

Georgiana Laverdure - - - - - *Appellant*

v.

Hon. Pamphile R. Du Tremblay and others - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF
QUEBEC (APPEAL SIDE)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 8TH MARCH 1937.

Present at the Hearing :

LORD BLANESBURGH.

LORD ATKIN.

LORD MAUGHAM.

LORD ROCHE.

SIR SIDNEY ROWLATT.

[*Delivered by* LORD MAUGHAM.]

This is an appeal from a judgment of the Court of King's Bench (Appeal Side), Province of Quebec reversing by a majority of three Judges, Bond, Galipeault and St. Jacques JJ. with two dissentients, Dorion and St. Germain JJ. a judgment of the Superior Court, District of Montreal. By that judgment Mr. Justice Duclos had maintained an action in which the appellant, Georgiana Laverdure, the widow, testamentary executrix, and universal legatee of Edouard Berthiaume who died on the 24th December, 1933, claimed from the respondents, trustees under a deed of gift executed by the late Hon. Trefflé Berthiaume (to be called for convenience "the donor"), and also from the respondent Du Tremblay, as sole trustee under the will of the donor, certain dividends declared by the respondents, La Presse Publishing Company, Limited (to be called "the Company") on its preferred and common stocks on the 27th December, that is to say three days after the death of Edouard Berthiaume, payable on the 2nd January following. It is admitted that the profits out of which the said dividends were declared were earned during the lifetime of Edouard Berthiaume. The appellant recovered judgment in the first Court for the total sum of \$13,335.42, being her husband's share in the dividends so declared; but the action was dismissed on the appeal.

The facts are not in dispute. The donor was the founder and, in substance, sole shareholder in the Company. There were 7,500 common shares and also certain preference shares in the capital of the Company. The ordinary shares

have become very valuable. By his will dated the 23rd June, 1913, he bequeathed all his property to his eldest son, Arthur Berthiaume, as trustee (*legataire fiduciaire*) and he gave him a hundred common shares in the Company. It may be mentioned that the trustee was given wide powers of administration with power to sell except as regards the donor's shares in the Company. The income of his property (*les revenus des biens qui font partie de ma succession*) was to be divided between his children and grandchildren with an ultimate gift of the capital to his great grandchildren. The material clauses of the will were as follows:—

IL est bien entendu que mon légataire fiduciaire partagera avec mes autres enfants les revenus de mes dits biens, mais les revenus de mes dits biens ne seront partagés entre mes dits enfants ou petits-enfants, et arrière petits-enfants, s'il y a lieu, que lorsque mon légataire fiduciaire jugera à propos de le faire, car je le laisse le seul juge de l'état de ma fortune et je lui donne à lui seul pouvoir de déclarer et décider que mes biens, tant ceux qui me sont personnels que ceux qui consistent en actions dans le fonds capital de LA PRESSE PUBLISHING COMPANY LIMITED sont dans un état tel que les fruits et revenus peuvent être distribués sans qu'ils en soient affecté.

MON légataire fiduciaire aura le droit de retirer des salaires, traitements ou rémunérations qu'il pourrait s'attribuer comme directeur ou président ou à quelque titre que ce soit de La PRESSE PUBLISHING COY LTD, ou que la dite compagnie pourrait lui attribuer pourvu que la somme ainsi reçue annuellement ne dépasse pas douze mille dollars, mais survenant le décès d'un ou de plusieurs de mes enfants je veux que sa part ou leur part de revenus soit dévolue à son ou à leur enfants, et s'il n'a pas ou n'ont pas d'enfants sa part ou leurs parts retournera à ses frères et soeurs, mais s'il a des enfants ceux-ci représenteront leur père ou mère et retireront les revenus suivant leurs droits de ceux qu'ils représenteront, et s'ils meurent en minorité et sans postérité leur part de revenus sera distribuée à mes enfants survivant ou aux enfants de mes enfants, mais si un de mes petits enfants décède sans postérité sa part de revenus sera dévolue à mes enfants ou à leurs défaut à mes autres petits enfants ou à leur défaut à mes arrières petits-enfants, car je veux que le revenu de mes biens soit toujours partagé, lorsqu'il y aura lieu, entre mes descendants et ceux de mes enfants, pourvu toujours qu'un de mes petits enfants ou de mes arrières petits enfants ne puisse prétendre aux revenus de ma succession du vivant de son père ou de sa mère suivant le cas.

