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An Historical and Juridical Analysis of Article 1301 of the Quebec Civil Code*

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History of Article 1301 C.C.

Article 1301 of the Quebec Civil Code now reads:

> A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect, saving the rights of creditors who contract in good faith.

The history of this article is interesting, bound up as it is with the history of European civilization from the days of the Roman Empire to the present.

The provision of law on which article 1301 is based first appeared in the legislation of Quebec in the year 1841. Owing to the disturbances culminating in the revolt of 1837, the Imperial Parliament passed an act (1 Vict., c. 9) by which the provincial government was suspended and the Queen was given power to appoint a Special Council for Lower Canada. This Special Council was duly appointed and passed numerous ordinances before it was abolished upon the passing of the Act of Union in 1840.

One of the last ordinances to be passed by the Special Council bore the rather lengthy title of "An Ordinance to prescribe and

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regulate the registering of Titles to Lands, Tenements and Hereditaments, Real or Immoveable Estates, and of Charges and Incumbrances on the same: and for the alteration and improvement of the law, in certain particulars, in relation to the Alienation and Hypothecation of Real Estates, and the Rights and Interest acquired therein".[1] This ordinance is commonly known as "The Registry Ordinance of 1841". It was in it that the prohibition against obligations of the wife in favour of her husband first appeared, in section 36, which reads:

> And be it further Ordained and Enacted, that from and after the day on which this Ordinance shall come into force and effect, it shall not be lawful for any married woman to become surety or responsible, or incur any liability whatever, in any other capacity, or otherwise, than as *commune en biens* with her husband, for the debts, contracts or obligations which may have been contracted or entered into by her said husband before their marriage, or which may by her said husband be contracted or entered into at any time during the continuance of any such marriage; and all suretyships, contracts or obligations made or entered into by any married woman, in violation of this enactment, shall be absolutely null and void, to all intents and purposes whatever.

It is not easy to see why this particular provision was inserted in a law enacted for the numerous worthy purposes recited in the title of the ordinance. Perhaps the legislators felt that by the section they were safeguarding the real estate of the wife, which would probably be her principal item of wealth; and it was with title to real estate that the ordinance was concerned. Sections 34 and 35 of the ordinance dealt also with married women. Section 34 allowed a wife over twenty-one years of age to sell her real estate by a deed entered into jointly with her husband, provided she was previously interrogated by a judge and convinced him that her consent to the deed was given freely and without coercion on the part of the husband. The judge then certified the consent on the deed itself. Section 35 permitted a wife over twenty-one years of age to join with her husband in the sale of any property which might be or become subject to her legal or customary dower. Sections 34 and 35, as can be seen, had some logical connection with the objects of the ordinance. Perhaps section 36 was inserted because the legislators, having gone pretty far in leaving the wife free from restraint (in sections 34 and 35) felt that it would be wise to restrain her in another direction.

In any case, when the Special Council was abolished, the Registry Ordinance, together with all the other laws and ordinances of Lower Canada, were continued in force by section 46 of the

[1] 4 Vict., c. 30.

Act of Union.[2] Section 36 remained in force until 1861, when the statutes of Lower Canada were consolidated. In section 55 of chapter 37 of the Consolidated Statutes of Lower Canada of that year, the wording of section 36 was replaced by the following:

> No married woman shall become surety or incur any liability other than as *commune en biens* with her husband, for debts or obligations entered into by her husband before their marriage, or which may be entered into by her husband during their marriage; and all suretyships by any married woman, in violation of this enactment shall be absolutely null.

When, in 1866, the Civil Code of Lower Canada came into force the section, considerably condensed, formed part of it as article 1301. At that time the article read as follows:

> A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect.

There is what appears to be a significant difference between article 1301 and the section of the Consolidated Statutes. Whereas the earlier enactment spoke of liabilities incurred "*for* debts of her husband", the new article says, "*with or for* her husband". As will be shown later, this addition of the word "with", important as it may seem at first, really effected no change in the law as interpreted by the courts and the commentators.

Article 1301 remained unchanged for many years, but it was the subject of ever-increasing criticism. The reason for the dissatisfaction was that the article created a situation in which it was unsafe to lend money to a married woman, since she could always repudiate the transaction if the creditor could not prove definitely that the money had been used for the benefit of the wife. A typical case to illustrate this is *Rheaume* v. *Caillé*, decided in 1878.[3] In this case, a married woman had borrowed money, allegedly stating that it was for herself. The husband signed the deed only for the purpose of authorizing her.[4] Later, when the loan became due, the wife refused to pay on the ground that the money had been handed over by her to her husband and had not benefited her. The court upheld her contention and declared the transaction null and void from its inception, saying that, even if she had misrepresented the destination of the borrowed funds, she was protected by article 1301. Moreover, the good faith of the lender was irrelevant.

The *Rheaume* case was only one in a long series of decisions to

[2] 3-4 Vict., c. 35.
[3] 1 Legal News 340.
[4] Under the law of Quebec, the authorization of the husband is required in all cases involving the wife's real estate.

the same effect. The result was that loan companies were afraid to deal with married women and this had the double effect of prejudicing the credit of married women and of losing lucrative business for the loan companies.

Finally, in 1899, a bill was introduced in the Legislative Assembly to amend article 1301 by adding the words (in the French version) "sauf la bonne foi du créancier". The Committee on Legislation added the words "et à moins que l'autorisation qu'elle aura préalablement obtenue de son mari, de la contracter, ne soit ratifiée par le tribunal ou le juge, sur requête exposant toutes les causes et circonstances de telle obligation. Une copie de la sentence de ratification rendue par le tribunal ou le juge devra être annexée à la minute de l'acte." The bill, as thus amended, passed the lower House, but was lost in the Legislative Council after a stirring debate, in which both the rights of the loan companies and the need for protecting married women were eloquently and forcefully pressed. The final vote was ten to ten, which meant, under the rules of the Council, that the measure was defeated.

Then, in 1902, the Court of Appeal rendered its judgment in the well-known case of *Trust and Loan Co.* v. *Gauthier et al.*[5] Here the Court of Appeal laid down these principles:

> Where a loan is obtained by a married woman separated as to property from her husband, with hypothecation of her real estate, it is sufficient to show that the money, although handed to her in the form of a cheque payable to her order, was not used by her, but was given to her husband, to bring the contract within the prohibition of article 1301 C.C.
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> The law does not require that the party from whom a wife obtains a loan should know that it is for the benefit and use of her husband. It is for the lender to exercise proper caution, and to see to the due employment of the loaned money for the purposes of the wife. Even in the case of deception by the wife, as to the use to which the money is to be applied, the contract of loan is nevertheless null.

The decision in this case, undoubtedly well-founded on the law as it then stood, led to renewed agitation seeking either the repeal of article 1301 or, at the least, its amendment to afford protection to creditors in good faith.[6]

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[5] 12 K.B. 281. This judgment was later confirmed by the Judicial Committee of the Privy Council, [1904] A.C. 94.

[6] Typical is an article written at the time by H. J. Kavanaugh, to be found in (1903), 9 R.L.n.s. 529, in which he says (at p. 537):

"The object of the law is to protect married women separate as to property. And how does it protect them? It takes away from them, saving their honour, their most valuable possession, their credit. It makes it impossible for them to borrow a penny on the security of their real estate. . . . It reduces them practically to the position of being unable to do anything with their property; and all by way of protecting them. In this state of things, the only hope is legislation, which cannot come too soon."

Finally, in 1904, the law 4 Edw. VII, c. 42, was enacted, adding to the article the words "saving the rights of creditors who contract in good faith". With this amendment, article 1301 assumed its present form.[7] It has remained unchanged ever since.

