THE LEGAL POSITION OF WOMEN IN CONNECTION WITH SURETYSHIP *

1. It is not difficult to prove that wherever there were or are in force legal rules protecting women in general and married women in particular in connection with obligations entered into for third persons, these rules are in principle derived from the *Senatusconsultum Velleianum*, a Roman statute passed in or about A.D. 45. This statute declared void any intercession by women, married or unmarried, for any person whatever and for any purpose whatever, not even creating a natural obligation so that voluntary payment could be reclaimed. The concept of intercession meant an engagement of any kind by which somebody became involved in an obligation of another person which was until that moment strange to the intercessor. It included also novations or independent loan transactions of women for the purpose of evading the prohibition.

It was not, however, forbidden to pay actually the debt of another person, even though there was no consideration other than *animus donandi*. The ruling seems to be based on a deep psychological understanding. It is easier to induce somebody to assume a guarantee than to part with money. The seriousness of the act of parting with money, and its irrevocability, are obvious; but guaranteeing a debt is felt mostly to be a formality, and the assurances of the principal debtor that it will remain a formality find easier credence than when the money has to be put on the table. Psychological considerations justify both the prohibition and the distinction between intercession and actual payment.

This legal institution found its way from Roman into French law at a period earlier than the time when Justinian introduced his reforms (A.D. 529). It was contained in most of the *pays de droit écrit* as well as in the *pays de droit coutumier*. The Code Napoléon abolished the institution in 1804, though it maintained several restrictions of the contractual capacity of women, but, contrary to the former ruling, only of married women.[1]

* This article is a short abstract of a larger paper prepared for the Section on Comparative Law of the Canadian Bar Association dealing with the subject more exhaustively.

[1] Planiol-Ripert, Traité pratique de Droit civil français, Paris (1932), vol. ii. sec. 1519. Le Code Civile n'a pas maintenu l'incapacité Velleien, qui interdisait à la femme de se porter caution. La femme mariée, elle même peut remplir ce rôle avec autorisation du mari. Elle est même présumée caution de celui toutes les fois qu'elle s'obligée avec lui sous le régime de communauté (art. 1431).

From French law this rule passed into the law of the Province of Quebec, and from Roman-Dutch law into the law of the Dominion of South Africa. This rule of Roman origin is thus the living law of several parts of the British Empire; and it exercised great influence on the law of the other parts of the Commonwealth.

Art. 1301 of the Quebec Civil Code says: "La femme ne peut s'obliger avec ou pour son mari, qu'en qualité de commune. Toute obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet". This wording was supplemented in 1904 by adding the words: "sauf les droits des créanciers qui contractent de bonne foi".

This rule is unmistakably a remnant of the Roman rule with the difference that :

(a) it does not affect an unmarried woman;

(b) it affects married women exclusively in relation to their husbands.

The rule does not extend exclusively to guarantees but extends also to any obligation assumed not only "for" but also "with" the husband. It is in that respect very similar to the Roman rule. The Quebec cases show also the principle: "Elle peut payer, mais elle ne peut pas s'engager" like the Roman law.[2]

The rule means that all engagements, even though with third parties and not creditors immediately of the husband, are to be treated constructively as the husband's liabilities; that is to say, the contract, whether of suretyship or of any other kind, is to be treated primarily as his contract and the wife as brought in by him to secure the liability which he proposes to contract.

In South Africa, the *Senatusconsultum Velleianum* is valid law under its original denomination. It therefore happened that the English High Court in *Bank of South Africa* v. *Cohen*, [1909] 2 Ch. 129, had to apply the *Senatusconsultum Velleianum* and the *Authentica si qua mulier* as sources of law, and was compelled to dismiss the action of the plaintiff. It was held not sufficient where defendant, a resident of England in 1903 and 1906, appointed an attorney to charge, mortgage or transfer her land situated in Transvaal, to execute the necessary documents and

[2] *Hamel* v. *Panet* (1876), 2 App. Cas. 121; *Robin Hood Mills Ltd.* v. *Dame Silverman* (1936), 74 Que. S.C. 15; *Guilmette* v. *North American Life Ins. Co. and Fafard* (1937), 63 Que. K.B. 138; *Pepin* v. *Lemire* (1939), 78 Que. S.C. 192; *Lessard* v. *Poulin* (1935), 60 Que. K.B. 219; *Page* v. *Nadeau* (1935), 75 Que. S.C. 376.