QUANT à la propriété de mes biens, je la donne et lègue et elle appartiendra à mes arrière petits-enfants qui existeront lorsque mes enfants et leurs enfants seront tous décédés, et alors le partage s'en fera entre mes arrière petits-enfants par souche et non par tête.

TOUS les biens ainsi que les revenus que je donne et lègue par mon présent testament seront insaisissables et sont donnés à titre d'aliment.

On the 26th December, 1914, by a notarial deed (called in this judgment "the deed of gift") the donor gave, ceded and assigned to Arthur Berthiaume, advocate, Joseph R. Mainville, notary, Zenon Fontaine, advocate, as donees in trust (*donataires fiduciaires*) 7,400 common shares in the capital of the Company. He reserved to himself during his life the usufruct and the enjoyment (*l'usufruit et la jouissance*), of the property so given, including the right of

voting in respect of the said shares, and he declared that the trust thus created would come to an end upon the death of the last of his children. The following passages in the deed of gift are of importance:—

“ Les donataires fiduciaires partageront les fruits et revenus que pourront produire les dits biens lorsqu'ils jugeront que ces fruits et ces revenus peuvent être partagés et distribués sans affecter les dits biens, mais le dividende de sept pour cent sur les actions privilégiées dans le susdit fonds social devra être prélevé et payé aux ayants-droit avant qu'un dividende ne soit prélevé et payé sur les actions communes. Le dividende sur les actions communes, s'il y en a, sera partagé comme suit: cinq sixièmes seront distribués aux ayants-droit plus loin nommés et l'autre sixième sera distribué aux fiduciaires à titre d'indemnité pour leur administration et gestion.

“ Lorsque l'usufruit que le donateur se réserve se terminera les cinq-sixièmes des fruits et revenus des biens présentement donnés seront partagés de la manière suivante: tous les enfants du donateur au premier degré ou leurs héritiers légaux en cas de prédécès recevront une part égale des fruits et revenus que les fiduciaires pourront retirer, et les dits fruits et revenus seront payables de la manière et aux époques que choisiront les fiduciaires.”

“ Si l'un des susdits enfants du donateur décède sans enfants, sa part de revenus accroîtra aux survivants de ses frères et soeurs et aux représentants de ceux qui seront prédécédés suivant l'ordre des successions légitimes. Si à son décès il laisse des enfants ou descendants, ceux-ci remplaceront leur père, mère ou ascendants suivant l'ordre des successions légitimes quant à la part de ceux-ci dans les derniers revenus.”

“ Les biens ainsi donnés aux fiduciaires seront remis et appartiendront aux descendants du donateur qui existeront à la mort du dernier des susdits enfants du premier degré et seront partagés de la manière suivante: ”.

It was the usual practice of the directors of the Company to declare dividends at quarterly periods and in particular to declare a dividend a day or two before the 1st January; there was, however, no express regulation in the letters patent of the Company as to the periods or dates at which dividends should be declared or paid. The Company was a very prosperous one, and possessed a considerable reserve fund. On the 27th December, 1933, the board of directors declared a dividend of $1\frac{3}{4}$ per cent. on the preference shares of the Company and of 12 per cent. on the ordinary shares, both payable on the 2nd January, 1934. The last preceding declaration of dividend had been made on the 26th October, 1933. The dividends declared on the 27th December were in fact being declared and paid out of profits earned before the 24th December. There was no statement in the declaration as to the period in respect of which the dividends were to be paid.

