

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Trust and Loan Company of Canada v. Gauthier and others, from the Court of King's Bench for the Province of Quebec (Appeal Side) delivered the 3rd November 1903.

Present at the Hearing :

LORD DAVEY.

LORD JAMES OF HEREFORD.

LORD LINDLEY.

SIR ARTHUR WILSON.

[*Delivered by Lord Lindley.*]

The question raised by this Appeal is whether a security given by a married woman on her separate property is valid or void under Article 1301 of the Civil Code of Lower Canada.

The Respondent Dame Hermine Labrice de Kerouack is the wife of M. Corriveau, but she is entitled to separate property. Such property consists of land in the town and district of Iberville. M. and Madame Corriveau, although duly separated as to property, lived together, and he managed her property. Considerable sums of money had been laid out upon it before 1897, and in particular some stables and a billiard room had been built. Part of the land had been laid out in lots for building purposes.

In February 1897 M. Corriveau applied to the Plaintiffs for a loan of \$4,000 on this property. The application was made in the name of his wife and was signed by him for his wife. The Plaintiffs allege, and they called witnesses to prove, that M. Corriveau stated that the money

was wanted for improvements on the property. He denies that he made any such statement, and his wife denies that she wanted money for any such purpose. She says she borrowed the money to enable him to pay his debts, and never understood that it was borrowed for any other purpose. She understands English very imperfectly, and never heard it stated that the money was wanted for improvements.

On the 11th March 1897 M. and Madame Corriveau went to a notary's office, and she then executed a formal mortgage (hypothec) of her property for \$4,000 advanced to her. This mortgage was in proper form: it was made before a notary and was duly signed and attested. It was made by Madame with the authority of her husband, and he signed it as required by Section 177 of the Code. It was also duly registered. The \$4,000 dollars were paid to Madame Corriveau by the Plaintiffs by a cheque drawn on the Bank of Montreal and made payable to her order. The cheque was given to her, she endorsed it and gave it to her husband, who paid it into the Bank of Quebec to the credit of his account there, and he drew upon this account by cheques signed by himself in the ordinary way. Madame Corriveau had no banking account herself, and it is plain that, although she had the cheque, she did not have the money or the benefit of it, unless she got it afterwards from her husband, of which there is no proof.

The loan was entered in the Plaintiffs' books as a loan to her. As interest on it became due she was regularly debited in these books with it; and she was credited in them with payment of the interest. But the interest was, in fact, paid by her husband by his own cheques, and receipts made out to her were sent to him by the Plaintiffs. She never saw these books or entries. She left all her business matters to her husband.

Attempts were made by the Plaintiffs to show that the loan was really for the wife, and that the money lent was laid out on her property. But all these attempts failed. M. Corriveau's evidence was objected to as inadmissible; but their Lordships are of opinion that the learned Judge of first instance did not do wrong in admitting it under Article 314 of the C. de of Civil Procedure, and they accept it as admissible for what it is worth. But M. Corriveau cannot be regarded as a trustworthy witness, and his wife is clearly interested in defeating the Plaintiffs. But, without relying on M. Corriveau's evidence, the entries in his pass-book appear to their Lordships as very significant. The \$4,000 appear to his credit in the books of the Quebec Bank on the 13th March 1897; on the same day he drew out \$2,000, and on the 16th March he drew out another \$2,000. On this same 16th March he is credited in another bank, the Merchants' Bank of Halifax, with \$2,000, and he drew this out by degrees during the month. By the end of March the whole of this money had disappeared. He said it went to pay his debts, but he produced no cheques, receipts, or other documents to corroborate his statement. Madame Corriveau, in answer to a question from the Court, said that all improvements on her property, made before she signed the mortgage, had been paid for, and that money was not wanted for them. But she admitted that her property had increased in value since the date of the mortgage, and she could give no satisfactory explanation of this increase. That the property was attended to and kept in decent order, and to some extent cleared from stones by persons employed by M. Corriveau, seems to their Lordships established by the evidence; and possibly some of the money borrowed may have been spent in this way upon the property. But the

amount, if any, so spent cannot be ascertained; and it appears to their Lordships that it cannot have been large enough to be worth considering. On this head the evidence of Mr. Ryder, the valuer, is important. He says the improvements were complete when he valued the property.

The case came, in the first instance, before Mr. Justice Doherty, who came to the conclusion that the mortgage was given by Madame Corriveau for the benefit of her husband, and he declared the mortgage invalid accordingly. From this decision the Plaintiffs appealed to the Court of King's Bench. The members of that Court, by a majority of three to two, agreed with Mr. Justice Doherty, and dismissed the Appeal. The two dissentient judges did not believe M. Corriveau's evidence, nor that of his wife; and were of opinion that the mortgage deed and receipt by Madame Corriveau of the cheque for the amount borrowed were enough to establish the Plaintiffs' case in the absence of satisfactory proof that she did not in fact get the benefit of the money.

From this decision the Plaintiffs have appealed to His Majesty in Council; and their Lordships have now to determine the inferences to be drawn from the evidence and the legal effect of such inferences.

The law applicable to the case is contained in Article 1301 of the Civil Code of Lower Canada, which in English runs thus: "A wife cannot bind herself either with or for her husband otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect."