Such is the history of article 1301 in the law of the Province of Quebec. One question remains: Did the members of the Special Council invent the prohibition set forth in section 36 of the Registry Ordinance or did they base themselves on a law previously existing elsewhere? Although we cannot state with complete certainty the source of this provision in the ordinance, because we do not seem to have any report of the debate or discussion that must have preceded its enactment, all the judges and writers who have dealt with the question are agreed that the councillors must have taken their inspiration from the Roman Senatusconsultum Velleianum, which was enacted about the time of the reign of Claudius (41-69 A.D.) and which, after some modification, was included in the Pandects of Justinian, the Byzantine Emperor, remaining until comparatively recent times, except perhaps during the Dark Ages, the law of most of Europe.[8]

Now, the Senatusconsultum Velleianum never formed part of the law of Quebec. When he created the "Conseil Souverain de Québec" in 1663, King Louis XIV of France introduced into Canada the law of France as it existed at that time. This law, with local modifications, remained in force until the country was conquered by the English and a Royal Proclamation, on October 7th, 1763, ordered that all cases before the courts, both civil and criminal, were to be decided according to law and equity and, in so far as possible, in conformity with the laws of England. The Quebec Act, sanctioned in 1774, declared that in civil matters it was the previously existing French law that was to be applied in the courts of the province. The Constitutional Act of 1791, which divided the colony into two provinces, Upper Canada and Lower Canada, provided that the laws previously in existence were to continue in force. A similar provision was contained in the Act of Union of 1840.

It is clear that any law of France which had been abrogated before 1663 did not become part of the law of Quebec. This applies to the Senatusconsultum Velleianum, which, as we shall see, was abolished in France in the year 1606.

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[7] See *supra*, p. 345 for the wording of the present article.

[8] See remarks of Gervais J. in *Lebel* v. *Bradin* (1913), 19 R.L.n.s. 16 (C.A.): "L'article 1301 . . . reproduit partiellement le senatus consulte Vellein d'une application générale en droit romain, puis spéciale en l'ancienne législation francaise . . .".

The Senatusconsultum Velleianum, as originally enacted at Rome, forbade all women, married or not, to oblige themselves (become surety) for anyone and it declared null and void any obligation entered into in contravention of it.[9] Later, in his Novel 134, c. 8, Justinian permitted a woman to become surety for any person other than her husband, provided she renounced the benefit of the Senatusconsultum in a public act. A further law of Justinian declared valid a woman's obligation in favour of a person other than her husband if she ratified it after two years from the date of the obligation.[10] But she still could not be surety for an obligation of the husband.

Such was the law until the barbarian invasions. During the Dark Ages, the Roman law was plunged into obscurity, but it finally emerged as the law of practically the whole of Europe. In France, towards the twelfth century, the Senatusconsultum, as applied to obligations in favour of the husband only, re-appeared, at first in the "pays de droit écrit", from which it spread to the "coutumes" of the northern part of France.[11]

In the 16th century, the Senatusconsultum Velleianum, as applied to the obligation of a wife in favour of her husband, was in force everywhere in France, but the wife could renounce the protection it gave her, provided she did so before a notary and in the deed of obligation itself. Thus the protection of the Senatusconsultum was completely nullified, since the clause of renunciation was invariably inserted and became a mere formality. It is true that the notary was supposed to tell the wife what her rights were and the consequences that might ensue from her renunciation. As may be imagined, the only result of all this was to give rise to litigation, which became so widespread and far-reaching as to constitute a scandal. Finally, in August 1606, King Henri IV issued an edict abolishing the senatusconsultum, as well as the Novel of Justinian. This edict was issued at the request of nearly all the provinces of France. It was registered in the *Parlement* of Paris in 1607 and subsequently in most of the other jurisdictions.

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[9] The terms of the Senatusconsultum and the comments of the Roman jurists upon it are to be found in the 16th book of the Pandects of Justinian. See the excellent text and commentary by Pothier, translated into French by Bréard-Neuville, published in 1821 under the name of "Pandectes de Justinien, mises dans un nouvel ordre", pp. 228 to 280. In referring to the Pandects, the writer will cite it as Pothier, Pandectes.

[10] 1. 22 C. ad Senatusconsultum Velleianum.

[11] See article by J.J. Beauchamp in (1896), 2 R.L.n.s. 321. He quotes an interesting contrary custom which prevailed in Britanny: "Femme ne peut s'obliger pour autres, si ce n'est pour son père et mère, ou pour son seigneur époux ou pour ses enfants".

Thereafter, in France,[12] a married woman could oblige herself in favour of her husband with no other formality than the customary authorization of the husband himself. Article 1431 of the Civil Code of France implicitly confirms the right of the wife to become surety for her husband.[13]

The principle laid down in article 1301 C.C., first appearing in the law of what is now Quebec in 1841, marked a radical departure from the previously existing law, which imposed no restriction, other than the necessity for authorization by the husband, upon the wife's contracts with or for her husband.[14] The only significant change in the original form of the prohibition was made in 1904, when the words "saving the rights of creditors who contract in good faith" were added.

Juridical Analysis of Article 1301 C.C.

1. *What is meant by "bind herself" in the article?*

Both the Registry Ordinance and the Consolidated Statutes specifically provided that the debts for which a married woman might not "incur liability" were those contracted "by her husband" (either before or during the marriage). The prohibition has always been taken to refer to a contract whereby the wife bound herself for the future, not to one by which she immediately alienated her property with her husband or for his benefit. Thus, the prohibition is really against a contract of suretyship by the wife in favour of her husband, whether the suretyship is personal or by way of a pledge or hypothecation of her property.

It is hard not to conclude that the codifiers, in drafting article 1301, were unfortunate in their choice of words when they substituted "bind herself" ("s'obliger" in the French version) for the "incur any liability" of the Consolidated Statutes. A wife "binds herself" by all her contracts, whether of alienation or of suretyship, whereas she "incurs a liability" only when she binds herself

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[12] Except in the few jurisdictions that did not register the edict. The law of Quebec is based on the Coutume de Paris.

[13] The article reads: "La femme qui s'oblige solidairement avec son mari pour les affaires de la communauté ou du mari, n'est réputée, à l'égard de celui-ci, s'être obligée que comme caution; elle doit être indemnisée de l'obligation qu'elle a contractée" (like any other surety).

[14] The husband and wife were also forbidden to confer benefits upon each other. Article 282 of the Coutume de Paris provided: "Homme et femme conjoints par marriage, constant icelui, ne peuvent avantager l'un l'autre par donations entre-vifs, par testament ou ordonnance de dernière volonté, ni autrement, directement, ni indirectement, sinon par don mutuel, comme dessus". A similar provision is to be found in article 1265 C.C., except as to the restriction on testamentary dispositions (which was abolished by the Imperial Acts, 14 Geo. III, c. 83, and 41 Geo. III, c. 4).

for the future, as in a contract of suretyship. However, it is clear from their report that the Codifiers had no intention of innovating and intended to re-enact the previously existing law.[15]

Rinfret J. of the Supreme Court of Canada (as he then was) stated the principle in *Laframboise* v. *Vallières:*[16] "L'on est d'accord . . . pour interpréter cet article comme une prohibition à la femme mariée de cautionner, de garantir, de s'engager pour l'avenir 'avec et pour son mari'; et il est admis que l'acte juridique ainsi proscrit par le législateur est le contrat de garantie ou de sûreté. Le mot 's'obliger' dans cet article, doit s'entendre comme indiquant seulement le contrat de cautionnement."

