THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (DEFENDANT) ..... APPELLANT;

AND

DAME ROSA BELLE LAROCQUE (PLAINTIFF) ..... RESPONDENT.

1942

* Feb. 10, 11, 12, 13.
* March 20.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance (life)—Husband and wife—Insurance contract or policy—Change of beneficiary—Loan and surrender cash values—Cash advances by insurance company upon sole security of policy—Insured appointing his wife as beneficiary—Wife asking and receiving cash advances—Whether a "loan"—Wife endorsing company's cheque in favour of husband and proceeds deposited in his bank account—Prohibition for the consorts to confer benefits inter vivos *upon each other—*

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Maclean J. *ad hoc.*

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Obligation by the wife with or for her husband—Whether transaction in conformity with Husbands' and Parents' Life Insurance Act, R.S.Q., 1925, c. 244—Articles 1265, 1301, 1762 to 1786 C.C.

In 1917, an "ordinary life policy" of insurance for $50,000 was issued by the appellant Assurance Society upon the life of one Larocque, the latter being also styled the beneficiary. The policy contained (in general) the customary clauses usually to be found in that class and form of insurance policies. More particularly, the insured had the right to change the beneficiary by written request; and it was provided that "such change must, however, conform to the laws of the province in Canada in which the insured resides * * *". There was also inserted in the policy a table called "Table of loan and surrender values per $1,000 of insurance"; and that Table showed that, after the policy had been in force for three years, a fixed cash value for each $1,000 of insurance would be paid at the request of the insured and that 95% of such cash value was to represent what was therein called "the loan value". At any time while the policy was in force, after three full year's premiums had been paid, the appellant Assurance Society obliged itself to advance, on proper assignment and delivery of the policy and on its sole security, a sum which, with interest, would not exceed 95% of the cash value at the end of the current policy year (as stated in the Table). Interest at the rate of 6% per annum would be payable on the amount of the loan. Failure to repay such "loan", or to pay interest thereon, would not avoid the policy, except under certain specified circumstances. In 1921, the insured, exercising his right to do so and complying with the necessary formalities, appointed his wife, the present respondent, beneficiary of the insurance policy; and the change was duly accepted by the appellant Assurance Society. In 1930, i.e., over ten years after the issue of the policy, the respondent asked for and received from the appellant a cash advance of $17,000, of which $2,645.50 was applied in payment of the annual premium then due. The amount of the cheque given to the respondent by the appellant was for $15,244.21, the surplus representing the accrued dividends. The respondent then endorsed the cheque in favour of her husband and the latter deposited it in his own bank account. In connection with the advance so made, the respondent signed a document, called "special contract", wherein it was stated that the appellant had made to the respondent a cash advance, receipt being thereby acknowledged, upon the security of the value of the policy which was duly assigned to the appellant by the respondent. The respondent also therein agreed with the appellant as to the conditions upon which such advance and any future additional advances would be made, these conditions *inter alia* dealing with the payment of interest and providing that unpaid interest would be added to the existing loan; it was also agreed that, upon default in payment of any premium, "the total of all advances and any interest shall not be repayable in cash but shall be deducted by the Society from any sum * * * otherwise applicable to the purchase of paid-up or extended term insurance"; though it was also stipulated that the appellant "Society may exercise all powers necessary to effect repayment of all advances and any interest thereon". Appended to that document was a declaration signed by the insured that "I hereby consent to the execution by my wife of the foregoing agreement and to the advance or advances