The expression "in any other quality" is explained by turning to the French version; in that version the words "otherwise than as being common as to property" are rendered "qu'en qualité de commune." There is no question

here as to common property. The property dealt with was the wife's separate property, and this she can dispose of with the concurrence of her husband (*see* Article 177 of the Code). But after marriage neither husband nor wife can dispose of their respective properties for the benefit of the other except in a few specified cases which may be disregarded on the present occasion (*see* Article 1265).

The language of Article 1301 renders it necessary to distinguish between obligations of a wife for her husband and other obligations contracted by her. The object of the Article is evidently to protect her against her husband and against herself. Except in dealing with their common property, she is not to bind herself with him, *i.e.*, she is not to join him in any obligation which affects him. But she clearly does not infringe Article 1301 by simply disposing of her own property with his concurrence under Article 177. If this is done for her own benefit, the disposition is good. If, however, she disposes of it for her husband, she immediately falls within Article 1301. What then is meant by "for him?" Does it mean jointly with him or as his surety and nothing more? or does it mean for him generally, *i.e.*, in any way for his benefit? Again, is the knowledge, or rather want of knowledge, of her obligee (*créancier*) important? If a person deals with her *bonâ fide* and without knowing that she is binding herself for her husband, is her obligation nevertheless null and void, if it turns out to have been for her husband in fact? Must a person lending money to a married woman on her separate property run the risk of losing his money, unless he takes care to ascertain that it is not borrowed for her husband? The answers to be given to these and other questions all depend on the true meaning and legal effect

6 Mignault 186 and 190, and 1 Sharp 578.

of Article 1301 and on the meaning to be attributed to the expression "for her husband."

Their Lordships are not surprised to find that Article 1301 has given rise to much difference of judicial opinion. It is not necessary to comment on the numerous decisions on this Article. They cannot all be reconciled with each other. But their Lordships gather from the decisions referred to in the argument and in the published commentaries on the Code Civil that the words "for her husband" are now judicially held to mean generally in any way for his purposes as distinguished from those of his wife; and that ignorance on the part of her obligee (*créancier*) cannot avail him if it is proved that she in fact bound herself for her husband. These conclusions are in their Lordships' opinion sound and in accordance with the language of Article 1301 and with its evident object.

6 Mignault 189 and 191

It is seldom necessary to consider on whom the burden of proof lies when the evidence is complete, but it appears to their Lordships that Article 1301 would have little or no effect in practice if the burden was on the wife to prove that she was acting for her husband. The modern decisions in Canada show (and their Lordships think correctly) that the lender must prove that she was acting, not for her husband's benefit, but for herself. If this is proved, the subsequent application by her of money she may have borrowed will not invalidate the security she may have given for it. But if, as soon as she gets the money, she gives it to her husband, or applies it for his benefit, it is difficult to come to the conclusion that she in truth borrowed it for herself.

6 Mignault 191.

Article 1301 clearly goes further than the law which prevailed in Lower Canada before the Code was framed; but their Lordships cannot accede

to the argument that the language used and deliberately adopted in the Code must be narrowed and held to have no greater effect than the previous law for which it has been substituted.

The law then being as above stated, and the facts being as already set forth, their Lordships are unable to differ from the decision appealed from. Taking the whole of the evidence, their Lordships cannot avoid coming to the conclusion that the security in question was in fact given by Madame Corriveau for her husband, although the Plaintiffs did not know it. Such being the case, the security is void.

Mr. Haldane contended that so long as the notarial act was not set aside upon an improbation, evidence to contradict it was inadmissible; and he referred to Articles 1208, 1210 and 1211 of the Code in support of this contention. But the notarial act in this case does not say for whom the money was borrowed; it merely says that the money was lent, paid, and advanced to the wife, which was perfectly true. The effect of a notarial act has been much discussed in Lower Canada (*see Cossette v. Vinet*, R.J.Q., 7 Q.B. 512), and although it seems settled that a notarial act is conclusive proof that the facts stated in it were stated to the notary and were accepted by him to be true, it does not appear settled that the truth of those facts cannot be controverted except in an improbation proceeding. However this may be, and assuming that the notarial act in this case should be accepted as complete proof of what is stated in it, their Lordships do not think it follows that it should be accepted as complete proof of anything else; and they decline to accept it as complete proof of what might be naturally inferred from it if no further evidence were forthcoming.

Another point raised by Mr. Haldane was that, assuming Article 1301 to apply, it only affected the debt contracted by Madame Corriveau and not the disposition of her property, and he contended that the Plaintiffs could at all events hold the property hypothecated by her until they were repaid their advance with interest. If their Lordships were dealing with an English mortgage which the mortgagor could not get back from his mortgagee without the assistance of a Court of Equity, this contention would deserve attention. But the Canadian law of hypothec is totally different from the English law of mortgage, and if there is no debt, there is no hypothec. (*See* Article 2017). Moreover Article 1301 avoids the whole obligation, and this word covers the hypothecation.

Their Lordships will therefore humbly advise His Majesty to dismiss this Appeal, and the Appellants must pay the costs of it.