to declare in her name that she renounced in favour of the bank and forever abandoned the benefits of all rights which the laws of the Transvaal granted her in relation to this land. These benefits mean that until a married woman who does not fall within certain exceptions has gone through certain exact formalities as the explicit and specific explanation of the exact nature of her rights and formally and expressly renounces those privileges, she is incapacitated from entering into a contract of suretyship for her husband.[3] There is no question here of duress or undue influence exerted upon the wife by anyone; and this distinguishes the rule from the corresponding rule of the English law, as pointed out by Eve, J., with reference to the law as laid down by Cozens Hardy J. in *Barron* v. *Willis*, [1899] 2 Ch. 578.

It is rather peculiar that two systems of law governing in countries very remote from the cradle of the *Sc. Velleianum* (Quebec Civil Code and South African law) preserved these rules so closely related to the original, and that the Anglo-American law, which in general is of all legal systems the least influenced by Roman law, stands in respect of guarantees of married women under the obvious influence of the Roman law, while legal systems like the French, the German, the Austrian, which in their basic principles and structure are undeniably derived from Roman law (even though in many respects emancipated from it), wiped out altogether this sort of restriction of women's legal status.

It is even more surprising that the most modern of the Continental Codes, the Swiss, which came into force in 1912, contains a rule (art. 177) according to which contracts between husband and wife in general, and not only guarantees given by wives, as well as obligations entered into by a wife in relation to third persons for the benefit of the husband, require for their validity the consent of the Guardianship-Office (*Vormundschafts-Behörde*). The rule may perhaps be regarded as contrary to the modern tendencies of full emancipation of women, but it gives security to the creditor against subsequent objections, it protects the woman against undue influence, it saves all the parties from the costs of lawsuits, and, last but not least, it saves the spouses from unpleasant consequences in their matrimonial relationship. Even should it happen that a decision is in isolated cases subsequently shown by the events to be wrong, the disadvantage to the parties will be no graver than when the

[3] Sir A. F. S. Maasdorp: The Institutes of South African Law, Book iii., p. 417.

court has to decide upon duress, undue influence, and similar subtle doctrines, after the whole property of the wife has gone, the family ruined, and the marriage destroyed, or the creditor gravely and unfairly injured.

2. If we wish to understand the relevant rules of Anglo-American law we cannot isolate the question of guarantees of women for their husbands, but we have to regard contracts of women on a wider field, both where the subject-matter of contracts and the persons of the contractual parties are concerned.

Common law and equity do not confine certain restrictions to women only, but introduce certain incapacities, or qualifications of the capacity of persons of both sexes, under certain conditions—persons who under other conditions would enjoy full and unrestricted contractual capacity. English law very early developed the view that contracts made between persons standing to each other in a special relationship of confidence must be treated differently from those made between other persons. Such confidential relationships exist between a lawyer and his client, a doctor and his patient, a trustee and the beneficiary, the spiritual adviser or confessor and his penitent, the guardian and his ward or the former ward shortly after coming of age.

In *Huguenin* v. *Baseley* (1807), 14 Ves. Jun. 273, a voluntary settlement by a widow upon a clergyman and his family was set aside, as obtained by undue influence and abused confidence in the defendant as an agent undertaking the management of the widow's affairs, upon the principles of public policy and utility. It was held that the same principle applies to similar relationships as outlined above, the mere existence of which gives rise to the presumption of undue influence, which can be rebutted only by the proof that the party granting benefits to the other was placed in such a position that he acted as a free agent under competent and independent advice, the onus of proof being on the party receiving the benefit.

The relationship of husband and wife is not expressly dealt with in this judgment, and it was for a certain time unsettled whether the doctrine applied to this relationship or not.