made or to be made thereunder"; and, at the same time, the insured signed a "special assignment" of the policy to the appellant Society. In 1932 and 1933, the respondent applied to the appellant Society and obtained two further advances, providing mostly for payment of premiums due, thus bringing the total advances up to $21,977. Default was made in payment of annual premiums in December, 1933, and the last of several extensions of time for payment terminated in August, 1934. Thereupon, the total of the advances, with accrued interest, became deductible by the appellant Society from any sum or amount under the policy which would otherwise have been applicable to the purchase of paid-up or extended term insurance; and, as the advances and interest due were in excess of such sum or amount, the policy, as contended by the appellant Society, became null and void and was not in force at the death of the insured in December, 1936. The respondent, after her request for the payment of the amount of the policy had been refused, brought the present action against the appellant Society, alleging that the money advances were absolutely and radically null and void and of no effect, that, consequently, the policy should be held to have been still legally in force at the death of the insured and that the appellant Society should be condemned to pay the full amount of the policy. The grounds, upon which the action was based, were that, although admittedly the cheque for the money advanced was made to her order, the respondent had immediately endorsed it over to her husband, who had deposited it in his own bank account; that she had not received any of the money thus advanced; and that it followed that the whole transaction was: 1st, contrary to articles 1265 C.C., as being in some manner a benefit *inter vivos* conferred by the consorts upon each other and not in conformity with the provisions of the law under which a husband may insure his life for his wife; 2nd, a transaction whereby the wife had bound herself with or for her husband, contrary to the provisions of article 1301 C.C.; and 3rd, a transaction not in conformity with the provisions of the *Husbands' and Parents' Life Insurance Act* whereunder, exclusively, the consorts were authorized by the Civil Code to confer benefits *inter vivos* upon each other. The trial judge, holding that the cash advance to the respondent was void, maintained the respondent's action to the extent of $46,042.88, deducting part of the advances used for the purpose of the payment of the premiums due at the time of the advances. That judgment was affirmed by the appellate court "sans admettre toutes les raisons données par la cour inférieure".

Held, reversing the judgment appealed from, (Q.R. 71 K.B. 279) that the respondent's action against the appellant Assurance Society should have been dismissed. The appeal to this Court was allowed.

The money advances to the respondent were not made contrary to the provisions of article 1265 C.C.—The transfer of the policy by the insured to his wife was not a benefit *inter vivos* conferred in contravention of that article, as, by its very terms, a husband may, subject to certain conditions and restrictions, insure his life for his wife "in conformity with the provisions of the law", and, more particularly, with those contained in the *Husbands' and Parents' Insurance Act*.—Also, the endorsement by the respondent, in favour of her husband, of the cheque issued by the appellant Society was not of the Society's concern. The prohibition contained in that article is a prohibition addressed to the

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

consorts themselves: they may not alter the covenants contained in their marriage contract and they cannot in any other manner confer benefits *inter vivos* upon each other; but that prohibition does not affect the appellant Assurance Society, except possibly in so far as the latter may have acted as an accomplice to the contravention of that article by the consorts themselves. Assuming, without formally deciding it, that the provisions of article 1265 C.C. would forbid a husband from insuring his life for the benefit of his wife unless he does so within the terms of the *Husbands' and Parents' Insurance Act* (the wording of the exception "in conformity with the provisions of the law" does not clearly exclude any provisions of the law found to be applicable and not expressed in the Act), the insurance policy in this case does not detract from the conditions enacted in that statute and, therefore, cannot be held to have been forbidden by, and to be contrary to, the provisions of article 1265 C.C.—As long as an insurance policy does not infringe any of the "conditions and restrictions" essentially required under that statute, the latter must be construed as authorizing the insertion of such accessory clauses as admittedly are usually to be found in ordinary insurance policies. Also, section 3 of the Act authorizes a husband to "insure his life or appropriate any policy of insurance held by himself on his life for the benefit of his wife"; and the word "any" connotes the idea of an ordinary insurance policy containing the usual and customary clauses. Moreover, the condition of the policy, upon which the respondent relies for contending that the policy was still in force at the death of her husband, is not to be found in the above statute and the necessary consequence of the respondent's argument would be that such a condition should not be read into the policy, thereby entailing a fatal result for the respondent's claim. Finally, if the conditions, which the respondent contended should be disregarded, are in conflict with the above statute, or, as an indirect consequence, in conflict with article 1265 C.C., they should be held to be contrary to public order, and, therefore, such conditions would render void the appropriation itself made under the statute: then the insured himself would have remained entitled to the benefits of the policy and the respondent would have no ground of action.

