SOME ASPECTS OF ARTICLE 1265

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The restrictions imposed by Article 1265 upon consorts married and domiciled in the Province of Quebec is a recognized rule of public order expressed in unamibiguous terms in the body of the Article itself. Whether or not a transfer of property by way of gift between a husband and wife who are separate as to property by virtue of the law of their non-Quebec matrimonial domicile is valid when the consorts have moved their domicile to this province remains a moot question. It is surprising that this particular point of law, which is of ever increasing importance, has long been a source of dispute among Quebec authors and diversity of opinion in Quebec courts. A definitive opinion has yet to be rendered by the tribunals.

The Articles of the Civil Code bearing upon the question are the following:

ARTICLE 1265

"After marriage the marriage covenants contained in the contract cannot be altered, (even by the donation of usufruct, which is abolished), nor can the consorts in any other manner confer benefits inter vivos upon each other except in conformity with the provisions of the law, under which a husband may, subject to certain conditions and restrictions, insure his life for his wife and children."

ARTICLE 6, PARAGRAPH 4

"An inhabitant of lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of lower Canada, who as to their status and capacity, remain subject to the laws of their country."

ARTICLE 8

"Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the Deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place; in any of which cases effect is given to such law or such intention expressed or presumed."

In its simplest terms the question to be resolved is whether Article 1265 C.C. is to be regarded as a law relating to capacity and therefore subject to the provisions of Article 6, Paragraph 4, or a law relating to matrimonial regime, which, partaking of contract in nature, is governed by the provisions of Article 8. If the former view is adopted then consorts who move their domicile to this province would fall *ipso facto* under the prohibition of Article 1265 C.C. On the other hand, if the latter view is to prevail, then consorts whose matrimonial domicile is outside the Province of Quebec, would not become subject to the prohibition of Article 1265 C.C. upon establishing their domicile in

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Quebec. A brief review of authors and relevant jurisprudence reveals an absence of agreement as to which is the correct interpretation.

Lafleur,[1] writing in the latter half of the nineteenth century, exhaustively examined the issue. He illustrated that the old French law considered restrictions such as Article 1265 as forming part of the *Statut réel, i.e.*, they were subject to the law of the *situs* of the property. Therefore the validity of a gift of immoveable property depended upon the *lex rei sitae*, and no regard was had to the domicile of the consorts. At the same time, since moveable property attached to the person, the law of the domicile determined the validity of a gift of moveable property.[2] Lafleur added that the then-modern French authors regarded such prohibitions as restrictions relating to the capacity of the consorts to contract and as such depended upon the law governing their status and capacity, *i.e.*, domicile or nationality, without regard to the *situs* of the property. A change of domicile, according to Lafleur, releases a person from the laws of his old domicile and subjects him to those of his new domicile. Therefore Article 1265 C.C., a restriction of capacity, applies to all consorts domiciled in the Province of Quebec.

Lafleur criticized the decision rendered in the case of *Eddy v. Eddy*.[3] In that case a couple who had been married in Vermont subsequently established their domicile in Quebec. The husband, while purporting to act under the law of Vermont, conferred benefits upon his wife in apparent violation of Article 1265 C.C. The court held that the question of status and capacity of consorts is determined by reference to the law of their matrimonial domicile and that Article 1265 C.C. did not have application. The benefits conferred were therefore held to be valid. Lafleur's comment on this decision was that it was not well-founded either on principle or on authority.

It is a settled rule of private international law, that property rights arising from the act of marriage must at all times be determined by the law of the matrimonial domicile. In the absence of marriage covenants determining property rights, the law of the matrimonial domicile is deemed to have been adopted by the consorts. This undisputed doctrine is based on the assumption of a tacit contract between the consorts, and consequently is governed in the Province of Quebec by the provisions of Article 8 C.C.

Lafleur's writing was followed in the early part of the twentieth century by a thesis of Loranger.[4] This scholarly work was devoted in large measure to an historical analysis of the problem posed by Article 1265, and the conclusions

[1] *Conflict of Laws*, page 169 *et seq.*

[2] Marler, *Law of Real Property*, page 203, has been the only notable advocate of this doctrine in Quebec. The doctrine seems to have been applied in a case involving the application of Article 1265 C.C. which arose in Ontario, *Landry v. Lachapelle*, 1937 2 D.L.R. 504.

[3] 4 R. de J. 78.

