GIFTS AFTER MARRIAGE—SOME ASPECTS OF ARTICLE 1265 OF THE QUEBEC CIVIL CODE

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Article 1265 of the Quebec Civil Code reads:

> After marriage, the marriage convenants 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 retrictions, insure his life for his wife and children.

The article comprises two prohibitions:

(a) against altering the marriage covenants after marriage;
(b) against the conferring of benefits *inter vivos* by one consort upon the other (with the exception therein stated).

A term requiring definition in the article is "marriage covenants contained in the contract." Article 1257 C.C. says: "All kinds of agreements may lawfully be made in contracts of marriage . . . " The "marriage covenants" in article 1265 are these "all kinds of agreements" mentioned in article 1257, and "the contract" in article 1265 is the "contracts of marriage" of article 1257. What, then, is a contract of marriage, as contemplated by article 1257? It is not the marriage itself, although that too is a "contract of marriage".[1] The contract of marriage referred to in article 1257 is one by which, before marriage, the future consorts arrange what are to be their financial relations during their married life.[2]

Article 1264 C.C. lays down the requirement that all marriage contracts be made in notarial form, and before the celebration of the marriage, on which they are conditional.[3] The statement that the contract is conditional upon the celebration of the marriage is a mere truism, since it is obvious that the contract cannot take effect unless it is followed by a marriage between the contracting parties, who have entered into it solely for the purpose of defining their financial relations as husband and wife.

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[1]Art. 115 C.C.: "A man cannot contract marriage before the full age of fourteen years . . . "

MIGNAULT, LE DROIT CIVIL CANADIEN, vol. 6, p. 127: " . . . c'est le contrat indissoluble par lequel deux personnes de sexe différent s'unissent dans une même communauté de vie".

[2]*Idem*, p. 128.

[3]In certain localities, which are excepted by special laws, the contract need not be in notarial form.

Before proceeding to a consideration of article 1265, it may be well to consider article 1266, which provides that, before the marriage, the marriage covenants may be altered, with the consent and in the presence of all such parties to the first contract as are interested in the alterations, but such alterations, too, must be in notarial form. An interesting case with relation to this article is *Gagné* v. *Berthiaume*.[4] In this case, a future husband and wife jointly signed a promissory note in favour of the future husband's parents, for a debt which the future husband owed them. The note was given during the period between the signing of the marriage contract and the celebration of the marriage. The marriage contract provided that the consorts would be separate as to property, and that neither would be responsible for any debts of the other, whether incurred prior to the marriage or after it. Not long after the marriage, the husband died, and the parents sued the widow for the amount of the note. In defence, she relied on article 1266 C.C., and the court maintained her defence, pointing out that "alterations in the marriage covenants" meant any agreement which derogated from the covenants, not only between the parties themselves, but even between one of the parties and a third party. Anything which modified the situation created by the contract, and which resulted in an increase or decrease of the advantages conferred by it, was an alteration, which, to be valid, had to be in notarial form. The promissory note was not in notarial form, and hence was null and void. This case, although it dealt with a pre-marriage transaction, is pertinent to a consideration of article 1265, because the note would have been equally open to attack if it had been given after the marriage. The word "altered" in article 1265 has the same connotation as "alterations" in article 1266, and the giving of such a note would be no less a variation of the marriage contract after the celebration of the marriage than before. However, the question would be purely academic, as the obligation assumed by the wife would in any case be void as being in violation of article 1301 C.C.[5]

To return to article 1265, we have seen that the first part of the article prohibits alterations in the marriage covenants after the marriage. This means, of course, that no new marriage contract can be entered into, nor can the terms of the original contract be varied in any way.[6] This is quite clear, and seems to require no comment, but a special case, of limited but increasing application, must be mentioned. I refer to agreements in contemplation of divorce. Article 185 of the Civil Code says: "Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble".

[4][1951] S.C. 366, Boulanger, J.

[5]See discussion of article 1301 in (1951) 29 Can. Bar Rev., pp. 345 and ff.

[6]Nor can a marriage contract be made if none was made before the marriage — art. 1264 C.C.