The cash advance made upon the strength of the policy by the appellant Society to the respondent was not a loan whereby the respondent *bound* herself (*s'est obligée*) either with or for her husband, contrary to the provisions of article 1301 C.C. and the obligation contracted by her was accordingly valid (although the respondent might be taken to have made to her husband an illegal gift *inter vivos* of the sums so advanced). Emphasis must be put on the word "bound" as that is the mischief, and the only mischief, which article 1301 C.C. is intended to prevent.—It was a term and condition of the policy that, at each of the periods mentioned in the "Table of loan and surrender values", the appellant Society obliged itself to advance a certain sum stated in the Table. This was one of the benefits and advantages conferred by the policy; it was, therefore, one of the benefits and advantages appropriated by the insured to his wife and conferred upon her at the date of her acceptance of the appropriation of the policy to her: she was at liberty to claim that benefit and advantage, at least after the expiration of ten years of the life of the policy. There was no new obligation assumed by either the husband or the wife in the "special contract": the respond-

ent did not, by that document, or on that date, or in respect of the advance payment made to her, bind herself to anything to which she was not already subject by having accepted the appropriation of the policy.—The appellant Society, when making the cash advance, was merely carrying out the contract which it had made long before with the insured and with the beneficiary. The appellant Society was bound to carry it out and could have been compelled to carry it out at the suit of the beneficiary: it was only paying its debt to the respondent beneficiary and it was none of its concern what the respondent would do with the money.

Hamel v. *Panet* (2 App. Cas. 121; 3 Q.L.R. 173), *Trust & Loan Co. of Canada* v. *Gauthier* ([1904] A.C. 94), *Laframboise* v. *Vallières* ([1927] S.C.R. 193), *Rodrigue* v. *Dostie* ([1927] S.C.R. 563), *Banque Canadienne Nationale* v. *Carette* ([1931] S.C.R. 33), *Banque Canadianne Nationale* v. *Audet* ([1931] S.C.R. 293), *Daoust, Lalonde & Cie* v. *Ferland & New York Life Insurance Co.* ([1932] S.C.R. 343), *Lebel* v. *Bradin* (19 R.L.n.s. 16), *Joubert & Turcotte* v. *Kieffer* (Q.R. 51 S.C. 152) and *Lacoste-Tessier* v. *The Bank of Montreal* (Q.R. K.B. 148) distinguished.

In none of the cases which have come before the courts, and in particular in none of the cases referred to in the reasons for judgment of the appellate court in this case, did the question arise of the effect of advances made by an insurance company upon a policy similar to the one now before this Court. In every one of those cases a loan had been made by a third party, generally a bank, on the security of the policy. The lender was at perfect liberty to make the loan, or not, to the wife. The transaction which the courts, in each of these cases, had to consider was not covered by an anterior contract. These circumstances are of primary importance as distinguishing those cases from the present one.

Upon the proper construction of the insurance contract or policy and also of the "special contract", the cash advance made by the appellant Society to the respondent was not a "loan" within the meaning of that word. (Articles 1762 to 1786 C.C.).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Duclos J., and maintaining the respondent's action based upon a policy of insurance issued by the appellant Society upon the life of the respondent's husband. The appellant Society was condemned to pay to the respondent the sum of $45,622.88 with interest.

The material facts of the case and the question at issue are fully stated in the above head-note and in the judgment now reported.

Aimé Geoffrion K.C., Gustave Monette K.C., and *A. H. Elder K.C.* for the appellant.

(1) (1941) Q.R. 71 K.B. 279.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

L. E. Beaulieu K.C. and *L. Beauregard K.C.* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—On January 4th, 1917, The Equitable Life Assurance Society of the United States insured the life of Mr. Charles Alphonse Arsène Larocque and agreed to pay $50,000 in lawful money of the Dominion of Canada to his executors, administrators, or assigns, upon receipt of the proof of his death, provided the policy was then in force and was then surrendered properly released.

An insurance policy was accordingly issued by the Society, wherein Mr. Larocque is styled the beneficiary ("with the right on the part of the insured to change the beneficiary").