As indicated above, Cozens Hardy J., dealt with the problem in *Barron* v. *Willis*, saying that it had been settled by binding authority—although some textwriters adopt the opposite view—that the relation of husband and wife is not one to which the doctrine of *Huguenin* v. *Baseley* applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor

is invalid: the onus lies on the party who impugns the instrument and not on the party who supports it. He relied on *Nedby* v. *Nedby* (1852), 5 De G. & Sm. 383 (per Sir James Parker V.C.) and *Grigby* v. *Cox*, 1 Ves. Sen 517 (per Lord Hardwicke).[4]

In *Howes* v. *Bishop* [1909] 2. K.B. 390, on appeal, Lord Alverstone declared: "There is no general rule of universal application that the rule of equity as to confidential relationships necessarily applies to the relation of husband and wife, so as to throw on the husband, or on the person suing the wife, the onus of disproving an allegation of undue influence". Lord Penzance's contrary view, expressed in *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462, at p. 468, was declared by Lord Alverstone to be a mere *dictum*. Lord Alverstone relied on Cozens Hardy's statement, and pointed out that the contrary view could be taken only in the presence of special circumstances, like pressure by the husband, and concealment of material facts by the trustee, as in *Turnbull* v. *Duval* [1902] A.C. 429.[5] Farwell L.J. concluded that business could not go on and married life would be intolerable if, in every transaction by way of gift by a wife to her husband, the onus were on the husband to show that the wife had independent advice.

The last stronghold of the contrary view was *Cox* v. *Adams* (1904), 35 S.C.R. 393. In spite of the fact that, in that case, the signatures of the wife and the daughter were obtained by gross fraud and misrepresentation, based on a conspiracy made by the husband and his creditor, which would have enabled the court to give relief on that basis, it was held that *Huguenin* v. *Baseley* applied, although the distinguishing feature of the doctrine in that case is that no fraud, no conspiracy, no misrepresentation, is necessary, and the existence of undue influence is presumed by the mere fact of the confidential relationship. Thus, in 1904, once again the view was revived which, according to Cozens Hardy J., in *Barron* v. *Willis* was maintained by single textwriters contrary to the authorities. But it was done away with finally in 1911, by the Privy Council, in *Stuart* v. *Bank of Montreal*, [1911] A.C. 120 at 126 and 137,[6] but not without causing in the meantime very many difficulties and complications.

[4] Further authorities: *Hudson* v. *Carmichael* (1854) Kay 613. *Paget* v. *Paget* [1898] 1 Ch. 470. *Baker* v. *Bradley* (1855) 7 De G.M. & G. 597. *Brainbridge* v. *Brown* (1881) 18 Ch. 188.

[5] *Vide* the judgment of Fletcher-Moulton L.J. and Farwell L.J. in *Howes* v. *Bishop* and by Lindley L.J. in *Allcard* v. *Skinner* (1887) 36 Ch. 145. at 187. and by Farwell L.J. in *Powell* v. *Powell*, [1900] 1 Ch. 243. at 246. *Bishoff's Trustee* v. *Frank* (1903), 89 L.T. 188.

[6] See quotation in section 3 of this article.

The wavering provoked by *Cox* v. *Adams* is shown by the attitude of the court in *Sawyer Massey Co.* v. *Hodgson* (1909), 18 O.L.R. 333, reserving judgment pending the disposition in the Supreme Court of *Stuart* v. *Bank of Montreal*, 17 O.L.R. 436, in which it was "anticipated that the principle of the decision in *Cox* v. *Adams* might be reconsidered", which expectation, however, was not realized. The Ontario Court of Appeal, as well as the Canadian Supreme Court,[7] decided *Stuart* v. *Bank of Montreal* on the basis of the principle in *Cox* v. *Adams*, which principle was discarded only when the case was dealt with by the Privy Council[8] as mentioned above. But the denial of the principle did not influence the material effect of the decision arrived at.

The interest which the case of *Stuart* v. *Bank of Montreal* provokes is justified by the importance of the problem for banks and for the public generally as well as for interested parties.

We shall give the facts as outlined by the trial judge, Mabee J., as well as his legal views in brief. Mrs. Stuart signed guarantees at her husband's request, she surrendered to the creditor all her property, and then brought action against the bank and tried to recover amounts already paid. Mrs. Stuart knew that her husband was connected with a business enterprise and was hoping that the company would offer her son as manager an opportunity for a successful business career. She said she consulted no one about the wisdom of her entering upon the guarantee, that she would have scorned to consult anyone, and that she regarded it solely as a matter between herself and her husband; that she knew the bank would advance a large sum of money to the company, and that she intended the bank to act upon the guarantee and advance the money; that she was in no way under the control or influence of her husband, but exercised her own free will, and that she was sanguine about the success of the company if the bank would advance the money; that she knew that she was becoming legally bound, and that her husband did not make the slightest misrepresentation to her; and she repudiated the suggestion that she was in any way deceived or misled.