Another case that illustrates the principle is *Equitable Life* v. *Larocque.*[17] In this case, the husband took out a policy on his life and later made his wife the beneficiary. After some time, she obtained from the insurance company an advance against the cash value of the policy and immediately endorsed over to her husband the cheque she received from the company. This process was repeated several times. Ultimately a position was reached, the premiums not having been paid for some years and having been charged against the cash value of the policy, where the policy had no further value against which premiums could be charged, and it accordingly lapsed. Then the husband died. The wife proceeded to claim against the company, asserting that the advances to her were loans and that she had obliged herself for her husband in violation of article 1301. (If the loans were invalidated, there would have been enough cash value to keep the policy in force until the husband's death.) The Supreme Court held that the advances made by the company were not loans, since the wife was under no obligation to repay them. The terms of the policy gave the beneficiary an absolute right to demand such advances, and the company had no right to refuse them. The company was merely carrying out its obligations under the policy and had no reason to inquire what the wife did with the money. Article 1301 was not violated because the wife did not "bind" herself. She did not borrow and did not undertake to repay.

In speaking of suretyship, one should keep in mind that the real nature of the contract must be looked at rather than the name given to it by the parties, often in an attempt to evade the law. It must also be remembered that "suretyship" includes such things

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[15] See report of Codifiers cited in Delorimier, La Bibliothèque du Code Civil, vol. 10, p. 711.

[16] [1927] S.C.R. 193, at p. 197.

[17] [1942] S.C.R. 205, See also the statute 6 Geo. VI, c. 64, amending the Act respecting Insurance by Husbands.

as a pledge of the wife's property or a hypothec on her immoveables, both of which are regarded as "real" suretyship. In *Rodrigue* v. *Dostie*,[18] the wife "sold" her immoveable, acknowledging to have received in part payment of the price a sum of $8000. The "purchaser" agreed to re-transfer the property to her upon repayment of this sum. Actually, the wife was paid nothing by the supposed purchaser. The purpose of the transaction was to guarantee the payment of a sum of $8000 owing by the woman's husband to the creditor (purchaser). The court held that the transaction was not an alienation but a contract of "real suretyship" in disguise; it was accordingly declared null and void as violating article 1301. A similar case of suretyship disguised as a sale with right of redemption is the famous one of *Trust and Loan Co.* v. *Gauthier*.[19] Here, likewise, the real contract was looked at, not the semblance the parties had given it. The point will be rendered clearer by our examination of the next question:

2. *Can a wife legally pay her husband's debt or renounce her rights in favour of a creditor of the husband?*

It seems illogical to permit a wife to hand over her assets to satisfy her husband's debt, and yet to forbid her to pledge her assets for the same purpose or undertake to pay his debt at a future time. Yet that is what the law, as interpreted by the courts, provides. The explanation commonly given is that a wife is less likely to yield to her husband's demand that she give up her property immediately for his benefit than she is to accede to a request that she oblige herself to pay in the future (if the husband does not himself meet the payment when due). In Roman times, in the Pandects of Justinian, we find the same reasoning: "Facilius se obligat mulier quam alicui donat".[20]

In the case of *Boudria* v. *McLean*[21] this consideration is thus stated by Meredith J.: "We all know the dangerous consequences of the contract of suretyship. And a wife, when asked to become the surety of her husband, is placed in a position of a peculiar difficulty. How can she doubt the honesty of her husband? And she is only too ready to believe the assurance that when the debt matures, there will be ample means to meet it without troubling her. I have no doubt there are some, if not many, women who would have sufficient determination to refuse to alienate their own

[18] [1927] S.C.R. 563. The court declared that the principle of *Salvas* v. *Vassal* (1896), 27 S.C.R. 68, does not apply where a party is incapable of contracting and where a matter of public policy is involved.
[19] [1904] A.C. 94.
[20] Pothier, Pandectes, vol. 6, p. 248.
[21] (1862), 6 L.C.J. 65, at pp. 73-74 (C.A.).

property, and who yet might be induced to become security for the debts of their husbands. . . . The object of the ordinance seems to me to have been to guard married women against the danger to which I have adverted."

In any case, the principle is clearly recognized in our law that a wife may renounce in favour of a creditor of her husband any rights she may have as well as pay her husband's debts. In *Boudria* v. *McLean*, the Court of Appeal decided that the wife could renounce the exercise of her hypothecary rights for her matrimonial reprises on an immoveable alienated by her husband. What she is entering is a present alienation not a suretyship.[22] In 1927, the Supreme Court, in *Laframboise* v. *Vallieres*,[23] decided that a wife may renounce in favour of a third party a hypothec granted by her husband in their marriage contract.

The distinction between payment and suretyship was strikingly illustrated in *Leclerc* v. *Brassard*.[24] In this case, the Court of Appeal decided that a wife may validly pay a debt of her husband by ceding to his creditor a debt owing to her by a third party. But if she undertakes to guarantee the payment of the debt by the third party ("fournir et faire valoir"), the undertaking is void, although the transfer of the debt is valid and permits the husband's creditor to claim payment from the third party. Another case to illustrate the distinction is *Lariviere Inc.* v. *Dame Gauthier*,[25] in which it was decided that, although a wife may pay her husband's debt, she cannot be held to a contract by which she *obliges herself* to pay his debt.[26]

The point need not be further laboured. It is clear that what is forbidden is a contract by which the wife binds herself or her property for the future; she is not forbidden to pay her husband's debts or to renounce her rights for his benefit.[27]

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[22] The same question was decided in the same sense in *Armstrong* v. *Ralston* (1864), 9 L.C.J. 16 (Superior Ct.). See to the same effect *Bank of Toronto* v. *Perkins* (1881), 1 D.C.A. 357.

In *Hogue* v. *Cousineau* (1879), 23 L.C.J. 276 (Superior Ct.), the law was stated thus by Jette J.: "Ainsi, elle peut payer pour son mari, car ce n'est pas là s'obliger pour lui, puisqu'elle ne contracte aucune obligation en ce cas. De même une femme mariée peut renoncer à son hypothèque légale sur les biens de son mari en faveur d'un créancier de ce dernier, en faisant cette renonciation elle ne s'oblige point, elle aliène". See to the same effect *Hamel* v. *Panet* (1876), 2 App. Cas. 121 (P.C.)

[23] [1927] S.C.R. 193.

[24] (1927), 42 K.B. 460 (C.A.).

[25] (1921), 59 S.C. 420 (Ct. of Review).

[26] See also *Auge* v. *La Banque d'Hochelaga* (1908), 34 S.C. 481, in which the Court of Review decided that a wife may lend money to her husband to pay his debts.

[27] However, Mignault says (vol. 6, p. 188, footnote): "La femme ne peut cependant donner ses immeubles au créancier de son mari en paiement de la dette de ce dernier". He cites a case of *Walker* v. *Crebassa* (1865), 9 L.C.J.

3. *Can a wife "bind herself" for her husband?*

The law says that the wife cannot bind herself "with or for" her husband: therefore she cannot bind herself for him. Here, however, we encounter complications. Sometimes it is not clear whether the obligation is for the benefit of the husband or of the wife: sometimes an effort is made to evade by a subterfuge the prohibition of article 1301. Moreover, effect must be given to the result of the change in the law made by the amendment of 1904, which added the words "saving the rights of creditors who contract in good faith".

Before the amendment of 1904, the criterion adopted by the courts was this: If the obligation does not result in benefit for the wife, it is considered to be for the benefit of the husband, and this regardless of the good faith of the creditor.

The case of *Trust and Loan Co.* v. *Gauthier*,[28] mentioned earlier in this article, placed the final stamp of approval on a long series of cases all to the same effect. In the Court of Appeal, Mr. Justice Wurtele, speaking for the majority of the court, said: ". . . the party who is about to make a loan to a wife is placed on his guard. It is for him to use proper caution and to see to the due employment of the loaned money for the purposes of the wife; if he does not do so and is subjected to a loss, he has, in the face of the law, only himself to blame".[29] The holding of the Privy Council was to the same effect: "A wife's mortgage of her separate property is void both as to the debt contracted and as to the disposition of it if it is in any way for the husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed. . . . 'For her husband' means generally in

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53 (Ct. of Review), in support, but the report does not indicate the reasoning of the learned judges. In the later case of *Belanger* v. *Brown* (1870), 14 L.C.J. 259, the Court of Review rendered a similar judgment, but remarked that the case would have been different if the wife had sold her property and used the proceeds to pay her husband's debt. Mignault tacitly accepts these holdings; in any case, he does not express dissent.