The policy contained the following material provisions:

Upon payment of the second year's premium and at the end of each subsequent policy year, the policy was to participate in the distribution of the surplus of the Society as ascertained and apportioned by it, the dividends, at the option of the insured (or of the assignee, if any), to be, in each year, either paid in cash; or applied towards the payment of premiums; or applied to the purchase of additional paid-up insurance; or left to accumulate at 3% interest, compounded annually.

The insured could, from time to time during the continuance of the policy, change the beneficiary, or beneficiaries, by a written request filed at the Home Office of the Society, such change to take effect upon the endorsement of the same on the policy by the Society, provided the change would conform to the laws in the province of Canada in which the insured resided at the time the change was requested (in this case, the province of Quebec).

If there was no beneficiary surviving at the death of the insured, the proceeds of the policy were payable to the executors, administrators or assigns of the assured.

No assignment of the policy was to be binding upon the Society unless in writing and until filed at its Home Office.

The Society assumed no responsibility for the validity of any assignment.

The policy, and the application therefor, a copy of which was endorsed on it or attached thereto, was to constitute

the entire contract between the parties. No agents were authorized to modify or, in event of lapse, to reinstate the policy or to extend the time for the payment of any premium or instalment thereof.

The insurance was granted in consideration of the payment in advance of $2,645.50 and of the payment annually thereafter of a like sum upon each 18th day of December, until the death of the insured.

All premiums were payable in advance in the city of Montreal. It was stated that the policy was based upon the payment of the premium annually (except that, upon the Society's written approval, the premium could be paid in instalments), provided that, in the event of the death of the insured, any unpaid portion of the premium for the then current policy year might be deducted of the amount of the death claim thereunder.

A grace of thirty-one days, subject to an interest charge at the rate of 5% per annum, was to be granted for the payment of any premium after the first, during which period the insurance was to continue in force. If death occurred within the days of grace, the premium for the then current policy or any unpaid instalment thereof was to be deducted from the amount payable thereunder.

Except as therein expressly provided, the payment of any premium, or instalment thereof, was not to maintain the policy in force beyond the date when the premium or instalment thereof became payable.

There was inserted in the policy a table called "Table of loan and surrender values per $1,000.00 of insurance"; and, as the policy was for $50,000, the values were to be fifty times those stated in such Table. However, the term for which extended insurance was to be granted remained the same without regard to the amount of the policy.

This Table showed that, after the policy had been in force for three years, a fixed cash value for each $1,000 of insurance would be paid at the request of the insured; that 95% of such cash value was to represent what is therein called "the loan value", which the Society undertook to advance. The Table also showed the amount of paid-up life insurance for $1,000 of insurance which the Society would issue in each of the several years therein mentioned. It also showed the number of years and months

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

for which the policy would remain in force and the time for which the payment of the premiums would be extended after the policy had been in force for each of the years stated.

These several figures or values specified in the Table were susceptible of being modified according as dividend additions may be available.

In connection with the so-called loans, at any time while the policy was in force, after three full year's premiums had been paid, the Society obliged itself to advance, on proper assignment and delivery of the policy and on the sole security thereof, a sum which, with interest, would not exceed 95% of the cash value at the end of the then current policy year (as stated in the Table), less any indebtedness to the Society thereon, provided all premiums or instalments on the same had been fully paid. It was stipulated that, in such a case, interest at the rate of 6% per annum would be payable, on the amount of the "loan", on the premium anniversary date of the policy. The "loan" could be increased by the cash value of dividend additions credited to the policy, if any. Unless, however, the "loan" was for the purpose of paying premiums to the Society, the granting of the same could be deferred by the Society for a period not exceeding ninety days after receipt of application therefor. Failure to repay such "loan", or to pay interest thereon, was not to avoid the policy, unless the total indebtedness thereon should equal the total "loan value", nor until thirty-one days after notice should have been mailed to the insured and to the assignee of record, if any, at the addresses last known to the Society.