It was not contested that the bank was fully secured for earlier advances, and did not need the guarantees of Mrs. Stuart, except for the purpose of making new loans.

Mabee J. concluded that there was no element of fraud; there was the utmost good faith by Mr. Stuart, both towards

[7] 17 O.L.R. 436; **41 C.L.C.R. 516.**
[8] [1911] A.C. 120.

the bank and the plaintiff, and no one would suggest that the facts were in any respects similar to those of *Cox* v. *Adams*. He referred to the Ontario Statute, 22 Vict. ch. 85, ss. 1 and 2, by which provision was made to the effect that deeds of married women for the conveyance of real estate might be executed before a Judge of the Courts of Queen's Bench, Common Pleas or County Court, or before two Justices of the Peace. An examination of the married woman apart from her husband respecting her free and voluntary consent to convey was required by this statute, and if this was given, it had to be endorsed upon the deed. This provision was repealed by the statute 36 Vict. ch. 18, sec. 14, in 1873, which enacted: "every married woman . . . may by deed convey her real estate . . . as fully and effectually as if she were a feme sole." Thus, said Mabee J., the necessity for independent advice was abolished by statute. What is to be done, he asks, when the attacking party says she would have scorned to take independent advice? The legislature could repeal the Married Women's Property Act and revert to the old law, but, in the meantime, married women were free to convey apart from fraud or misrepresentation. The present acts were not open to attack.

In the Court of Appeal for Ontario, which consisted of four members, opinions were equally divided, and so the trial judgment was confirmed. Nevertheless, the opinion of Moss C.J. in favour of the appeal is of high importance, because subsequently the Canadian Supreme Court ordered the case to be disposed of in the manner proposed by him. The Chief Justice saw the facts as well as the attitude of the interested parties in much the same way as the trial Judge did; he recognized the utmost good faith on the part of the bank and of Mr. Stuart; he recognized that the bank was in the position to withdraw, holding security sufficient to cover all its claims against the company and was induced to advance large sums upon the faith of the dealings now impeached. He recognized that Mr. Stuart was not an agent for the bank, and that plaintiff acted of her own free will for the sake of her husband and her son, free from coercion, deception, misrepresentation or the active exercise of undue influence or pressure . . . "but", he said, "she acted without independent advice".

It is submitted that if the transaction for that reason could not stand in the relation of husband and wife it could not stand as between her and the bank, for the bank had notice and knowledge of the relationship, and was bound to see that all

proper steps had been taken in order to make the transaction binding and effective against the plaintiff. A wife, in this view, must be protected not only against her husband but against herself, so that even when she rejects the suggestion of the intervention of an independent adviser and refuses to be guided by any but her own judgment, she is utterly incapacitated and no one can safely deal with her in respect of a transaction in which her husband is personally interested.

In the Supreme Court of Canada, Anglin J., declared that the relation of husband and wife was one of those confidential relations in which, on grounds of public safety, the law presumes that an obligation was contracted under undue influence and that the person claiming the benefit of the transaction, with notice of the relationship, can rebut that presumption only by proving that the obligor had in fact competent and independent advice. He concludes: "Solely because I am convinced that the present case falls within the principle of *Cox* v. *Adams* and because I consider this decision binding, I would allow the appeal". He emphasizes the "importance that people may know with certainty what the law is", and says, "this can only be attained by a loyal adherence to the doctrine of stare decisis".[9] Anglin J. alludes to a dictum of the Earl of Halsbury in *Street Tramway Co.* v. *London County Council*, [1898] A.C. 375: "What is an occasional interference with, what is perhaps, abstract justice, as compared with the disastrous inconvenience of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions?"

The dissenting judgment of Idington J., is a review of the historical development of the property and contractual rights of married women in Ontario, which warns against a misapprehension of the process the goal of which was the emancipation of married women. He stresses the requirement that the nature of the instrument should be understood by the woman; but no presumption of undue influence and no requirement of independent advice seems to him justified. The nature of the instrument had been explained by a trustworthy solicitor, who, though solicitor for the bank, was not disqualified from acting in this capacity.