[4] The relevant part of this thesis was reproduced in 5 R.L.n.s. page 145 in an excerpt entitled *L'Incapacité Légale des Epoux Prononcée à l'Etranger, sera-t-elle reconnue par nos Lois?*

of Loranger are directly opposed to those of his predecessor, Lafleur. With regard to the incapacity of consorts arising from their matrimonial status, Loranger observed:

> "L'incapacité des époux commence avec le mariage et finit avec lui. C'est une conséquence naturelle du mariage qu'il existe entre les époux certaines incapacités que l'on peut considérer comme accessoires du mariage, et comme tels doivent être régis par la loi du lieu du mariage, comme le contrat principal lui-même."[4a]

Despite the scholastic merit found in Loranger's thesis, his interpretation of the text of the Civil Code is open to question. Some subsequent writers have argued that Loranger placed a peculiar and unnatural interpretation upon the word "domicile" as it appears in Article 6 of the Civil Code: in his view the word domicile meant the following:

> "Il ne s'agit pas, croyons-nous, dans cet article, du domicile réel que les époux acquièrent après le mariage, ni du domicile que les époux peuvent choisir pour la perpétration d'un acte postérieure au mariage, mais tout simplement que les époux avaient au moment du mariage, c'est-à-dire du domicile matrimonial."[4b]

It is difficult to find support for this view in the text of the article itself. By the words "so long as he retains his domicile therein," the article indicates that the domicile referred to is not immutable and consequently it cannot refer to matrimonial domicile. This moreover is in complete accord with the accepted doctrine of private international law referred to above.

Billette[5] adopts the position taken by Lafleur:

> "La loi qui prohibe les dons entre époux (Articles 779 and 1265) est une loi relative à la capacité, qu'elle qu'ait été la conception qu'auraient pu en avoir les anciens auteurs et arrêts, dans un état social à facture différente du nôtre. L'article 770 est au chapitre de la capacité, et par le jeu combiné des articles 759, 985 et. 770 et 1265, il est impossible d'exclure de cette notion de capacité, les dons entre époux, qui, sous cet angle, sont considérés comme les contrats en général . . .
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> Malgré un arrêt de notre tribunaux (*Eddy v. Eddy*), il nous semble bien que le mariage ne détermine que le régime légal des biens des époux, et non leur capacité future, ne dépendant pas de ce régime légal et relativement à des choses futures. Ce régime légal résulte d'un contrat tacite soumettant les parties à leur loi. Mais leur capacité résultant de divers domiciles acquis plus tard, n'est et ne peut être envisagée dans ce contrat."

Johnson[6] differed from Billette and Lafleur and subscribed to the Loranger school of thought. Despite indications in the jurisprudence with which Johnson was confronted at the time he wrote, he founded his opinion on a decision rendered in the case of *Laviolette v. Martin*,[7] which he maintained properly represented the law of Quebec. The matrimonial domicile of the consorts in that case was Quebec, and they subsequently moved their domicile to the State of New York. The wife endeavoured to sell immoveable property situated in Quebec without the authorization of her husband, during the time when the parties were domiciled in New York. The court of first instance held that the wife did not need the authorization of her husband since the law of the country where the consorts were domiciled at the time of the

[4a] *Ibid* p. 159.

[4b] *Ibid* p. 161.

[5] *Traité de Droit Civil Canadien* (Donations et Testaments) Volume 1, No. 295.

[6] *Conflict of Laws*, Volume 1, page 419, *et seq.*

[7] 11 L.C.R. 254.

transaction did not require such authorization. The court of appeal, however, unanimously reversed this judgment holding that a change of domicile did not free the wife of the incapacity created by the law of Quebec, the matrimonial domicile. The *ratio* of the decision would therefore appear to be that the incapacity resulting from the law of the matrimonial domicile follows the consorts into their new domicile. Although this case did not deal directly with Article 1265, it supports the view that Loranger and Johnson hold with regard to that article, that the capacity or incapacity as the case may be arising from the act of matrimony is fixed immutably by the law of the matrimonial domicile.

Faribault[8] adheres to the Johnsonian argument and states:

> "Lorsque le régime matrimonial des époux est régi par une loi étrangère qui ne leur défend pas de s'avantager durant leur mariage, ce qui est le cas dans presque tous les pays de droit anglais, la prohibition de l'article 1265 ne peut être invoquée même si ces étrangers viennent par la suite résider dans notre province."