The reason for the distinction in the latter case may perhaps be found in article 1592 C.C., which says: "The giving of a thing in payment is equivalent to a sale of it, and makes the party giving liable to the same warranty". Since the wife who gives a property in payment is bound to warranty against eviction and against latent defects, she may be said to be binding herself for the future and thus violating article 1301. The obligation of warranty would not be severable, since it is a legal obligation, not like the contractual one of "fournir et faire valoir" above referred to.

In the recent case of *Allard* v. *Legault*, [1945] S.C. 287, it was held by the Superior Court that a wife could validly sell her assets and use the proceeds to pay her husband's debts.

[28] (1903), 12 K.B. 281; [1904] A.C. 94.

[29] At p. 294.

any way for his purposes as distinguished from those of the wife."[30]

It is unnecessary to examine all the many cases that preceded the judgment in *Trust and Loan* v. *Gauthier*. Two examples will suffice. In a case decided under the Ordinance of 1841, it was held that a joint and several obligation of the husband and wife for a loan, the proceeds of which were used to pay the husband's debt, was null and void as regards the wife.[31] Then in *Société de Construction de St. Hyacinthe* v. *Brunelle*,[32] it was decided that, although the loan was made to the wife herself and in the deed she declared that she was borrowing for herself, nevertheless her obligation was illegal, since it was in reality made for the purpose of guaranteeing the husband's debt.

What was the effect of the amendment of 1904, which was designed to protect creditors in good faith? What constitutes good faith? Can a creditor merely shut his eyes to what is going on and then claim to be in good faith? The jurisprudence affords reasonably satisfactory answers to these questions.

In *Lebel* v. *Bradin*,[33] decided in 1912, the Court of Appeal thus stated the rules for the determination of "good faith":

> Le créancier qui prête à la femme mariée, séparée de biens, pour être réputé de bonne foi, doit verser le produit de l'emprunt à la femme elle-même, et il doit ignorer et n'avoir aucune raison de croire que cet argent pourra servir les intérêts du mari;
>
> Le créancier ainsi de bonne foi, n'est pas responsable si, subséquement, la femme remet les fonds empruntés à son mari.
>
> Depuis l'amendement [of 1904] le créancier n'est plus tenu de surveiller l'emploi des deniers provenant du prêt qu'il a fait.

This principle was followed in the subsequent case of *Leclerc* v. *Bedard*,[34] in which the Court of Review decided that, if a wife

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[30] It is to be noted that in this case the obligation was disguised as a sale with right of redemption. The loan company purchased the property for a certain sum, giving the wife the right to redeem it within one year. It was proven that the money loaned was immediately handed by the wife to her husband to be used by him in settling a claim made against him by one of the creditors. The courts held that, although the contract was on the surface a contract of sale, it was really a contract of suretyship.

Pothier, Pandectes, vol. 6, p. 232, in commenting on the Pandects of Justinian, indicates that in Rome the law was similar to ours in this respect: "... sive se, sive res suas in rem alterius obliget [mulier]; ex quacumque contractus specie, pro quacumque persona, et erga quemcumque creditorem, locus est senatusconsulto; item sive fraus senatusconsulto facta sit". (Of course, under our law, the "quacumque persona" can only be the husband.)

[31] *Little* v. *Diganard* (1861), 12 L.C.R. 178 (C.A.).

[32] (1870), 1 R.L. 557 (Superior Ct.).

[33] (1913), 19 R.L.n.s. 16. An earlier case, *Beaudoin* v. *Brule*, decided in 1908 (15 R.J. 97, Superior Ct.) had laid down the rule that the burden was upon the creditor to prove that the wife had benefited by the money loaned. This was an isolated decision, and was not followed in later cases.

[34] (1913), 45 S.C. 129.

obliges herself alone, she must prove that the transaction benefited her husband to the knowledge of the creditor, in order to escape liability. In *Brault* v. *Dame Sephton et vir*,[35] the Court of Review rendered a similar judgment: "Un prêteur de bonne foi d'une somme d'argent à une femme mariée, séparée de biens, ne perd pas son droit contre elle si, hors sa connaissance, elle remet la somme empruntée à son mari. Il n'est pas tenu de voir à l'emploi que fait cette femme de son argent." Similarly, in *Lessard* v. *Poulin*,[36] the Court of Appeal held that if the money is loaned and handed over to the wife separate as to property, the burden of proof is upon her to prove that the loan was really made to the husband and that the lender knew or had reason to know the true position.[37]

In *Banque Canadienne Nationale* v. *Audet*,[38] it was held that when a husband and wife together guarantee to a bank the repayment of a loan made by the bank to a limited company in which the husband is a shareholder, the wife's undertaking is one for the benefit of the husband. In such a case, the burden of proof is upon the bank to establish its good faith. Mr. Justice Rinfret said (p. 313): "Dans le cas où la femme s'oblige avec son mari, l'amendement [of 1904] permet d'établir la bonne foi du créancier. Mais la loi présume contre lui; et c'est donc à lui qu'il incombe de la prouver." Thus, a distinction is made between the case in which a wife obliges herself alone, and one where she binds herself with her husband. In the former case, the burden of proof is on the wife.

In *Banque Canadienne Nationale* v. *Carette*,[39] the Supreme Court held: "Transfer of an insurance policy, issued on the life of the husband for the benefit of his wife at his death but also payable to him if living at a certain specified date, which transfer was made jointly by the husband and wife to secure reimbursement of advances made to the husband by a bank, is illegal and void, as to the wife, such transfer being in contravention of the provisions of article 1301 C.C.[40] The question of good faith does

[35] (1921), 27 R.L.n.s. 115.
[36] (1935), 60 K.B. 219.
[37] See *Pepin* v. *Lemire* (1939), 78 S.C. 192 (Superior Ct.), in which it was decided that if the creditor had reason to know the obligation was contracted for the husband, he could not rely upon the exception of good faith.
[38] [1931] S.C.R. 293.
[39] [1931] S.C.R. 33.
[40] In this case, there was also raised a question on the effect of the act known as "An Act respecting life insurance by husbands and parents". On this point, the court said: "The Legislature, in enacting article 7405 R.S.Q. 1909, now article 30 of R.S.Q. 1925 c. 244 (An Act respecting life insurance by husbands and parents), although authorizing in general terms the transfer of a life insurance policy by the insured and the beneficiaries, did not intend

not seem to have been seriously considered, since the bank obviously knew that the husband was indebted to it and that the wife was putting up her rights under the policy as a guarantee for the payment of his debt. The bank obviously was not in "good faith". To the same effect as the *Carette* case were *Daoust Lalonde & Cie.* v. *Ferland*[41] and *Banque Provinciale* v. *Poulin and New York Life Ins. Co.*[42] In both, the assignment by the wife of a policy on her husband's life, of which she was the beneficiary, to a creditor of the husband, was declared null and void as being in contravention of article 1301.[43]

From these cases, it appears that the creditor is not considered in good faith if he has reason to suspect that the husband will benefit from the wife's undertaking. Clearly, he is put on inquiry if the wife binds herself together with the husband. But when the wife contracts alone, in what circumstances will the good faith of the creditor be marred? Obviously, if he has knowledge that the wife's obligation is for her husband, he is not in good faith. His good faith is likewise lacking if he has reason to know or believe that the transaction was for the benefit of the husband.[44] In what circumstances he will be held to have reason to know or believe is always, of course, a question to be decided on the facts of each case. It seems clear that the creditor cannot shut his eyes to what would be visible to an ordinarily prudent and perspicacious person (presumably the traditional "bon père de famille") and lay claim to good faith based upon lack of knowledge.[45]

4. *Can a wife bind herself with her husband?*

This question resolves into three sub-questions, since the obligation of the wife with her husband may be incurred (a) for the husband, (b) for a third party, or (c) for the benefit of the wife. As for (a), we have already seen that a wife cannot bind herself

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to make any change as to the provisions of the Civil Code which deal with personal incapacities and contraventions of public order, and notably as to the prohibition contained in article 1301 C.C."