3. We wish to analyze the reasons given by Lord Macnaghten in the Privy Council, and to offer, in all humility, our modest opinion, which must not be regarded as voicing criticism, but as an objective attempt to find out the leading idea of the

[9] For Ontario, see R.S.O. 1937, c. 51, p. 81.

judgment and to investigate how this fits into the legal system and as to whether it creates bearable conditions for banks to give credits based upon guarantees of wives for their husbands or for others in the interest of their husbands.

The juristic atmosphere was essentially cleared by Lord Macnaghten by his declaration made at the outset. "Their Lordships do not think that the doctrine supposed to be laid down in *Cox* v. *Adams* can be supported—which said that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shown to have had independent advice." Further, their Lordships accepted the law as laid down by Sir James Parker, V.C., in *Nedby* v. *Nedby* (1852), 5 De G. & Sm. 377, that, in the case of husband and wife, the burden of proving undue influence lies upon those who allege it.

Thus a clear situation was created. No presumption of undue influence against the husband; neither he nor the creditor has to prove the lack of undue influence, but the attacker has to prove its existence. That meant, for the case at bar, that unless the wife succeeded in proving active undue influence exercised upon her by her husband, her action was bound to fail. Now what evidence was produced by plaintiff in that respect? Smith J.A., states, in *Bradley* v. *Imperial Bank*, 58 O.L.R., at p. 669, with regard to the judgment in *Stuart* v. *Bank of Montreal*, that their Lordships *did not make findings* of facts *different from* the trial judge "who held that Mrs. Stuart had a full knowledge of facts and her own judgment without undue influence, and it is supposed that the result is due to the opinion of the Privy Council that the transaction was not sufficiently explained to her and she did not understand it beyond the general knowledge that she was undertaking a liability to help her husband" and further "the lack of sufficient explanation and understanding of the document is not put forward as in itself a ground for relief".

When we keep in mind that the necessity of independent advice was ruled out by the Privy Council by saying that *Cox* v. *Adams* did not apply, and when we remember that the existence of active undue influence had been ruled out already by the Court of Appeal, then we have to see what new support for the relief granted was found by the Privy Council.

The judgment referred to the fact that Mrs. Stuart surrendered to the bank all her estate, and that she was a confirmed invalid; but it left without refutation the statement of

facts accepted by the trial judge and Court of Appeal that she knew that the bank, which was fully secured for the earlier advances, would give anew large amounts upon her guarantee, and that she intended the bank to do so. The statement of the Privy Council "that she had no will of her own and no means of forming a judgment even if she had desired to do so" is seemingly derived from her statement that she would have refused to consult anyone even if she had been told to do so. Passive obedience is seen here, which shows "how deeprooted and lasting this influence was" so that it worked even at the time of her examination. But if there was an influence so deeprooted and lasting from the time the guarantee was signed until the plaintiff was examined in court, the question arises why and how the plaintiff, in between these two moments, instituted the action; for, in instructing her solicitors, she must have placed an emphasis on facts contrary to those she asserted in her evidence, so that the effect of the influence must have been interrupted at the time of suing and then have become newly operative in the time of examination.

It is certainly difficult to determine in any case the point at which the influence of one mind upon another amounts to undue influence. But when the law has created the notion of undue influence, and has connected with its existence very far-reaching consequences, such can apply only when the determination succeeded—whether difficult or not.

The judgment quotes from Lord Cranworth's statement in *Boyse* v. *Rossborough* (1857), 6 H.L.C. 48: "The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish". But when it is impolitic to permit inquiries, there can be no findings; and without an actual finding of active undue influence, there ought to be no relief. On the other hand, it can be said, with all deference, that while the paramount purpose of marriage is to foster the union of affections and it ought not to be inquired what has gone on within this intimate union, the paramount duty of banks, which administer the money of infants and widows, petty depositors is to defend the capital entrusted to them.