This is supported by the opinion of Trudel in Volume I of the same series where he says:

> "Aussi la capacité des époux de se faire des donations est réglée pour tout le temps de leur mariage par la loi de leur domicile matrimonial . . ."[9]

The latter statement is in fact more explicit than the former, because the word "résider" does not necessarily imply a change of domicile. It is clear that within the terms of Article 6, paragraph 4, a change in residence has no effect whatsoever on the status and capacity of a person.

The authors reviewed briefly above constitute the bulk of written authority on the subject. Recently, however, Professor Paul Crépeau has carefully analysed both the juristic and judicial opinions expressed on the subject and has differed from the views expressed by Loranger and Johnson.[10] After tracing the conflicting views of the authors and jurisprudence Crépeau concludes in favour of the doctrine stated by Lafleur. He convincingly attacks Loranger's thesis when he says:

> ". . . le rapprochement fait par Loranger entre l'état des époux et leur régime de biens est inadmissible. Analyser l'état des époux comme un statut contractuel me paraît erroné. Il me semble plus juridique de suivre Lafleur et d'admettre que le mot "état" contenu au 4ème paragraphe de l'article 6, comprend, non pas uniquement l'état des personnes en tant qu'individus, mais aussi en tant que membres d'une société familiale."

For Crépeau, Article 1265 must be characterized as a question of capacity, and as such, it is brought within the application of Article 6, paragraph 4, which in turn must be read in its literal sense.

From this cursory examination of Quebec authors, it is obvious that the issue is far from being resolved. As will be seen in the pages that follow, the judicial decisions on point serve only to confuse and not to clarify the question.

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[8]*Traité du Droit Civil du Québec*, Vol. 10, page 48.

[9]*Traité du Droit Civil du Québec*, Vol. 1, page 43.

[10]His carefully reasoned opinion is summarily set forth in a *Conférence prononcée à l'Association des Notaires de Montréal*, 24th November, 1959, entitled *Le régime de capacité ou d'incapacité de la femme mariée dans le droit international privé de la Province de Québec.*

Thus far two cases of some importance have been dealt with; the first being *Eddy v. Eddy*, which related to the application of Article 1265, and the second being *Laviolette v. Martin*, which dealt with the question of marital authorization. For the purposes of this examination only cases which have arisen under the provisions of Article 1265 are considered. Although the legal considerations involved in similar questions of incapacity may be the same, the equitable considerations are different. For example, the fact that marital authorization becomes necessary for consorts who move their domicile to Quebec, does not of itself affect them more prejudiciously than consorts married and domiciled in this province. They are in fact doing no more than accepting the law which applies to their neighbours. This is not true of Article 1265 which prohibits the conferring of benefits between the consorts after the celebration of their marriage. Before the act of marriage, Quebec consorts are given the opportunity of providing for such benefits in their marriage contract. However, a couple married when domiciled outside the Province of Quebec, being unaware of this prohibition and probably not anticipating a change of domicile to this province, are given no such opportunity and unless they come from another community property jurisdiction, they will not have a marriage contract at all. Consequently, Article 1265 becomes much more burdensome for them than for their Quebec counterparts. Of course it can be argued that there is no room in our law for such equitable considerations, but it would appear that this equitable factor has had a strong influence on some decisions rendered by our courts. It is for this reason that the judicial decisions arising under Article 1265 C.C. should be considered apart from other questions of capacity arising from the matrimonial status.

Directly on point is a decision of the Superior Court in the case of *Huestis v. Fellows*.[11] The parties concerned had been married in England while domiciled in the Province of Ontario, and they subsequently changed their domicile to the Province of Quebec. The court determined that the capacity of consorts to confer benefits *inter vivos* upon each other depended upon the law of their matrimonial domicile, which governed them throughout their marriage. Consequently, the prohibition of Article 1265 was held not to apply. Unfortunately, in the course of the judgment, not one authority was cited in support of this proposition.

The following year in the case of *In Re Gold Bros. ex-parte Chernin*[12] Rivard, J., made the following observation:

> "Ici se présente une question de droit international privé, touchant l'effet du domicile des époux quant au mariage (C.C. 63) sur leurs rapports subséquents, après l'établissement d'un nouveau domicile à l'étranger, et en particulier, sur la validité, en ce cas, des avantages prohibés par notre article 1265. Question fort intéressante, que les tribunaux supérieures n'ont pas eu besoin de trancher dans la cause d'*Eddy v. Eddy* . . . , mais qui n'est pas moins résolue depuis longtemps par la doctrine. C'est la loi du domicile des conjoints au moment de la donation mobilière qui détermine sa validité et non pas la loi du domicile qu'ils avaient lors de leur mariage."