The testator died shortly after the execution of the deed of gift. One of his sons, namely the said Edouard Berthiaume, the husband of the appellant, as already stated died on the 24th December, 1933, and under his will the appellant is his executrix and universal legatee. It is in that capacity that she claims in right of her late husband the share of the dividends which according to her contention were due to her husband under

the said will and deed of gift. The respondents dispute this claim on two grounds, first, because under the terms of the instruments the trustees were to distribute, at their discretion as to time and amount, but only after receipt by them, the dividends paid in respect of the said shares to the children or grandchildren then living, and, secondly, because the dividends in question ought not to be deemed to accrue from day to day and are not governed by article 451 of the Civil Code of Quebec.

For the sake of clearness it may be well to add that the whole of the common shares (except the 100 bequeathed to Arthur Berthiaume) passed by the deed of gift, while the preference shares or the greater part of them passed by the will of the donor. The terms of the will and of the deed of gift are different in many respects and the persons ultimately entitled under these instruments, as appears from the above, are different; but it has not been suggested in the Courts below, nor was it suggested before their Lordships, that there is any ground for coming to a different conclusion with regard to the dividend on the preference shares than that which is a correct decision with regard to dividend on the ordinary shares.

Their Lordships think it desirable here to make two preliminary observations. In the first place it is clear that the questions involved ultimately turn on the true construction of the will and the deed of gift, since the appellant can have no claim except one founded on those instruments. The true nature of the main contest is this:—Has the donor used expressions which indicate with reasonable certainty that his son Edouard Berthiaume was not to have any right or title to share in any dividends which had not been paid, or alternatively which had not been declared, before his death on the 24th December, 1933, or, on the other hand, if this part of the question is answered by saying that there are not such expressions, has the donor, by giving to Edouard Berthiaume a certain share in the fruits and revenues produced by the shares, indicated by the words which he has used that Edouard was to be entitled to his portion of the dividends earned before his death but not declared till the 27th December, 1933, and not made payable till the 4th January, 1934? The first part of the question may be described as depending on a particular or a special intention of the donor: the second part may be said to depend on his general intention, and on the view which ought to be taken on the legal point as to whether the dividends of the Company ought to be deemed to be acquired day by day, that is, whether they ought according to the English phrase, to be apportioned. The second remark is this, that the only claim of the appellant is in right of her late husband, and this claim must stand or fall by the determination of the question whether or not Edouard Berthiaume was entitled at the date of his death to his due portion of the dividends which were in fact declared three days after his death.

Upon the question of the true construction of the will and of the deed of gift, there has been in the Court of King's Bench (Appeal Side) a striking difference of opinion. Mr. Justice Galipeault, with whose judgment Mr. Justice Bond agreed, took the view that the donor's intention was simply to maintain his descendants, and that he never contemplated that any part of the fruits and revenues bequeathed or given to his children could belong to the widow of a child. Mr. Justice St. Jacques came to a like result by holding that the trustees were not effectively seized (*saisis*) of the dividends until they were paid by the Company, and that it was only then that the beneficiaries, according to the true construction of the will and deed of gift, were entitled to share in the dividends. These conclusions would have the advantage of making it unnecessary to decide some difficult questions in relation to the Civil Code of Quebec, but their Lordships, like Mr. Justice Duclos, the Trial Judge, and Justices Dorion and St. Germain, find it difficult to accept them. The question of construction is a delicate one, largely because the donor in the deed of gift, as St. Germain J. pointed out, has confused the rights and functions of his trustees with those of the directors of the Company; but it seems to their Lordships that upon the true construction of both documents the donor after his death has given the whole of the revenue or income of the property, whatever that may be, by the description of *revenus* in the will and of *fruits et revenus* in the deed of gift (subject to the deduction of one-sixth), to the legatees he has mentioned as above stated. The circumstance that the trustees have a discretion as to the times of distribution and that the revenues so distributable are to be *insaisissables* and *sont donnés à titre aliment*, or are to be so considered, are insufficient to qualify the plain direction that (in the will) the trustee shall divide with the testator's other children the revenues of his property and that (in the deed of gift) the dividends on the common shares shall be divided as to five-sixths among those entitled, and as to the other one-sixth among the trustees as a recompense for their services (*à titre d'indemnité pour leur administration et gestion*). Again, the donor (in the deed of gift) directs that the five-sixths of the *fruits et revenus* shall be divided, when the usufruct reserved by the donor comes to an end, as follows: "all the children of the donor in the first degree . . . shall receive an equal part of the fruits and revenues which the trustees can draw out, and the said fruits and revenues shall be payable in the manner and at the times which the trustees shall choose." The direction in the deed that all the children during their joint lives are to receive *une part égale* is unequivocal, and it is plain that any provision not leading to exact equality might lead to difficulty in the family since one of the trustees was himself a beneficiary, and a discretion to postpone payment to a brother or sister if such postponement might benefit a trustee would be not unlikely to cause trouble. On the other hand, the circumstance that the income of the common