We are unable to see how any "evidence of overpowering influence' could have been brought, or that in the present case such influence could be termed "complete" even when the

transaction might deserve the description of being "immoderate and irrational". We can find nowhere a definition for these concepts or a test for their application. One judge might find it irrational to put 75% of one's fortune in one business. Another might say that even 50% is irrational; a third might find dozens of cases in which a full 100% was invested in one single business, and the enterprise turned out very favourably. Where are the boundaries? Where are the legal principles which will enable men to shift the financial consequences of their misjudging the prospects of a business upon their creditors, and yet to keep the results if favourable? Can a feme sole or a man find in sound legal principles any relief from their miscalculations? We think not. As the law stands there is no special rule in that regard for the benefit of married women unless undue influence is proved. That is the sense, at least, of *Nedby* v. *Nedby*, and the reasoning of that judgment was endorsed expressly by the Privy Council.

Another part of the judgment alludes to the "unfair advantage" which was taken by the husband and by the solicitor, but it is not even said that any undue advantage was taken by the bank, which had no need for the guarantee, as it had previously been fully secured. Now why should the bank bear the brunt, even where the husband has taken unfair advantage; and where is the borderline between usual and unusual or fair and unfair advantages between spouses? Is it in itself an unfair advantage when the wife makes a gift to her husband voluntarily, without undue influence, and where she suffers no other contractual incapacity. This capacity is now governed by the same principle as that of a feme sole. We suggest that it is not in accordance with the law as it stands to say that contracts made by a married woman for the benefit of her husband are affected by undue influence differently than contracts made between strangers, or that the burden of proof ought to be governed by different rules. If that is so, why should there be required a specific explanation in the case of a married woman (as suggested in *Hutchinson* v. *Standard Bank* in discussing *Stuart* v. *Bank of Montreal*) which is not required in the case of a feme sole or a male contracting party?[10]

[10] In *MacKenzie* v. *Royal Bank of Canada* [1934] A.C. 468, the Privy Council refused to recognize that wives belong in the "protected classes" in whose favour there is a presumption of undue influence, and declared that because the wife, on whom the onus of proof lies, did not prove active undue influence exercised by her husband, she *obviously* possessed and exercised a will of her own. Compare *Euclid Avenue Trust Co.* v. *Hohs* (1911), 24 O.L.R. 447, per Moss C.J. at 450.

In the last part of the judgment, it is said that their Lordships do not attribute intentional unfairness to the solicitor who acted in the case, but that the House of Lords had laid it down as a rule that the solicitor of the husband owes a duty of care to the wife in transactions between the husband and the wife where her interests are concerned. In the *Stuart* case, however, there was no transaction between husband and wife like a sale, an exchange, or even a gift, but as between the wife and a bank giving full value. This, in our opinion, makes an irreconcilable difference. But supposing the solicitor did commit a fault, which we are not able to examine, why is not he responsible, and why the bank? The judgment says, because the bank left everything to the solicitor. This sounds like constituting the responsibility of a principal for the act of the agent. But if this is meant there would be many details to be cleared, and problems to be solved. Was it a relationship of principal and agent at all? If so, was the relationship known to Mrs. Stuart, and therefore a case in which to apply the rules referring to a known or unknown principal? What does the act of the agent constitute—a fraud, a misrepresentation, a nondisclosure, duress, or what? Was it committed within the scope of the agent's authority and on behalf of the principal? It is said that the solicitor himself was a shareholder and a creditor of the company for which the guarantee was given and in which the husband of the plaintiff was the main interested party. When he acted in an impeachable way—which is not for us to discuss, then it may be possible that he did so on his own behalf: the interests of the bank did not require any protection, as the business stood when Mrs. Stuart entered the field.

As it seems to us, there are unsettled, open problems,[11] which, in the interest of the predictability and stability of the law, stressed in the statement of Mr. Justice Anglin, and in the legitimate interest of banks and investors, should be cleared up. It cannot be said that, after all, the question touches one tiny little problem of one field of law, which is neither the most important, nor the most urgent. When we look into the dozens of judicial decisions, we become aware that even such tiny problems can cause much embarrassment to creditors and much mischief to families.