However, as is well-known, marriages are frequently dissolved by Act of Parliament, this constituting the sole exception to the article.[7]

Agreements in contemplation of divorce are a commonplace in the United States, and are frequently resorted to in the other provinces of Canada. Without going deeply into the question of the legality of such agreements, it can be said that they are perfectly legal if they are not "collusive", that is, if there are real (not manufactured) grounds for the divorce, if the taking of the divorce proceedings was not induced by a "bargain", and if no deception is practised upon the court.[8] There is no reason to believe the Quebec courts would take a different view. In *X* v. *Z*,[9] Mr. Justice Mackinnon held that such an agreement was not contrary to public order. In *Bigelow* v. *Reddy*,[10] Mr. Justice Duclos upheld a similar agreement. But here enters the complication of article 1265. Even though the provisions of the pre-divorce agreement are to take effect after the marriage has been dissolved by the divorce, they must not vary the terms of the marriage contract.

In France, article 1395 C.N. is to the same effect as the first part of our article 1265. It reads: "Elles (les conventions matrimoniales) ne peuvent recevoir aucun changement après la célébration du mariage". It has been held that this applies even to changes which are to take effect after divorce: "La règle de l'immutabilité des conventions matrimoniales prohibe aussi bien les changements qui produisent effet durant le mariage que ceux qui doivent produire leurs effets seulement après la dissolution".[11] The case of *X* v. *Z*[12] already referred to, is authority for the statement that the law of Quebec is the same. In this case, the husband sued the wife for divorce (in New York, although they were domiciled in Montreal) on the ground of adultery. During the pendency of the divorce suit, husband and wife entered into a written agreement by which the husband agreed to pay the wife a certain sum each month throughout her lifetime, as permanent alimony, irrespective of the divorce, and regardless of whether the divorce action was successful or not. The husband also undertook to provide in his will for the continuation of the payments after his death. A divorce was granted, and some years later, the ex-wife sued for arrears of the stipulated payments. (She had meanwhile remarried). The Parties were at all times domiciled in the Province of Quebec,

[7]Judgments of annulment of marriage are not a real exception, as they are rendered on the ground that there never was a valid marriage.

[8]*Dutko* v. *Dutko* [1946] 4 D.L.R. 471.
Hutton-Potts v. *Royal Trust Co.* [1950] 1 D.L.R. 50.
Dennis v. *Moni* [1945] O.W.N. 340.
Prockiw v. *Prockiw* [1947] 3 D.L.R. 504; [1948] 4 D.L.R. 140.

[9](1935) 43 R. de J. 219.

[10](1940) 78 S.C. 277.

[11]FUZIER-HERMAN, CODE CIVIL (1940) art. 1395, no. 52. See also: S. 1937.1.57 and S. 1930.2.100.

[12](1937) 43 R. de J. 219.

as well when they married as at the time of the making of the pre-divorce agreement.

The court seized of the wife's action held that the agreement to pay alimony after the divorce conferred a benefit on the wife, in violation of article 1265. The obligation of the husband was to support his wife during the marriage, and the extension of this obligation to a period after the termination of the marriage was tantamount to the conferring of a benefit which was forbidden by article 1265. The contrary was void as violating the article, but was not contrary to public policy or good morals.[13]

Similarly, any agreement by which the marriage covenants would be varied by being made more onerous or less onerous would be annullable. It has been held by our courts that a divorce has the same effect as the death of one of the consorts, in bringing into operation the provisions of a marriage contract or of the law which would become effective upon such death.[14] In *Desnoyers* v. *David*,[15] the Court held: "Considering that the divorce . . . dissolved the marriage as effectually as the natural death of one of the parties would have done, so far as the matrimonial rights of the parties *inter se* are concerned". In *Dawson* v. *Hislop*,[16] Bruneau, J., put it thus: "Divorce is the equivalent of the natural death of the defendant for the purpose of ascertaining the matrimonial rights of the spouses *inter se*".[17] If divorce is equivalent to the death of a consort in bringing the terms of the marriage contract into operation, it follows that the wife becomes entitled to claim sums stipulated in the marriage contract to be payable to her upon the death of the husband. Then if, in a pre-divorce agreement, she should undertake to accept the sum in instalments instead of in a lump sum, it would seem that this would be a violation of article 1265, since payment in instalments is less onerous to the debtor and less advantageous to the creditor than payment in a lump sum. And a stipulation that the benefited consort is to lose his or her rights upon re-marriage (a provision which is often used), is even more objectionable, under our law. Of course, an outright renunciation of a benefit conferred by the marriage contract would clearly be invalid as constituting an alteration in the marriage covenants, and could be set aside at the demand of the wife, her heirs or her creditors (if they are prejudiced thereby). But a renunciation must not be

[13]This case is of interest also as illustrating the principle that the matrimonial domicile determines the matrimonial status of the parties for all time.