shares was being given as to one-sixth among the trustees as a recompense for their services tends in the same direction, for it seems at least unlikely that the donor would have wished a trustee dying shortly before the declaration or payment of a dividend to have no remuneration for the period which had elapsed since the last declaration or payment. These considerations are indeed of no great weight. The decisive clause is the direction to divide the fruits and revenues in equal shares, taken together with the fact that there is nothing expressed in the deed of gift which suggests that a child's right to a share of dividend is to be lost because of some accidental delay in the declaration or the payment of a dividend.

Their Lordships, therefore, are unable to take the view that the respondents can succeed on the contention that the donor has manifested what they have termed the particular intention. But this by no means concludes the matter. It is undeniable that in fact dividends of a limited company do not accrue day by day, and that until a dividend is actually declared there is no debt due by the Company to the shareholder, his right while the Company is a going concern being merely to share in such of its profits as shall be legally declared as dividend whilst he is a shareholder. From this it is evident that, in the absence of any special direction in the deed of gift, the appellant cannot succeed unless she can establish that, according to the law of Quebec, as applied to the provisions of the will and deed of gift, the dividends in question must be deemed or considered as accruing from day to day. The contention put forward on her behalf is in fact based on article 451 of the Civil Code of Quebec which, in the English translation, reads thus:—“Civil fruits are considered to be acquired day by day, and belong to the usufructuary in proportion to the duration of usufruct.” Here, however, arise some further difficulties. The article is found in a section dealing with usufructuaries and their rights and liabilities, and the first question that arises is whether the children of the donor are usufructuaries. The second question is whether dividends in joint stock companies can in any circumstances properly be described or considered as “civil fruits” within the meaning of article 451. If the first question be answered in the negative, and the second in the affirmative, a third and final question arises:—Is article 451 applicable by analogy to civil fruits enjoyed under the will and deed of gift by the children of the donor?

In considering these questions, on which there has been a divergence of opinion in the Canadian Courts, the following articles of the Civil Code of Quebec are the most material:—

443. “Usufruct is the right of enjoying things of which another has the ownership, as the proprietor himself, but subject to the obligation of preserving the substance thereof.

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.

448. "Natural fruits are those which are the spontaneous produce of the soil. The produce and the increase of animals are also natural fruits.

"The industrial fruits of the soil are those obtained by the cultivation or working thereof.

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.

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."

The Civil Code of Quebec must, no doubt, be construed according to the principles laid down in *McArthur v. Dominion Cartridge Company* [1905] A.C. 72, 77, *Maclaren v. Attorney-General for Quebec* [1914] A.C. 258, 279, and *Quebec Railway, etc., Company v. Vandry* [1920] A.C. 662. The conclusions of French Courts or French jurists upon articles of a Code similar, if not identical, with those in the Civil Code now under consideration, though entitled to great respect, are not of binding authority in Quebec. The Civil Code of Quebec, as Lord Sumner pointed out in the last cited case, is in the language of a legislature established within the British Empire. Further, it must not be forgotten that the enactment is a Code of "systematized principles and rules, not a body of administrative directions or an institutional exposition." It follows that there are many legal rights and obligations not precisely within any article of the Code, more particularly in relation to systems and methods of carrying on business, and to inventions and innovations, which had never even been thought of at the time when the text was originally put into a written form. In these cases, if there is no modern legislation which applies, it is necessary for a Court, in many cases, to apply the principles of the Code by way of analogy. It may be remarked that the articles of the Code Napoleon relating to usufruct, copied in substance word for word in the Civil Code of Quebec, were first decreed in the year 1804, and that some of them were taken directly from the Institutes of Justinian (Lib. II, Tit. IV).—One must not expect, in the absence of a modern statute, to find in the language of the sections dealing with usufruct anything referring to the profits of a trade or a partnership, still less to the dividends arising from shares in a modern company.