4. We have alluded already in our introduction to the rules of the law of the Province of Quebec, and we wish to deal in detail with them, the more because they were referred to even

[11] *Vide* Smith J.A., in *Bradley* v. *Imperial Bank*, 58 O.L.R. at 669.

in the Ontario case of *Cox* v. *Adams,* in which Mr. Justice Girouard (criticizing the view taken by the trial judge, Falconbridge C.J., that banking business would be exposed to unbearable terrors by extending the doctrine of *Huguenin* v. *Baseley* to cases of guarantees given by wives in the interest of their husbands) stresses the fact that the law of the Province of Quebec is far more sweeping, and nevertheless the banks find it profitable to carry on business in Quebec. By coincidence, in the same year in which this announcement was made, the rule of Quebec law was amended by adding the words "sauf les droits des créanciers qui contractent de bonne foi".[12]

The history of the amendment is described in the "Livre Souvenir des Journées du Droit Civil Français" Montreal (31 Août—2 September 1934) pp. 367, 368, and in *Lebel* v. *Bradin* (1912), 7 D.L.R. 470, by Gervais J., who, besides the history, makes also a criticism, and a harsh one, saying: "The old art. 1301 was . . . an absolute prohibition . . . a lender could no longer lend to a married woman without running the risk of losing his money. The rights of a creditor in good faith were to be protected. Just as if there could be a violation in good faith of an absolute prohibition. . . . And that is what the Speaker of the Legislative Council (later Chief Justice of the Province of Quebec, Sir Horace Archambeault) said when he stated that the amendment would deprive the public of a fixed guide of a rule well established by jurisprudence and would replace it by an obscure, ambiguous provision. . . . In order to give the amendment a practical effect, conclusions must be drawn therefrom, even if with a little hesitation. The distinction which the amendment wished to authorize between creditors violating art. 1301 in good faith or in bad faith is direct payment by the lender to the wife and ignorance in good faith on the part of the lender of the use to which the wife puts the loan. These are the two essential elements of good faith as required by the amendment of 1904. . . . So that where the lender, although he has paid over to the wife, knows that the husband is to obtain the benefit therefrom, art. 1301 shall be applied. On the other hand, where the lender is unaware of the financial situation of husband and wife, and makes a loan and hands over the money to the wife, he will be entitled to recover from the wife even in the event of her having handed over the sum to her husband, without the knowledge of the lender". The judgment makes it clear that, before the amendment, the lender

[12] (1904) 4 Ed. VII. ch. 42. s. 1.

was under the duty to make sure that the money was re-invested (*remploi*) for the benefit of the wife. From the Livre Souvenir, p. 368, it is to be inferred that the principles laid down by Mr. Justice Gervais in 1912 became permanent jurisprudence.

The doctrine was again expounded in the famous case, *Larocque* v. *Equitable Life Assurance* (1941), 71 Que. K.B. 279. Mr. Larocque insured his life in 1907 for $50,000 for the benefit of his own estate, and made his wife beneficiary in 1912. In 1930, he was unable to pay the premium of $2,600, and asked, together with his wife, for an advance, which was given to the amount of $17,000 in a cheque of the company to the order of the wife, who endorsed it to her husband, who retained the money for his own use. After the death of the husband, the wife claimed the full amount of $50,000.

Four out of five judges decided, upon art. 1301 (three of the judges also upon art. 1265), that the wife obligated herself with and for her husband, taking a loan and transferring the policy as guarantee. The argument of the company that there was no loan, but an anticipation of the claim belonging to the wife, was found unsubstantial, because the wife had only a contingent and conditional right, dependent firstly upon her surviving her husband, and secondly upon the husband not changing the beneficiary. Interest was paid. The document spoke of repayment. So no anticipation, but a loan, was intended. The action was maintained for $44,000, an allowance being given for unpaid premiums.

The fifth judge, Barclay J., concurred in the judgment, not upon art. 1301, but exclusively upon art. 1265 and upon the Husband's and Parent's Insurance Act. Under art. 1265, husband and wife cannot benefit in dealings with each other *inter vivos* except by life insurance in accordance with the above Act. But this Act does not allow loans upon such policies for purposes other than to pay premiums. Other advances cannot benefit the husband because he has appropriated the insurance to the protected class, and the wife cannot benefit because she has only contingent and conditional rights, which are far from due. All this must have been obvious to the company. Barclay J. declared art. 1301 not applicable.