[11](1927) 65 S.C. 137.

[12](1928) 11 Canadian Bankruptcy Reports 170 at p. 185.

The opinion expressed by the learned judge does not stand as a judicial precedent of the Court of Appeal because this particular question was never at issue in the case before the court and therefore the statement must be regarded as *obiter dictum.*

Judges of the Superior Court have had occasion to deal with the question twice in recent years. The decisions in point are found in the cases of *Bell v. Best-Lefebvre*[13] and *Sewell v. McGown.*[14]

The first decision concerned a couple who had been married in Ontario and had subsequently moved their domicile to Quebec. The defendant wife bought an immoveable in Montreal, and part of the sale price paid had been drawn from the joint bank account to which both she and her husband had deposited funds. The plaintiff husband had contributed some $4,000 toward the purchase price. Upon demand the defendant wife refused to reimburse these moneys on the ground that they were gifts not rendered invalid by the prohibition of Article 1265, because under the law of their matrimonial domicile such gifts were permissible. Perrier, J., gave judgment in defendant's favour stating:

> "Ce problème a donné lieu à une grande controverse juridique, mais l'ensemble de la jurisprudence est à l'effet que la capacité des époux est immuablement fixée par la loi de leur domicile matrimonial et qu'aucun changement subséquent de leur domicile ne saurait changer cette capacité acquise."

In the second case the husband by way of *saisie-conservatoire* endeavoured to have himself declared the owner of property which he had previously transferred to his wife. In order to do so he invoked the prohibition of Article 1265. The consorts had been married outside of Quebec and their matrimonial regime was subject to the laws of Virginia. As a result, the parties were separate as to property by the laws of Virginia where they could validly make gifts between themselves. Batshaw, J., held that the gifts were valid, relying on the authority of Johnson and on the decision of Perrier, J., *supra.* He stated:

> ". . . not only the matrimonial convention but also the capacity to make sales or gifts is fixed immutably by the law of the matrimonial domicile of the consorts."

Both of the above decisions are unsatisfactory in that the learned judges made no effort to resolve a much disputed question of law which is in need of careful judicial reasoning. These decisions do no more than add the weight of numbers to the position of Johnson and Loranger.

On the present state of the authorities, it is difficult to state a conclusion with any confidence. This is indeed unfortunate, because as serious as the problem has been in the past to persons who became involved with it, today's high taxes and the consequent concern of taxpayers with tax and estate planning have increased the need for resolution of the uncertainty. The problem becomes

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[13](Unreported) S.C.M. 304470.

[14](Unreported) S.C.M. 377529.

For these cases see P. A. Crépeau, *Recueil de Documents et arrêts en droit international privé québécois,* Montréal, 1958 Vol. 2 Vo Statut personnel.

one of more general application when the incidence of succession duty, estate tax and gift tax is considered.

It is of the essence of a "good" tax in the economic sense that it apply equally to persons in the same circumstances. Yet, as will be briefly outlined below, the application of Article 1265 to persons now domiciled in this province whose matrimonial domicile is not Quebec, can have the effect of imposing severely different tax consequences on those persons than upon other Canadians who make exactly the same kinds of gifts between spouses.

The problem is not a minor one, since there is a large number of persons now domiciled in Quebec who were not so domiciled at the time of marriage – in particular, the large number of executive transferees from other parts of Canada and the United States who have moved to the head offices of the many national and international companies based in the Province of Quebec.

In terms of Federal taxes, the problem has two facets – one relating to gift tax, and the other to estate tax. Gifts of property between spouses constitute an obvious means of reducing the overall burden of taxes that are imposed on income or property on a graduated scale.

The Federal income tax consequences of transfers of income-producing property between spouses is settled by Section 21(1) of the Income Tax Act, which taxes the income from the property in the hands of the transferor and not the transferee. The Quebec Provincial Income Tax Act contains no such provision, although it reproduces the other sections of the Federal Income Tax Act that are designed to prevent income splitting by transfers of income-producing property.

In the realm of gift tax and estate tax, the problem concerns taxability of the capital value of property given from one spouse to another. These gifts are usually motivated by a desire to save estate tax (Federal) and succession duty (Provincial) since the estate tax or duty on two estates having net taxable value of $10,000 each is inevitably less than that chargeable on one estate having a net taxable value of $20,000. In order to reduce the toll exacted by the graduated rates, the taxpayer is often advised to dispose of property during his lifetime, and the taxpayer's spouse is a frequent object of this *inter vivos* bounty.