The definition of a usufruct has not varied since the time of Justinian:—“*Usufructus est jus in alienis rebus utendi fruendi salvâ rerum substantiâ.*” Article 443 of the Quebec Code is taken from article 578 of the Code Napoleon and is in these terms:—“*L'usufruit est le droit de jouir des choses dont un autre a la propriété comme le propriétaire lui-même, mais à la charge d'en conserver la substance.*” The usufructuary can himself make use of the property, which may consist of moveables or immoveables (article 446) and he may also enjoy the fruits of the property. The French version of article 447 is in the following words:—“*L'usufruitier a le droit de jouir de toute espèce de fruits, soit naturels, soit industriels, soit civils, que peut produire l'objet dont il a l'usufruit.*” It is not in doubt that this article is dealing only with the “fruits,” and that the usufructuary has also the right to the use in a wide sense of the property, e.g. the right to live in a house or to ride a horse; but so far as fruits or revenues are concerned, they must be within article 447, directly or by analogy, and accordingly must be classed as *naturels* or *industriels* or as *civils*. Nothing turns upon the differences between the first two categories, but it is important to distinguish between these two and the third category since by the express terms of article 451 (already cited) “*les fruits civils sont réputés s'acquérir jour par jour, et appartiennent à l'usufruitier à raison de la durée de son usufruit.*” A very different rule applies under article 450 to natural and industrial fruits.

Their Lordships will now proceed to deal with the three questions above defined. On the first of them their Lordships entertain no doubt. The children of the donor are not usufructuaries under the deed of gift. All they have is a right as beneficiaries to share in certain “fruits and revenues” distributed from time to time by the trustees. Plainly they have no direct interest as shareholders, and neither a right of attending meetings, nor of voting. And, as Mr. Justice St. Germain points out in his judgment, a donee or legatee of a usufruct has a real right in respect of the property whilst the donee or legatee of the income paid or payable by trustees has only a personal action against the trustees. On the other hand it has not been contended that the donor did not retain, as he plainly stated he did, a usufruct in relation to the 7,400 common shares with the full right of enjoying that property.

The second question presents more difficulty. It is desirable in the first place to consider whether a person having usufruct of shares in a Canadian company is entitled to the dividends on such shares and whether such dividends are to be considered as civil fruits and therefore as being acquired from day to day.

There is now no doubt that dividends of a limited company according to the law of Quebec are “fruits” to which the usufructuary is entitled. It is true that dividends of trading concerns are not mentioned in any of the relevant articles; they did not exist when the articles of the Code

Napoleon, from which articles 447 to 478 of the Quebec Code were taken, were framed; but it has long been settled law both in France and in the Province of Quebec that all moneys produced periodically, whether at fixed or at uncertain dates, without exhausting or reducing the capital of the enterprise or business are "fruits" to which the usufructuary in general has a lawful claim. There has been a contest between jurists as to whether such dividends ought to be classified as industrial or as civil fruits. The numerous authorities cited by Duclos J. in his careful and exhaustive judgment on this part of the case present a very strong body of juristic opinion in favour of the view that such dividends are civil fruits. They clearly are not natural fruits which are those which the soil produces, and the increase of animals. It should be mentioned that the Code Napoleon (article 583) defines industrial fruits as follows:— "*Les fruits industriels d'un fonds sont ceux qu'on obtient par la culture.*" The Civil Code of Quebec (article 448) added to this sentence the words "*ou l'exploitation,*" and without this addition there could be little foundation for the suggestion that dividends are to be classed as industrial fruits. In the English version the words are translated "or working thereof", meaning "of the soil." Their Lordships cannot take the view that the addition was intended radically to alter the nature of industrial fruits, particularly having regard to the wording of article 450 which by its reference to "branches or roots" tends strongly to support the view that industrial fruits are derived from the cultivation or other use of the soil, not being the spontaneous produce of the soil. The words of article 449, though they certainly do not mention either dividends of a company or periodical distributions of the profits of a trade or a partnership, are much more easily extended by analogy to include such periodical payments. It is true that the jurists cited by Duclos J. are nearly all of them French jurists dealing with the almost identical provisions of the Code Napoleon (articles 582 to 586); but their opinions have great persuasive force, and their Lordships have noted that Judge Mignault, whose authority as a writer on the *Droit Civil Canadien* is indisputable, has taken the same view. The passage is to be found in a note to p. 552 of Vol. II (published in 1896):—