5. When we wish to reach conclusions and are basing our considerations on historical views, we have to realize that the full emancipation of women in general, and married women in particular, in respect of property and contractual rights, is the obvious, visible, final goal of an evolution which is traceable in

almost all modern legal systems. Therefore, it is questionable whether an almost unbroken line of evolution ought to be interrupted or even turned in the contrary direction just in the particular point which represents the topic of our investigation. Following the general line of this evolution, the Ontario Legislation removed in 1879 an institution which represented a preventive protective measure for married women which can be regarded as restrictive of their contractual rights; and yet almost the same restrictive measure was introduced in 1912 by the highly praised modern and democratic Swiss Civil Code referred to in sec. 1 of this paper.

What is the soundest solution of this burning question? What tests have we at hand for measuring the soundness of rules of law? Is it the consistency of the historical development, or the conformity with some general line followed by a given legal system, or with the governing ideas of time and place, or with the political, social and economic ideology of a people? Is it at all maintainable that the best solution is that which complies most completely with a "theoretical correctness" (assuming that a common denominator for this concept could be found), or is that the best solution which complies most completely with the requirements of a "practical usefulness"?

Theoretically, the full emancipation of women, married or unmarried, is unquestionably a requirement of political, social, economic and legal democracy; but from a purely practical view, it cannot be denied that married women are more frequently and more easily exposed to duress and undue influence than nearly all other categories of contracting parties.

But is it logical that the legislator on one side recognizes women as clothed with full capacity in matters of property, and contractual rights, and on the other side protects them against their own alleged weakness and insufficient understanding of business or legal matters? Logically, women are either possessed in general of the necessary mental qualities required for full legal capacity, or they are not. If the legislature accepts the affirmative stand, it may grant full and unrestricted capacity, but must consequently make women responsible like other contracting parties without regard to sex,[13] and not allow the slightest diminution of the interests of third parties dealing in good faith for value, merely because of the fact that one of the parties is a married woman. If the legislature accepts the

[13] So expressly stated in the Austrian Code of 1811, sec. 1349.

negative stand, it has to qualify the capacity of women or, at least, of married women in general.

Shall the legislature choose between these two logical alternatives in an effort to be consistent, or shall it emancipate the decision from theoretical considerations and accommodate it to the practical views only? This is a question of the policy of the law (*Rechtspolitik*). But one aspect should not be forgotten: legal protection given to married women against duress and undue influence exercised by their husbands does not affect only the interests of the spouses but also affects the interests of third parties acting in good faith.

From the practical point of view, it can be said only that transactions should not be facilitated which subsequently lead in many cases to endless litigations, to the ruin of families, and to unequitable losses for creditors.

There must be found means to put banks in a position to ascertain in advance that the transaction is one out of which no such harm can arise to them as in the *Stuart* case. Is it not unnatural, in the light of modern economic conditions and banking, to charge the bank with the obligation of giving explanations to the surety or to see that she is provided with independent advice, or to exercise control over the disposition by a wife of the borrowed money? And why should the husband be regarded as the agent of the bank in providing the suretyship of his wife but not when he is providing the suretyship of a stranger? The bank is interested only in getting a financially reliable surety, and not specifically in the guarantee of the wife. It is the task of the would-be debtor to create the presuppositions of the loan, and he is acting in that respect on his own behalf, and by no means as agent on behalf of the bank. Exceptions may exist when the guarantee is required for an already existing and not sufficiently secured debt,[14] and there can arise borderline cases; e.g. guaranteeing an old and insufficiently secured and a new debt to be granted. Different conditions here may justify different treatment. But all these questions should be investigated and decided in advance by an impartial competent and independent agency authorized by statute. Banks might be put in a position to know that when the contract of guarantee was endorsed by a certain office, official, public guardian, court, judge, or justice of the peace, a financially and disciplinarily responsible notary public or some other agency named by statute, they could grant the credit without being later exposed to any legal attacks.

[14] E.g., *Cox v. Adams, supra.*

One aspect has to be closely watched. Half measures do more harm than good; and if the legislature finds reasonable grounds for abandoning a certain doctrine, the proper way is to do it openly, declaring frankly one given case or a set of cases to be exceptions from the general principle, and implementing those exceptions institutionally with all requirements of smooth functioning without injuring innocent third parties.

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