[41] [1932] S.C.R. 343.

[42] (1933), 55 K.B. 498.

[43] In the *Daoust Lalonde* case, it was held that the wife could recover from the creditor the proceeds of the policy, which had been paid to him upon the husband's death.

[44] *Lessard* v. *Poulin* (1935), 60 K.B. 219; *Pepin* v. *Lemire* (1939), 78 S.C. 192.

[45] In the recent case of *Boyer* v. *Dame Boyer*, [1950] S.C. 375, Tyndale A.C.J., in the Superior Court, dismissed a creditor's claim against a wife because he came to the conclusion on the evidence that the creditor had knowledge that the money was to be used by the husband. On the facts of this case, the same result could have been arrived at by applying the "reason to believe" principle.

(become surety) for her husband. She cannot do so either alone or together with him.[46]

Can a wife bind herself together with her husband for the benefit of a third party? Again it must be understood that "bind herself" means "become surety" either by incurring a personal obligation or by hypothecating or pledging her property. Our courts have clearly and unmistakably answered this question in the negative. It is hard to see how they could do otherwise in the face of the Codifiers' statement:[47]

> L'article du Code [Napoleon] conforme à l'ancienne jurisprudence française, reconnaît la validité d'une telle obligation en faveur des tiers; seulement la femme, dans ce cas, a son recours contre son mari. . . . Notre article est différent; l'acte par lequel la femme s'oblige pour son mari ne la lie nullement si elle renonce.[48] Les engagements qu'elle contracte avec son mari ont été, dans notre article, assimilés à ceux qu'elle contracte pour lui, d'après une présomption admise par les tribunaux, qui ont justement donné cette extension à la loi.

The Codifiers cite as an example of the old jurisprudence *Jodoin* v. *Dufresne*,[49] decided in 1853 by the Court of Appeal. In that case it was held: "Une femme ne peut s'obliger avec son mari que comme commune en biens, et . . . dans l'espèce un cautionnement par une femme, conjointement avec son mari, pour un tiers, est nul d'après les dispositions de l'Ordonnance de la 4^{e} Vict. ch. 30, sect. 36".[50]

The principle laid down in the *Jodoin* case, and adopted by the Codifiers, has been consistently applied by the courts. For example, in *Leclerc* v. *Ouimet* [51] it was held that where a wife, together with her husband, endorsed a promissory note for the benefit of a third party, she was not bound. And again in *Banque Canadienne Nationale* v. *Audet*,[52] the Supreme Court held that a wife cannot, jointly with her husband, guarantee a debt of a third party. The judgment turned on another point, but the court clearly set forth its agreement with the principle just enunciated. The

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[46] See *Banque Canadienne Nationale* v. *Audet*, *Banque Canadienne Nationale* v. *Carette*, *Daoust Lalonde & Cie.* v. *Ferland*, *Banque Provinciale* v. *Poulin*, *ante*, pp. 357-358.

[47] See Codifiers' Report, cited in Delorimier, La Bibliothèque du Code Civil, vol. 9, p. 711.

[48] This refers to the case of a wife in community of property. If she renounce the community, she is not bound by a contract entered into for the benefit of the husband. If she did not renounce, she would take over one-half of the debt in her share of the community.

[49] Delorimier, *op. cit.* vol. 10, p. 305.

[50] This case is of particular interest because the Registry Ordinance did not annul contracts entered into "with" the husband. It said, as we have seen, "for the debts . . . entered into by her husband . . .".

[51] (1890), 19 R.L. 78 (Superior Ct.).

[52] [1931] S.C.R. 293.

conclusion is inescapable that the wife is prohibited from becoming surety, together with her husband, for a third party.

Can a wife bind herself together with her husband for her own benefit? This question presents apparent difficulties from the outset. The Code itself makes no distinctions: it says baldly that "a wife cannot bind herself either with or for her husband . . ." and, if we take the article as it stands, the law seems to say that a wife cannot enter into any contract whatever together with her husband.

Certainly the Codifiers had no intention of introducing such a radical innovation into Quebec law. Soon after the Registry Ordinance was passed, the problem was discussed in an article by Louis Réné Lacoste.[53] Putting the question, Can the wife oblige herself for her own affairs, either alone or with her husband? he unhesitatingly answers it in the affirmative, citing in support two unreported cases decided by the Court of Appeal in 1847.[54] As has already been shown, the consolidation of 1861 did not materially vary the previously existing law, and the Codifiers likewise indicated their intention of re-enacting the substance of the law as they found it. Thus, we are entitled to conclude that article 1301 was not intended by the Codifiers to prevent the wife from contracting, either alone or with her husband, for her own affairs.

Moreover, if we are right in concluding, as we have, that the prohibition of the Code is directed against suretyship only, then surely it cannot apply to the contract of the wife for her own benefit, since it is essential to the contract of suretyship that it be for "another". Article 1929 C.C. says that "Suretyship is the act by which a person engages to fulfil the obligation of another in case of its non-fulfilment by the latter". A wife obviously cannot be surety for herself, and therefore her contract for her own affairs cannot be regarded as coming under the ban of article 1301.[55]

In the Roman law, it was unanimously admitted that the Senatusconsultum Velleianum did not apply where the woman contracted for her own benefit.[56]

The point under consideration is well illustrated by the juris-

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[53] Dissertation de Quelques Questions sur la section 36ième de l'Ordonnance de 1841 sur l'Enregistrement (1847), 3 R. de L. 121.

[54] *Vallée* v. *Guilbault* and *Hudon* v. *Dubord*.

[55] As a matter of fact, the Codifiers themselves provide an example of a case in which the husband and wife may both be obliged. In article 1302 C.C., it is provided that "A husband who contracts obligations for the individual affairs of the wife, has a recourse against her property in order to obtain the reimbursement of what he is obliged to pay by reason of such obligations". This article clearly envisages a guarantee by the husband for a debt of the wife, and implies that both are responsible.

[56] Pothier, Pandectes, vol. 6, pp. 249 ff.

prudence. In *Ruelland* v. *Martel*,[57] it was held that if a husband and wife together borrow for the purpose of defraying their joint living expenses, the wife can be held liable for one-half of the amount borrowed, since she benefited to that extent.[58] In *Lefebvre* v. *Dagenais*,[59] it was held that a wife in community may contract together with her husband for the purposes of a business carried on by her.[60]

However, the Court of Appeal, in *Gagnon* v. *Boivin*,[61] decided that where a business was sold jointly to a husband and wife, separate as to property, and the husband and wife jointly signed notes for the purchase price, the notes, in so far as the wife was concerned, were null and void. The contract entered into by the wife was one *with and for* her husband, especially since the proof disclosed that the husband was the real trader and that the creditor so regarded him by entering his name alone in its books.[62]

An important case on the point we are considering is *Banque d'Hochelaga* v. *Jodoin*,[63] in which the Privy Council decided that the wife's obligation entered into jointly with her husband towards a third party was valid, since all the assets for which the liability was incurred were the property of the wife, the husband being penniless. This was true even though some of the assets were for a time in the name of the husband.