[14]Art. 1310 C.C.: "The community is dissolved: 1. By natural death . . . ".

[15](1923) 61 S.C. 206.

[16](1922) 60 S.C. 336, at 341.

[17]See FRASER, HUSBAND AND WIFE, vol. 2, p. 1217, where it is said that (under Scots law, which is similar to that of Quebec) the innocent party can claim benefits under the marriage contract which would be payable if the marriage were dissolved by death. In Quebec, there would seem to be no room for distinction between the innocent party and the guilty one, on this score, since the Senate Divorce Committee does not and cannot pronounce forfeiture of financial benefits.

confused with what is really the exercise of a right. In *Bigelow* v. *Reddy*,[18] the wife renounced in favour of her children a sum of $10,000 payable to her under the marriage contract. This was held perfectly valid, since the so-called renunciation was really the *exercise* of her right, plus a transfer thereof to the children. The wife did not relieve her husband of the obligation to pay; she maintained the obligation and made the children the beneficiaries of it. On this point, Guillouard says:[19] "Il faut combiner le principe que les époux ne peuvent renoncer aux avantages qu'ils se sont faits, avec le droit qui leur appartient de disposer de leur fortune pendant le cours du mariage. Par exemple, si l'un des époux renonce à l'avantage que son conjoint lui a fait au profit de l'un de leurs enfants, la renonciation sera valable, si elle transfère à l'enfant donataire l'avantage auquel le père ou la mère renonce".

Incidentally, the failure of the consorts to make a pre-nuptial agreement is in itself a sort of contract. Article 1260 C.C. says: "If no covenants have been made, or if the contrary have not been stipulated, the consorts are presumed to have intended to subject themselves to the general laws and customs of the country, and particularly to the legal community of property . . . ". One of the consequences of being in community of property is that upon the dissolution of the community, the wife has the right either to accept or renounce it.[20] In *P.* v. *L*,[21] it was held by the Quebec Court of Appeal that a renunciation of the community by the wife prior to the enactment of an Act of divorce by Parliament was void, and the wife could, after the divorce was granted, sued for a partition of the community. This case also touched upon a point already mentioned. The husband claimed that since the divorce had been granted on the ground of the wife's adultery, she was excluded from sharing in the community property. The Court, however, pointed out that it was only in cases of separation from bed and board that such exclusion could occur, and then only when it was ordered by the judgment in the separation action (article 209 C.C.) Finally, on the question of a change in the marriage covenants, it is to be noted that an alteration in the mode of payment of a gift provided for in the marriage contract is not necessarily objectionable. Baudry Lacantinerie says:[22] "Il est possible, sans transgresser la défense écrite dans l'article 1395, d'apporter quelques changements dans le mode de paiement de la dot promise. On peut très bien convenir, par exemple, que la dot sera payée en immeubles quoiqu'elle ait été promise en argent".

Let us now return to the second part of article 1265, which forbids the consorts to "confer benefits *inter vivos* on each other, except in conformity

[18](1940) 78 S.C. 277.
[19]Du Contrat de Mariage, vol. 1, No. 235.
[20]Art. 1338 C.C.
[21][1953] K.B. 119.
[22]Contrat de Mariage, No. 110.

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". This provision is necessary, if the first part of the article is to be at all effective, for it would be easy to circumvent the provisions of the marriage contract by transfers of property from one consort to the other, if the prohibition contained in the second part of article 1265 did not exist.

Now, what is meant by "confer benefits"?[23] In general, it means increasing the assets of one of the consorts by diminishing those of the other. This does not necessarily mean than any transfer of assets from one to the other is a violation of the article. For instance, loans from one consort to the other have been held not to be barred by the prohibition.[24] As an extension of this principle, it has been held that if a wife pays her husband's debts, article 1265 is not infringed. The sum paid out is deemed to be a loan to the husband, not a gift. A case in point is *Leclerc* v. *Brossard*,[25] where a wife transferred to her husband's creditor, in payment of her husband's debt, a claim which she had against a third party. The judges of the Court of Appeal held that the transfer of the claim by the wife was equivalent to a loan to the husband, which, as already pointed out, is permissible.[26]

Further, the renunciation by the wife of a hypothec or other real right in immoveables owned by her husband, which right was given to guarantee the payment of gifts stipulated in the marriage contract, is not forbidden by article 1265, according to the decisions of our courts. In *Laframboise* v. *Vallieres*,[27] the Supreme Court of Canada held such a renunciation valid.

