 20.

(a) In failing to apply the provisions of article 451 of the Civil Code (above cited).

20 (b) In considering the appellant's claim as a personal one against the estate when as a matter of fact she was asking only for the share of said fruits and revenues accrued to her husband at the time of his death.

(c) In giving a wrong interpretation to the Will and Deed of Trust.

14. The Appellant respectfully submits that the judgment of the Court of King's Bench (Appeal Side), dated the 28th day of April 1936, is wrong and ought to be reversed and that the judgment of the Superior Court dated the 10th day of January 1935 ought to be confirmed and the Appellant's action maintained for the following among other

p. 59, l. 15.

p. 23, l. 30.

REASONS.

- 40 1. Because under the Will and Deed of Trust, Edouard Berthiaume was entitled to his share of the fruits and revenues of the estate left by his father the late Treffle Berthiaume.
2. Because the dividends or profits earned by La Presse Publishing Company Limited, the main part of the estate, are fruits and revenues.
3. Because the said fruits and revenues were fully accrued to the said Edouard Berthiaume on the 24th day of December 1933, at the time of his death.

4. Because the said fruits and revenues were apportionable according to article 451 of the Civil Code.
5. Because the Appellant claimed, in her quality of universal legatee, fruits and revenues due, to her husband and did not claim a part of the estate which, under the terms of the Will and the Deed of Trust, belong to the children and the great children. 10
6. Because the reasons of Messrs. Justices Dorion and St-Germain are right.

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