The policy was styled an "ordinary life policy" on the life of Mr. Larocque (the insured); but it was stated that, at any anniversary date during its continuance, it could be converted into a "limited payment life policy" by the payment of increased premiums for a stipulated period; after which premiums would cease. Such option was available upon the written request of the insured and the return of the policy to the Home Office of the Society for proper endorsement. At the maturity of the policy, after the insured's death and in case the insured had made no election, the beneficiary was to have the option of

getting the net sum due either paid in cash; or left on deposit with the Society during the lifetime of the beneficiary, to be paid upon the death of the beneficiary, to the beneficiary's legal representatives or assigns, with interest at the rate of 3%; or paid in a fixed number of annual instalments; or converted into a fixed income to the beneficiary for life, by the payment of a fixed amount annually for twenty years certain, said payments to be continued thereafter during the beneficiary's life as shown by a table thereto appended.

Finally, it was agreed that the terms of this insurance contract were to be subject to the laws of the Dominion of Canada, and that any action to enforce any obligation under the policy might be validly taken in any court of competent jurisdiction in the province where the policy holder resides or last resided before his decease.

It is not disputed that, at the date of its issue, the insurance policy just outlined was absolutely legal, nor that the several clauses therein regarding beneficiary, assignments, grace for payment of premiums, cash surrender value, "Loan value", paid-up insurance, paid-up extended term insurance, were (in general) the customary clauses usually to be found in that class and form of insurance policies.

Exercising his right to change the beneficiary mentioned in the policy, Mr. Larocque, on the 11th day of January, 1921, complied with the necessary formalities to appoint his wife, the present respondent, the beneficiary of the insurance policy in question. The change was duly accepted by the Society and the appropriate entries were made accordingly in the register. The fact of the change was endorsed on the policy as follows:

> Jan. 14th, 1921. Beneficiary: Rosa L. Belle Larocque, wife, if living.

On December 17th, 1930, the respondent asked for and received from the Society a cash advance of the amount of $17,000, of which $2,645.50 was applied in payment of the annual premium on the said policy payable on December 18th, 1930. The amount of the cheque given to the respondent by the appellant was for $15,244.21, the surplus representing the accrued dividends.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

In connection with the advance so made, the respondent signed a document on the nature and effect of which her contentions in the present case largely rely; and, for that reason, this document must be carefully examined.

It is called a "special contract". It states that the Society has made to the respondent a cash advance, receipt whereof was hereby acknowledged, upon the security of the value of its policy, on the life of Charles A. A. Larocque, and the dividend additions thereto, if any.

The respondent thereby assigned the policy and the dividend additions, if any, to the Society, as security for the repayment of the advances and of all additional advances which might be made thereafter upon such security (delivery of the policy being waived by the Society). The respondent therein agreed with the Society that the conditions upon which all such advances would be made were as follows:

1. Interest shall be payable to the Society from the date of such advances at the rate of 6% per annum (or such lower rate as may be stated in the policy or from time to time established by the Society) and, unless otherwise stated in said policy, such interest shall be payable upon the next premium anniversary date and annually thereafter. Interest if not paid when due shall be added to the existing loan and shall bear interest at the same rate.

2. Unless repaid to the Society prior to default in payment of any premium while said policy is in force all said advances and any interest thereon shall become due to the Society:

(*a*) When the total of said advances and interest shall equal or exceed the loan value of said policy and of the dividend additions thereto, if any. In that event such loan value shall be applied by the Society in repayment of said advances and interest, and said policy and dividend shall be cancelled without notice or upon such notice as is stated in said policy. If the loan value is not fixed by the provisions of said policy it shall be deemed to be the full reserve on the basis of the American Experience Table of Mortality, with interest at the rate of four and one-half per cent (4½%) per annum;

Or (*b*) Upon maturity or termination of said policy. In that event the total of all advances and any interest thereon shall be deducted from any sum otherwise payable on said policy and the dividend additions thereto, if any;

Or (*c*) Upon default in payment of any premium on said policy. In that event the total of all advances and any interest thereon shall not be repayable in cash but shall be deducted by the Society from any sum (including the surrender value or dividend additions, if any, to such policy) otherwise applicable to the purchase of paid-up or extended term insurance.