From all the foregoing, it might perhaps be argued that the words "with or for" in article 1301 mean nothing more than the word "for" alone. That this is not entirely true was brought out by the Supreme Court of Canada in *Banque Canadienne Nationale* v. *Audet*.[64] In this case, the wife, separate as to property, was a shareholder in a limited liability company in which her husband was also a shareholder. Together, they signed a joint and several guarantee in favour of a bank for advances made and to be made to the company. The court held that this was a violation of article 1301 and that the wife could not be held liable on the guarantee. It is true that the wife was binding herself partly for her own

[57] (1932), 38 R.L.n.s. 257.

[58] However, where a husband and wife jointly bought goods for their common household and the seller knowingly charged them to the husband, he has no claim against the wife: *Derouin* v. *Dansereau* (1903), 10 R.J. 25 (Superior Ct.). See also *Gloutnay* v. *Davignon* (1911), 40 S.C. 228 (Ct. of Review).

[59] (1938), 45 R.L.n.s. 278 (Superior Ct.)

[60] See also *Page* v. *Nadeau* (1935), 75 S.C. 376.

[61] (1928), 44 K.B. 160.

[62] The judgment does not lay down any general principle; it deals only with the specific facts, which showed a clear intention of the wife to guarantee her husband's debt.

[63] [1895] A.C. 612.

[64] [1931] S.C.R. 293.

business, but the fact remained that she was binding herself "with" her husband and certainly "for" him. And the bank, which knew that the husband was a shareholder of the company, could not plead good faith within the meaning of the amendment of 1904.[65]

Finally, under this head, it may be pointed out that "with her husband" does not necessarily mean "in the same deed". Thus, if a husband should guarantee a loan made to a third party, and the wife on the following day should sign another deed making her jointly and severally liable with her husband for the obligation, she would be protected by article 1301.[66]

5. *What is the nature of the nullity decreed by article 1301 C.C.?*

It has repeatedly been decided that the nullity is absolute, destroying the obligation at its root. The prohibition of article 1301 is generally considered to concern public order. This being so, articles 989 and 990 C.C. are a conclusive answer to the question:

> 989. A contract without a consideration, or with an unlawful consideration *has no* effect. . . .
>
> 990. The consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order.

The result is that the pretended contract of the wife is no contract at all and can give rise to no rights. This sometimes leads to far-reaching results. For instance, in *Sutherland* v. *Bedard*,[67] the Court of Appeal decided that the nullity of the wife's contract was absolute to such a degree that it carried with it the nullity of the contract by which a third party guaranteed the performance of it. And the third party had the right to set up this nullity in defence.[68] In *Phialcoski* v. *Gareau*,[69] the Court of Review held that the nullity of the wife's contract need not be set up in the pleadings, but will be declared by the court if it is established during the hearing that the wife has in fact bound herself in contravention of the article. In *Banque Nationale* v. *Guay*,[70]

[65] The same principle was applied by the Supreme Court in *Sterling Woolens* v. *Lashinsky*, [1945] S.C.R. 762. In this case, the facts were similar to those in the *Audet* case, except that in the *Lashinsky* case it was brought out that the husband owned practically all the shares of the company. The court remarked: "It is immaterial whether the husband held more shares than the wife . . . or whether he held a lesser number than she did. It is sufficient that he held a substantial interest in the company."

[66] See article by J. J. Beauchamp in (1896), 2 R.L.n.s. 321.

[67] (1903), 13 K.B. 128.

[68] In the earlier case of *Warmington* v. *Lapierre* (1892), 1 S.C. 69, the Court of Review decided that only the wife and her creditors could set up the nullity. This seems to be an isolated judgment.

[69] (1890), 34 L.C.J. 200.

[70] (1891), M.L.R. 7 S.C. 144 (Superior Ct.).

it was held that a promissory note given by a wife to a creditor for her husband's debt was null and void even in the hands of a bank in good faith which had discounted it without knowing of the cause of nullity. This was simply an application of the principle of absolute nullity.[71] A decision to the same effect was rendered more recently by the Court of Appeal in *Gagnon* v. *Boivin*.[72] In this case, the husband and wife jointly signed promissory notes in connection with a transaction which the court held to be within the prohibition of article 1301. It was ruled that the notes were null and void as regards the wife, even in the hands of a holder for value without notice.

The question arises whether the amendment of 1904, protecting creditors who contract in good faith, affects the nature of the nullity. It is submitted that it does not. The amendment shifts the burden of proof; instead of the creditor being presumed to know that the wife was binding herself for her husband, it is now necessary to demonstrate that he had such knowledge or had reason for suspicion. But once this demonstration is made, the nullity is an absolute one and the contract is null and void from its inception.[73]

Before the amendment of 1904, it was argued by some that it was immoral to allow the wife to set up the nullity of her obligation against a creditor to whom she had declared that the transaction was for her benefit, not her husband's. For instance, the wife might borrow money jointly with the husband, declaring to the lender that the money was for her own purposes, and then, when the debt became due, show that the money was given by her to her husband. The husband being insolvent, the creditor was without recourse. (As we have seen, before the amendment of 1904 the wife's obligation in such a case was null and void, regardless of the good or bad faith of the creditor.) Thus an immoral result was arrived at: the law had put the wife in a position where she could cheat the lender.

The answer is that the law was clear, leaving no room for distinctions. *Dura lex sed lex.* The situation could be remedied only by legislation. The amendment of 1904 did away with the possibility of frauds of this type in cases where the creditor was in "good faith".[74]

[71] See to the same effect *Banque Nationale* v. *Ricard* (1893), 3 Q.B. 161.
[72] (1928), 44 K.B. 160.
[73] See on this point an article by Gérard Trudel, Capacité légale de Contracter, in (1945), 5 Revue du Barreau 413, at p. 435.
[74] It is interesting to note that in Roman law the woman was not protected if she was in bad faith (assuming that the creditor was himself in good faith): "Decipientibus mulieribus senatusconsultum auxilio non est. In-

However, in the recent case of *Sterling Woolens* v. *Lashinsky*,[75] the Supreme Court pointed out that even if there was fraud on the part of the wife, her obligation was nevertheless null and void if the creditor was not technically in good faith, the matter being one of public order. This was a sound holding, in view of what has just been said. The wife had bound herself for a debt of the company in which she and her husband were both shareholders. The creditor was well aware that the husband was a substantial shareholder in the company and therefore he could not claim good faith. Such being the position, he did not come within the saving clause of the amendment of 1904, and we find ourselves in a situation where the authorities before that amendment apply.

6. *Can a wife reclaim a payment made by her in virtue of a contract that violates article 1301?*

In *Banque Provinciale* v. *Poulin and New York Life Ins. Co.*,[76] previously referred to, the wife, who was the beneficiary under an insurance policy on her husband's life, assigned the policy to a creditor of the husband to guarantee the payment of the husband's debt. This, as we have seen, was a clear violation of article 1301. Then, later, she joined with her husband and the assignee in surrendering the policy for the cash value, which was then paid over to the assignee. The wife attacked the entire transaction as being in violation of article 1301. The assignee admitted that the original assignment was illegal, but claimed that the surrender of the policy and the payment of the funds to him were legal as being merely a payment (not a guarantee) of the husband's debt. The Court of Appeal rejected this defence: the later payments were merely the carrying out of the original illegal assignment.[77] The wife could reclaim the cash surrender value from the assignee.[78]

It is abundantly clear that the wife can reclaim what she has paid to a creditor in virtue of a contract that violates article 1301.[79]

firmitas enim foeminarum, non calliditas auxilium meruit." (Pothier, Pandectes, vol. 6, p. 264)

[75] [1945] S.C.R. 762.

[76] (1933), 55 K.B. 498.

[77] See on this point: *Silverstein* v. *Provincial Bank* (1934), 40 R.J. 124 (Superior Ct.), and *Pepin* v. *Lemire* (1939), 78 S.C. 192 (Superior Ct.).