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[23]As for the words *"inter vivos"*; art. 755 C.C. says: "Gift *inter vivos* is an act by which the donor divests himself of the ownership of a thing, in favour of the donee . . . " Gifts *inter vivos* are contrasted with dispositions in contemplation of death. Art. 758 C.C. says: "Every gift made so as to take effect after death, which is not valid as a will, or as permitted in a contract of marriage, is void." Reading these articles with 1265, we conclude that the consorts, after the marriage, can make wills in each other's favour, but cannot otherwise pass the ownership of assets from one to the other.

[24]*Dery* v. *Paradis* (1900) 10 K.B. 227.
Bank of Toronto v. *Perkins* (1881) 1 D.C.A. 357.
Allard v. *Legault* [1945] S.C. 287.
Irvine v. *Lefebvre* (1893) 4 S.C. 75, 77.

[25](1927) 42 K.B. 460.

[26]But it has been held in two cases that a wife cannot hand over her immoveable property to a creditor in payment of her husband's debt. The two cases are:
Walker v. *Crebassa* (1865) 9 L.C.J. 53.
Belanger v. *Brown* (1870) 14 L.C.J. 259.
In the latter of these cases, it was said by the Court that if the wife had sold her poperty and used the proceeds to pay her husband's debt, the transaction would have been valid. No reasons for judgment were given by the court. Perhaps the point is that a violation of article 1301 was involved, in that the wife was bound by law to warrant the transferee against eviction and against latent defects. (See discussion of this matter in (1951) 29 Can. Bar Review, at pp. 354 and 355, footnote.

[27][1927] S.C.R. 193.

Voluminous authorities were cited by Rinfret, J. (now C.J.) The point was that the wife had not renounced the gift, only the security, which was permissible.[28] The very respectable authority of Pothier's opinion supports this holding, for he says:[29] "La remise qu'une femme fait à son mari d'un droit d'hypothèque qu'elle a sur un héritage de son mari, en consentant à la vente qu'il en fait, est valable, et n'est point regardée comme une donation prohibée entre mari et femme . . . La raison est que la remise qui est faite au conjoint de ce droit d'hypothèque, n'apportant aucune diminution à sa dette, ne le rend pas plus riche qu'il ne l'était auparavant. Or c'est un principe de droit romain, qu'il n'y a de donations prohibées, entre homme et femme, que celles par lesquelles l'un s'enrichit aux dépens de l'autre: *Ubicumque non deminuit de facultatibus suis qui donavit; vel etiam si deminuat, locupletior tamen non sit qui accepit, donatio valet.*" If it be objected that this doctrine is not entirely satisfactory, in that the relinquishment of the wife's right over the husband's immoveable constitutes a real diminution of her assets, and that the abandonment of the security may result in the total loss of her claim against her husband, the answer is that the principle is so well established, both in the doctrine and in the jurisprudence, that it would be quite futile to dispute it.

Although article 1265 forbids the conferring of benefits by one consort on the other, it is generally agreed that this is not intended to bar gifts of clothing and even of jewelry and other assets of modest proportions. "Modest proportion" is a relative term; the financial status of the donor must be taken into account. Thus, a gift by a millionaire to his wife of a ten thousand dollar bracelet would be of modest proportions, while one worth five hundred dollars, given by a man without resources, would not be so considered. In *Eddy* v. *Eddy*,[30] it was held that a husband could not reclaim from the heirs of the wife gifts of furniture and jewelry, when the gifts were of a modest amount in proportion to his fortune. The gifts, in all, amounted to less than $6,000 over a period of years, and the husband had assets of $500,000. Likewise, it is permissible for the husband to give his wife money periodically for household expenses.[31]

The transfer of assets from one consort to the other by means of an interposed person to whom the property is first transferred, and who subsequently makes it over to the other consort, is, of course, a violation of article 1265.[32]

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[28]See also *Hamel* v. *Panet* [1876] 2 A.C. 181, to the same effect.

[29]DONATIONS ENTRE MARI ET FEMME, Bugnet, 2nd ed., vol. 7, No. 41, p. 464.

[30](1898) 7 Q.B. 300.