In addition to the question whether such transfers effectively remove the subject property from the transferor's estate (assuming he survives the transfer by the requisite number of years[15]) there is the problem of gift tax if the value of the property transferred by way of gift in any one year exceeds the applicable exemptions.

To illustrate the problem suppose in one year a husband, domiciled in Quebec at the time, transfers property worth $10,000 as a gift to his wife. Assume

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[15]3 years Federal: *Estate Tax Act*, s. 3(1) (c).
5 years Provincial: *Quebec Succession Duty Act*, s. 22(1).

also that his gift tax exemption for the year is $8,000 and that he then survives the gift by 6 years. Two questions arise which involve the provisions of Article 1265 C.C.:

(a) Is gift tax exigible under the Federal Income Tax Act on the $2,000 excess over the amount of gift tax exemption in the year of transfer?

(b) Is the property transferred by way of gift to the wife subject to estate tax and Provincial succession duty upon the death of the husband?

If the transfer was made pursuant to a valid marriage contract, Article 1265 of course has no application and in that circumstance a guide to the answers to the questions posed can be found in two decided cases.[16]

But where the gift was not made pursuant to marriage contract and did contravene Article 1265, what are the tax effects (a) where the matrimonial domicile of the parties was Quebec, and (b) where the matrimonial domicile of the parties was not Quebec?

In practice the Federal authorities will treat the transfer as valid if it was otherwise legally complete but for the invalidity arising from the application of Article 1265. This means that in the example given the gift will be taxed on the one hand, but on the other hand the property given will not form part of the transferring spouse's estate upon his death. This practice is applied whether or not the matrimonial domicile of the spouses was Quebec, and of course has the administrative merit of putting the Quebec transfer on the same footing for Federal tax purposes as similar transfers made between spouses in all the other provinces of Canada.

The Province of Quebec of course imposes no gift tax, but for purposes of its Succession Duty Act, in practice the transfer will be ignored and the property transferred will be regarded as still comprised in the estate of the transferor upon his death. This approach proceeds from the proposition that contravention of Article 1265 makes the purported transfer void *ab initio*, and of no force and effect whatever.

The Federal practice is that *for purposes of the taxing statutes* gifts between spouses validly made except for contravention of Article 1265 are to be taken at face value, while the Quebec practice is to ignore them, since the contravention of Article 1265 is a fatal defect rendering the transfer wholly void. If the Quebec practice is the true interpretation of the law, then the further question arises whether Article 1265 has application to persons now domiciled in, but whose matrimonial domicile is not, Quebec.

This discussion has only raised, and has not answered, certain questions concerning the effect of Article 1265 C.C. as applied to a fairly substantial group of Quebec residents, those persons whose domicile is now in the province but who were domiciled elsewhere at the time of their marriage. The questions are:

[16] *Arnold Houghton v. M.N.R.* (1956) 15 T.A.B.C. 246, and *M.N.R. v. Royal Trust Company and Dawes*, 1950 C.T.C. 21.

(1) Whether, for tax purposes, a gift which contravenes the prohibition in Article 1265 is void *ab initio* and is to be regarded as never having taken place, or whether it is to be taken at face value;

(2) Whether Article 1265 applies at all to gifts made between spouses whose matrimonial domicile is not Quebec.

The uncertainty as to the answer to the second question becomes the more unsatisfactory in terms of tax and estate planning if contravention of Article 1265 renders a gift between spouses void. If the Article so operates, and if it applies to all persons domiciled in Quebec regardless of matrimonial domicile, then there exists a substantial body of taxpayers who are put under a serious legal disadvantage in relation to their legitimate concern so to arrange their affairs as to minimise tax however legally possible. By contrast, spouses with a matrimonial as well as a present domicile outside Quebec are free to make gifts to each other, and spouses with a matrimonial as well as a present domicile in Quebec at least had the opportunity under the law to provide in their marriage contract for the making of such gifts.

The tax questions can be answered in terms of administrative practice, but the true legal position remains uncertain. The taxing statutes can and should be amended to treat on an equal footing all taxpayers whose taxable circumstances are the same, but until the basic questions of the effect for tax purposes and the applicability of Article 1265 in the situations discussed above have been settled, it is not likely that the revenue authorities of either the Government of Quebec or the Government of Canada will change their present practices or institute any legislative changes.