[78] But only if and when her husband should predecease her, since her right as beneficiary, though a vested one, was conditional upon her surviving her husband.

[79] Moreover, in a contract that violates article 1301, there are lacking two of the requisites to the validity of a contract called for by article 984 C.C., namely "parties capable of contracting" and "a lawful cause or consideration". Hence, there is no contract, and the payment received by the creditor from the wife is received without right; he is not entitled to keep it. See Pothier (Bugnet), Traité des Obligations, No. 42.

7. Is verbal proof admissible to show the causes of nullity affecting the wife's contract?

Before the amendment of 1904, as we have seen, it was sufficient for the wife, attacking the contract, to show that her contract was in fact entered into for the benefit of the husband. It was never doubted in any reported case, except one,[80] that oral evidence was admissible and, in fact, such proof has universally been allowed.

The ground on which verbal proof is customarily said to be admissible in cases of this type was well stated by the Court of Appeal in *Mercille* v. *Fournier*:[81] "The law is one of public order. Any attempt to evade such a law is a fraud, and opens the door to oral proof to establish it, otherwise it would be useless for the legislator to pass such a law, if it were possible to evade it merely by covering it with a notarial deed."[82] The creditor has always been permitted to produce verbal evidence to prove that it was the wife who benefited by the contract.[83]

On the whole, logic, the jurisprudence and long, unbroken practice in cases involving article 1301 all combine to justify an affirmative answer to the question we are considering.

8. What is meant by the words "otherwise than as being common as to property" in article 1301?

Article 1301 says: "A wife cannot bind herself either with or for her husband, otherwise than as being common as to property". The meaning of the last phrase has never been considered to present any difficulty. For the benefit of readers not familiar with the Quebec system of community of property, a brief explanation may however be helpful. In Quebec law, in the absence of an antenuptial contract, the husband and wife are in community of prop-

[80] *Fuchs* v. *Talbot* (1863), 13 L.C.R. 494 (Superior Ct.).

[81] (1859), 4 L.C.J. 51, 9 L.C.R. 300, 347.

[82] See article 1234 C.C.: "Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument". As can be seen, the courts place considerations of public order ahead of the prohibition of this article. (The same concern for public order is undoubtedly the basis of the rule of evidence that fraud can always be proved by testimony.) The admissibility of oral evidence could also be justified by the contention that the article does not apply in cases where the question is one involving a radical nullity, in other words, one that raises the issue of whether the contract is in fact a "valid written instrument" within the meaning of the article. See on this point *Cossette* v. *Vinet*, decided by the Court of Appeal in 1898 and cited in 1 Revue du Notariat 238, at p. 245. See also *Malhiot* v. *Brunelle* (1870), 15 L.C.J. 197 (Ct. of Appeal).

[83] In *Banque d'Hochelaga* v. *Jodoin*, [1895] A.C. 612, the burden was on the bank to prove that the wife had benefited. Verbal evidence was freely and unrestrictedly introduced on both sides, and its admissibility does not seem to have been questioned.

erty. Likewise, where they do make an ante-nuptial contract in the prescribed form, they are in community of property if they so provide in the contract, if they do not expressly exclude community or if they fail to mention it.[84] Into the community fall all immoveables acquired during the marriage, as well as all the moveable property of the consorts.[85] The husband alone administers the property of the community. He may sell, alienate and hypothecate it without the concurrence of the wife.[86]

With these dispositions in mind, the "otherwise than as being common as to property" of article 1301 is easily understood. The husband, as head of the community, can enter into contracts of all kinds, the result of which is to engage the credit of the community. The wife owns one-half of the community property and is entitled to claim or renounce her half on the death of the husband.[87] If the community has liabilities, one-half of these naturally fall into her share of the community. Therefore, the wife in community of property is automatically affected by the contracts entered into by her husband. If she accepts the community, she assumes her share of the liability resulting from the contracts entered into by the husband during the existence of the community, and to this extent she may indirectly become liable for obligations entered into by her husband.[88] But it is only this indirect and problematical liability that is permitted to the wife in community of property. She cannot, any more than the wife separate as to property, become surety for her husband's debts or pledge or hypothecate her individual property [89] for the benefit of her husband (or of the community). That is the meaning of the words "otherwise than as being in community of property" in the article.

The point was discussed in *Fecteau* v. *Jobidon*.[90] In this case, it was held that a joint and several obligation of a husband and wife in community of property was void as to the wife. She could bind herself only in her quality as common as to property, and

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[84] Articles 1271 C.C. and 1384 C.C.

[85] With certain exceptions prescribed in art. 1271 C.C. The consorts may additionally own in their own respective rights property which does not fall into the community (arts. 1275, 1276, 1277, 1278 C.C. etc.)

[86] Art. 1292 C.C.

[87] Art. 1338 C.C. (or upon the rendering of a judgment declaring the parties separate as to bed and board under art. 1310 C.C.).

[88] Of course, if she renounces the community, she is under no liability for its debts.

[89] Property that does not fall into the community, *e.g.* immoveables inherited from ascendants (art. 1276 C.C.), damages collected from outsiders for bodily injuries (art. 1279a), gifts or legacies to which is attached the condition that they shall not fall into the community (art. 1272 C.C.), sums the wife earns by working (art. 1425 C.C.).

[90] (1889), 18 R.L. 95 (Ct. of Appeal).

her participation in the deed added nothing to the obligation contracted by the husband for the community.

The Adequacy of Article 1301 under the Conditions of Contemporary Society

The question of the adequacy of article 1301 in modern conditions must be discussed against the background of the legal position of married women in the civilized world of to-day. In Quebec, as elsewhere, an unmarried woman, whether spinster or widow, has absolute freedom of contracting. Except during the period of the *patria potestas* in the early Roman law and the later, comparatively short period when the Senatusconsultum Velleianum, before being restricted to married women, was applicable to all females, unmarried women have almost everywhere and at all times been allowed to contract freely.

The modern tendency is towards making the wife the equal of her unmarried sisters in civil capacity, just as, except during the Hitler period, she has tended to become enfranchised from her traditional *Kinder, Kueche und Kirche* confinement and to play a part in the world of business, the professions, education, art and politics.[91] Article 1301, which imposes on married women a restriction unknown elsewhere, must be classed as an anachronism. Moreover, it is an anachronism imported into the law of Quebec, of which it had never before formed a part. The Coutume de Paris, which was the basis of Quebec law, did not distinguish the contract of suretyship from any other contract, permitting the wife to enter into any form of contract, with her husband's authorization.[92]

It must not be forgotten that the right of renouncing the benefit of the Senatusconsultum was established in Justinian's time and existed until the abolition of the Senatusconsultum in 1606. The Civil Code of Quebec has done away with this right of renunciation and, in so doing, has re-introduced the situation as it existed before the right was given. There is therefore a regression of nineteen centuries. Thus to turn the clock backward while other parts of the world were progressively moving toward greater emancipation of women would certainly seem, on first consideration, to be completely unjustifiable. There is assuredly nothing in the character of the married women of Quebec that disentitles them to the freedom enjoyed by the married women of the rest of the civilized world.

[91] See as to the law of France, Boutard: Les pouvoirs ménagers de la femme mariée (1947).

[92] Except a gift in favour of the husband. This restriction is mutual, however, and is intended largely for the protection of creditors: see art. 1265 C.C.

On the other hand, would it not be proper to consider the possibility that the legislators of Quebec are right and all the others wrong? After all, the voice of the majority is not necessarily the voice of God. The reason commonly assigned for the enactment and continued existence of article 1301 is an alleged "weakness" on the part of women, particularly married women. Obviously, physical weakness is not referred to here, since it is not seriously suggested that in this age women can successfully be subjected to physical coercion to induce them to sign contracts of guarantee in favour of their husbands. Nor can it be mental inferiority that is meant, it being universally admitted that the level of intelligence among women is not lower than among men. What is undoubtedly implied is that married women are inexperienced in the ways of the world, particularly of the business world, and hence are easily influenced by their husbands to sign documents detrimental to their interests.