"Les fruits civils ne sont point toujours réguliers dans leur perception: souvent leur *quantum* varie avec les différentes époques de l'année. Ainsi, les actions sur les ponts et canaux, les actions de chemins de fer, ont leur bonne saison et leur saison morte. Comment procéder alors, si l'usufruit n'a duré qu'une fraction d'année? Faut-il attribuer à l'usufruitier la recette corrélative au temps pendant lequel a duré son usufruit? Cette attribution ne serait pas juste: elle donnerait trop ou ne donnerait pas assez à l'usufruitier."

He, therefore, decides in favour of an apportionment.

Their Lordships have not omitted to note that an eminent French writer M. Demolombe (Vol. 10 sections 280, 281) writing in 1875, expressed a contrary opinion, though

not in a very confident manner; but his view, based only on the absence of anything in the Code justifying the recovering of an apportioned part of a dividend from the owner or from a subsequent usufructuary, has not been followed in France; and it was not accepted by Judge Mignault, writing in 1896, as the law of Quebec.

Their Lordships, therefore, agree with the opinions on this point expressed by Duclos J. and in the Court of King's Bench by St. Germain J. that dividends paid out of the profits of industrial companies, declared periodically as far as circumstances permit, are generally speaking to be treated as "civil fruits" within article 449 of the Civil Code. On this view the dividends pursuant to article 451 must be considered as having been acquired day by day and belong to the usufructuary in proportion to the duration of his usufruct. A passage from Laurent, the well-known French jurist, may be cited as an example of the way in which the French authorities mentioned by the Trial Judge deal with the matter:—

Quant aux intérêts et dividendes (dit-il) que les sociétés industrielles et commerciales payent aux actionnaires, il se présente d'autres difficultés. Il va sans dire que l'usufruitier a droit aux intérêts et dividendes, puisque c'est un fruit civil, et il y a droit à raison de la durée de sa jouissance; peu importe le moment où les intérêts et dividendes se payent. Ce paiement se fait d'ordinaire plusieurs mois après la fin de l'exercice pour lequel l'actionnaire y a droit. Cela n'empêche pas que l'usufruitier ne gagne les intérêts et dividendes jour par jour. Il y a analogie complète entre ces revenus et les fermages, et là où il y a identité de motifs, la décision doit être la même. (LAURENT, vol. 6, No. 402.)

If, then, the children of the donor had been usufructuaries their Lordships would have found not much difficulty in deciding the appeal in favour of the appellant. Since they were not usufructuaries the question arises as to what was their true legal position. The Civil Code of Quebec had originally no articles relating to trusts, and generally speaking the French system does not recognise trusts. In Quebec however their great convenience was recognised some 50 years ago and article 981 (a) to article 981 (n) were added to the Code. (See Revised Statutes of Quebec, 1888, article 5803.) It may be useful to add that the English law relating to trusts and trustees was only adopted to the limited extent involved in those specific provisions and of any implications necessarily flowing from them. The English system of Equity was clearly not introduced. In view of those sections however there can be no reason for doubting that the true position of the children, including Edouard Berthiaume, after the death of the donor, was that they were beneficiaries under the deed of gift and under the will, with personal rights against the fiduciary donees (*donataires fiduciaires*) in the case of the deed and the fiduciary legatee (*légataire fiduciaire*) in the case of the will.