[31]*Goulet* v. *Gratton* (1915) 47 S.C. 465.
Jodoin v. *Theriault* (1916) 50 S.C. 347.
Naturally, the sums given must be proportionate to the husband's means. If the wife, by managing well, can save some of the allowance thus given her, she can keep the surplus without violating article 1265.

[32]*Fonderie de Plessisville* v. *Dubord* (1889) 17 R.L. 499.
Carter v. *McCaffrey* (1892) 1 Q.B. 97.

The final part of article 1265 makes an exception in favour of insurance on the husband's life in favour of the wife, under the laws permitting such insurance. I do not intend to discuss these laws here; it is sufficient for our purpose to note that, by exception, such insurance is permissible, even though it constitutes the conferring of a benefit by the husband on the wife. However, to revert for a moment to the question of the effect of divorce upon the rights of the consorts, the courts have held that if the consorts are divorced, the wife ceases to have any claim to the insurance, which reverts to the husband.[33] And, although the law permits a husband to insure his life for the benefit of his wife, the latter cannot insure her life for the husband's benefit.[34] This is merely the application of article 1265, which does not make an exception in favour of such insurance on the wife's part. Finally, on this question of insurance, the case of *Morin* v. *Bolduc*[35] may be mentioned. In this case, it was held that where the marriage contract stipulated that the husband donated to his wife the benefit of a policy on his life and undertook to keep it in force, but permitted it to lapse, the wife could, after his death, claim from his executors the face amount of the policy.

We have seen that the consorts cannot evade the prohibition against altering the marriage covenants by conferring benefits upon each other, either directly or through an interposed person. Nor can they do so by subterfuge. In *Lamarche* v. *Cardin*,[36] the consorts, dissatisfied with the terms of the contract, arranged that the wife should take an action in separation as to bed and board, concluding that the husband be deprived of the benefits provided by the marriage contract. The action was duly taken and judgment rendered accordingly, but the judgment was later set aside at the suit of the husband, on the ground that the arrangement was a scheme to violate article 1265 by altering the marriage covenants.

A final word as to the nature of the nullity of transactions violating the prohibitions of article 1265. Although the article is frequently referred to as one having to do with public order, the courts have repeatedly held that advantages conferred in violation of the article are not radically null, and can be attacked only by a person who has been or may be prejudiced by them. Thus, in *Nadeau* v. *Prevost*,[37] it was held: "La vente[38] ou l'avantage entre conjoints ne sont pas radicalement nuls et inexistants; ceux dont les droits sont ou peuvent être lésés, sont seuls admis à opposer cette nullité. Ainsi dans le cas de donation de créance par le mari à sa femme, le cédé ne peut

[33] *Dame Winer* v. *Great West Life* (1941) 79 S.C. 262.
[34] *Belanger* v. *Perras*, (1927) 65 S.C. 502.
[35] [1952] S.C. 362.
[36] [1949] S.C. 384.
[37] (1917) 52 K.B. 387.
[38] Article 1483 C.C. says: "Husband and wife cannot enter into a contract of sale with each other".

arguer de cette nullité pour refuser le paiement de sa dette". A judgment to the same effect was rendered in *Boisseau-Picher* v. *Turgeon*.[39] The point is that the debtor had no interest to oppose the transfer, since he had to pay the debt once only, and it made no difference to him whether he paid it to the husband or to the wife. The same principle was applied in *Arsenault* v. *Huile Laurentide*,[40] where the husband, to whom a debt was owing, had the debtor sign a promissory wife payable to his wife instead of to himself.

The classes of persons who can attack such transactions are limited to three, as declared by Wurtele, J., in *McLaren* v. *Merchants Bank*,[41]: "The third question is who can contest the transaction by which these sums were placed in the wife's name. Three classes of persons can do so: the husband himself, his heirs or other representatives, and, if it was in fraud of their rights, his creditors".[42]

In conclusion, mention should be made of the "donation of usufruct", which article 1265 declares to be abolished. This donation was a mutual right of usufruct granted by the consorts to the one who would survive, over all or a part of the property left by the other at his or her death. The introduction of unlimited freedom of testamentary disposition of property rendered this procedure obsolete long before the Code was enacted, and it now has only a historical interest.

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[39](1938) 65 K.B. 87.

[40][1949] S.C. 349.

[42]This holding was cited with approval by Bond, J., in *Boisseau-Picher* v. *Turgeon*, above referred to, in which all the authorities are discussed. See also *Nadeau* v. *Provost* (1917) 52 S.C. 387, at p. 389, where the same principle is applied.