There is some force to this contention. When a woman marries she enters into a restricted sphere. Theoretically at least, and in practice in the majority of cases, her interests are centred in the home, and subsequently in the home and children. It is the husband who goes outside the home and who is in contact with the world of affairs. The wife therefore is inferior to her husband in knowledge of business and the world of finance. This has nothing to do with inferiority of intellect; it is rather a matter of lack of experience. Complicate this with the natural desire of the wife to aid her husband, especially when he assures her that her guarantee in his favour will not result prejudicially to her, and you have a situation that imperils the wife's property.

The position of the unmarried woman is different. She has to earn her living; she learns the realities of life in the school of experience. She is able to take care of her interests to a greater extent than can a wife whose attachment to and dependence upon her husband are powerful influences affecting her judgment.

It may be objected that what has just been said is not a true picture of the emancipated married woman of to-day, who, we are told, carries on business, goes to work, engages in politics: in short, does everything an unmarried woman does. This may be true in many, and even in an increasingly large number of cases, but on the whole it is submitted that the majority of married women, by the nature of their being, are subject to the restricting influences indicated, and are at a disadvantage as compared with their husbands and unmarried sisters in the matter of worldly experience. If this is so, it would seem not illogical to accord the

wife some protection against her impulse to jeopardise her property or credit for her husband.

At a recent convention of the Bar of Quebec a report was presented [93] advocating the repeal of article 1301 on three grounds, because:

(a) it results from the idea of the incapacity of the wife due to her sex;

(b) it damages her credit and her position in business, "especially in view of the uncertainty created by the present state of the jurisprudence";

(c) it may give rise to frauds and abuses prejudicial to creditors with whom the wife enters into contracts.

As for the first ground, we have just seen that article 1301 is not based upon an incapacity due to sex so much as on a lack of worldly experience. It is therefore not intended as a stigma, but as a protection. Still, although the thought of protecting the interests of the married woman may be an excellent one, the question arises whether the protection does not introduce evils greater than those from which it seeks to shield her.

This brings us to the second ground of objection raised in the report to the bar convention, that article 1301 damages the wife's credit, particularly in view of the unsettled state of the jurisprudence. Although the writer is not prepared to concede that the law is as unsettled as suggested in the report, it must be admitted that when a client asks a lawyer for advice on a transaction involving a loan sought by a married woman, the lawyer is faced with a serious problem. He has to advise the client that questions of fact enter largely into the legality or illegality of the wife's contract, and that the client must be free not only from knowledge that the money is to be used for the husband's purposes but also from "reason to believe" that it is to be so employed. And the client may well be alarmed at the thought that a judge may find, in some innocent remark of the wife that passed unnoticed by the client, or in some circumstance that did not impress itself upon his mind, the "reason to believe" that will invalidate the transaction and lose him his money. The result is an understandable hesitancy to lend money to married women.

This result may be serious for the wife. Her property may be in need of repairs, or she may require money to pay off a balance of price or to meet urgent expenses for medical attention or for any one of a hundred emergencies. In some of these cases, it will be easy for the prospective lender to satisfy himself that the money

[93] (1948), 8 R. du B. 349, at p. 389.

loaned will in fact be used for the purposes of the wife, as for instance when it is being used to pay off a balance of price on her property. On the other hand, the reason given by the wife for borrowing the funds, although perfectly true and honest, may leave the lender unconvinced that he should take the legal risk involved. Or a case may be imagined where the wife seeks to borrow to meet the expense of an illness in the family or to pay for household equipment or supplies. Here, the lender must be an interpreter of the law. Is the expense in question one that properly belongs to the husband? If so, is not the wife involving herself in a contract of suretyship?

In practice, there can be no doubt that married women encounter much greater difficulty in borrowing than do men or unmarried women, and that article 1301 is a barrier in their path whenever they wish to enter into any financial transaction.

The third ground of objection in the report to the bar convention, that article 1301 may give rise to frauds and abuses prejudicial to persons with whom the wife may contract, is less weighty than it would have been before the amendment of 1904. It would be difficult to imagine a case to which this objection would be applicable, unless perhaps where the wife binds herself together with her husband, in which case, as we have seen, the burden of proof is thrown on the creditor. In reality, this ground of objection is tied up with the previous one, and it is rather the fear of lending that is to be considered than the possibility of fraud.

Another valid and serious ground of complaint against article 1301 is that it prevents a wife from coming to the aid of her husband by acting as surety for him. This may conceivably result in financial disaster for the husband, a disaster from which he might have been saved by the wife's intervention.

Striking the balance between the arguments for article 1301 and those against it, it seems to me that the latter far outweigh the former, that our legislators are wrong and those of the rest of the world are right. The protection accorded by article 1301 is bought at too high a price. The married women of Quebec would be better off without it.

The Senatusconsultum Velleianum, long since abandoned by all the civil law countries, has not been re-adopted by any of them.[94] Moreover, in the common law countries, it has not been

[94] Troplong (Cautionnement, No. 186) says that article 1341 C.N. represents a triumph over a superannuated institution (the Senatusconsultum Velleianum) and adds: "En cela, le Code Civil a agi avec sagesse et maturité; il répugne qu'une femme majeure ait moins de liberté que les autres

found necessary to adopt a similar rule. We are therefore entitled to assume that, in practice, it has not been found that husbands are inclined, or able, to influence their wives to ruin themselves by acting as surety for them — certainly not on so large a scale as to become a public scandal like that which led to the abolition of the Senatusconsultum Velleianum in 1606.

In the result, it must be concluded that article 1301 is by no means indispensable. Although it has been termed a rule of public order by the Quebec courts, it could be abolished without detriment to public order, and without condemning to financial ruin the wives of the province. On the contrary, its abolition would restore their credit and enable them to utilize their financial resources to the advantage of themselves and their families.

Bias, Sacred and Profane

There are many other forms of bias — the bias against sexual vice, for example, which makes certain judges entirely unfitted to try certain types of case. After the political, the commonest I should say was the religious. Lord Westbury could not abide a bishop, and was always looking for their heads with a stick like an Irishman at Donnybrook Fair. He it was, you remember, who 'disestablished Hell, dismissed the Devil with costs, and took from the Church of England her last hope of eternal damnation'. Some judges cherish a passionate ecclesiasticism; some have a prejudice against the clergy. There was an eminent judge in Scotland, Lord Young, who had a gift of bitter language and a great dislike of Dissent. On one occasion counsel began his speech with, 'My Lord, my client is a most eminent and most respected minister of the Free Church of Scotland', and then stopped to allow the words to make a proper impression on the Bench. Lord Young looked down under his grim eyebrows: 'Go on, sir, go on. Your client may be a perfectly respectable man for all that.'

Now there is nothing to be said against the retention of these prejudices. I believe in every man having a good stock of them, for otherwise we should be flimsy, ineffective creatures, and deadly dull at that. Since a judge is a human being, he must be permitted to have his share in the attributes of mortality. But he must be capable of putting them aside. He must have the power of separating a question from the 'turbid mixture of contemporaneousness' with which it is clogged. It is a task which requires supreme intellectual honesty, a complete absence of the 'lie in the soul', and it is the first duty of a judge. (John Buchan, The Judicial Temperament, from *Homilies and Recreations*)

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majeures, il n'est pas raisonnable de faire du cautionnement un acte à part, plus difficile à comprendre et d'un plus dangereux usage que tant d'autres sur lesquels une femme pourrait consommer sa ruine, si la prudence que l'âge fait supposer en elle aussi bien que dans l'homme ne la dirigeait pas".