In considering the final question which now remains for consideration, whether article 451 can properly be considered as applicable to the rights of a beneficiary under the deed of gift and the will in respect of the dividends of

the Company declared on 27th December, 1933, it is expedient to repeat that the donor has declared that the fruits and revenues (*les fruits et revenus*) of the shares are to be divided among the persons entitled, and that when the usufruct of the donor shall terminate the fruits and revenues of the shares shall be divided in the manner stated. It is clear that by his repeated reference to *fruits*, the donor was using a word that might well suggest the application of the principle formulated in article 451. The donor himself, as a usufructuary, was bound by the article, and that again points to the conclusion that, if the trustees for his children were to have the obligation of accounting for a proportion of the dividends declared after the death of the donor out of profits accrued during his lifetime, a similar rule was to be applied to their interests as beneficiaries. Nor is there any sound reason for applying in such a case as the present, where the dividend has to be distributed by trustees, any rule as to these "fruits and revenues" differing from that which applies to the civil fruits of a usufruct. Their Lordships must, therefore, agree with the opinions of Duclos J. and of Dorion and St. Germain JJ. that the dividends in question must be considered as *fruits civils* and treated as subject to the principle contained in article 451. Their Lordships note with interest that a similar conclusion has been reached in a recent case in the Court of Cassation in France which will be found reported in *Dalloz, Jurisprudence Générale*, for 1933, p. 100. No question of a usufruct was involved. The headnote relating to the relevant part of the case, and taken verbatim from the formal decree, is as follows:—

" Les bénéfices des sociétés commerciales, dans la mesure où d'après les statuts, ils doivent être répartis périodiquement entre les ayants droit, participent de la nature des fruits civils, auxquels il y a lieu de les assimiler en ce qu'ils sont réputés s'acquiescer jour par jour au cours de chaque exercice social."

This decision affirmed a judgment of the Court of Appeal of Limoges, and is explained and approved in a learned note signed by Professor Paul Cordonnier in which a large number of authorities in the same sense are cited. The case is not in any sense an authority on a question of the law of Quebec even although the relevant sections of the two Codes are virtually the same. Their Lordships, however, are of opinion that the principle should be followed in Quebec, in the absence of any contrary direction express or implied in cases where shares are held in trust for beneficiaries in succession, the rule being limited to cases where the dividends are those of a company which either by established usage or by its articles of association or statutes makes an annual or other periodical distribution of dividends if the circumstances permit. It is hardly necessary to add that the rule has no reference to reserves if not made use of for the purposes of dividend during the relevant period and in no way touches the effect of purchases and sales of shares whether privately or in the market. It will be noted that the objection above referred to raised by

Demolombe, as regards the difficulty of justifying the recovery from a proprietor or a usufructuary of a proportion of a dividend received by him during the period of his ownership or his usufruct, has no application in the case where the shares are held by trustees and the dividends have to be distributed by them according to the legal rights of the beneficiaries.

For the reasons above given their Lordships are of opinion that the appeal should be allowed with costs subject to a small adjustment in the amount. The appellant has contended that there is no apportionment to make because it was admitted in the evidence of the secretary of the Company that the dividends declared on the 27th December, 1933, were earned on or before the 24th December. This contention is unsound. The dividends are not in fact earned for the present purpose at any particular period, and the result would have been the same if they had been declared out of a reserve fund available for the purpose but earned many years previously. Following the words of article 451 they are "*considered* to be acquired day by day"; and on the facts of the present case they must be considered as having been acquired up to the 27th December when the declaration was made since there is nothing in the declaration to the contrary. An apportionment is therefore necessary in respect of these three days. The figures can doubtless be agreed and will be inserted in the formal Order in Council. Their Lordships will humbly advise His Majesty accordingly.

Horizontal Velocity (ft/min)

0.000000

0.000000

0.000000

0.000000

In the Privy Council.

GEORGIANA LAVERDURE

v.

HON. PAMPHILE R. DU TREMBLAY
AND OTHERS

DELIVERED BY LORD MAUGHAM.

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