3. The Beneficiary, provided said policy be not assigned, or the absolute assignee, if any, of said policy, shall have the sole and exclusive right from time to time, without the execution of any additional agree-

ment, to apply for and receive additional advances upon the security of the value of said policy and the dividend additions thereto, if any, until the total advances and the interest thereon shall equal the then loan value thereof, it being understood that the Society is hereby authorized to make such additional advances to and upon the sole application of such Beneficiary or such absolute assignee, as the case may be.

4. The Society may exercise all powers necessary to effect repayment of all advances and any interest thereon including the commutation of any amount payable in instalments under said policy.

5. Nothing herein contained shall restrict any right of revocation or change of beneficiary reserved in said policy, but any such right reserved therein may be exercised in the manner therein stated, provided, however, that all the interest of the new or substituted beneficiary shall be subject to the lien of all said advances and any interest thereon; and the Society shall have the right to retain this agreement for use as evidence upon repayment of all said advances and any interest thereon.

6. The undersigned agrees to make and deliver to the Society at any time and from time to time such other or further written agreements as the Society may demand for the due performance of the conditions hereof.

7. This agreement is made and delivered and the amount of the first advance is paid and received at the Society's Home Office in the city of New York. All applications for additional advances shall be made and accepted and the amount thereof paid and received at the Society's said Home Office. All advances and any interest thereon are repayable at the Society's said Head Office and this agreement is made under and pursuant to the laws of the state of New York and shall be construed in accordance therewith, except that if the policy upon the security of the value of which an advance is made is a policy issued in Canada the provisions of this section 7 shall not apply.

The document was signed by the respondent, who acknowledged that she had executed it before a justice of the peace of the district of Montreal, who certified that the respondent had personally come before him, that she was known to him, and that she had signed it before him.

Appended to the document was the following (signed by Mr. Larocque):

I hereby consent to the execution by my wife of the foregoing agreement and to the advance or advances made or to be made thereunder.

At the same time, Mr. Larocque signed this "special assignment":

The undersigned hereby consents to the conditions of the agreement on the reverse side hereof, to the assignment of the policy therein referred to, and to the advance or advances made or to be made in accordance with said agreement, and in consideration of the sum of one dollar in hand paid, and other good and valuable considerations, receipt of which is hereby acknowledged, does hereby assign to The Equitable Life Assurance Society of the United States said policy and the dividend additions thereto, if any, as security for the repayment of such advance or advances.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

Although called "special contract" and "special assignment", the forms used in this particular transaction were the usual forms used by the Society for similar transactions in Alabama, Florida, Georgia and the Dominion of Canada; and it was not contended that the agreements signed in this instance by the respondent and her husband were not the usual agreements which insured and beneficiary respectively were called upon to sign upon cash advances being made by the Society under the provisions of an insurance policy such as we have in the premises.

On or about January 22nd, 1932, pursuant to the agreement, the respondent applied to the Society for and obtained a further or second advance of $3,379.33, to provide in part for payment, amongst other items, of the annual premium of $2,645.50 due on the policy on December 18th, 1931; thus bringing the total advances up to $20,379.33.

On or about August 23rd, 1933, the respondent, in like manner, applied to the Society for and obtained a further or third advance of $1,597.67, to provide in part, amongst other items, for payment of the then still unpaid balance of $1,587.30 and interest thereon, in respect of the annual premium on the policy, which had become due on December 18th, 1932; thus bringing the total advances up to $21,977.

Default was made in payment of the annual premium on the policy due on December 18th, 1933; and, while several extensions of time for the payment of the premium were granted by the Society to, and at the request of, the insured, in consideration of money deposits made on account, the last of these extensions of time for payment terminated on August 18th, 1934.

Thereupon, in accordance with the provisions of the agreement, the total of the outstanding advances, amounting to $21,977, and interest accrued thereon, became deductible by the Society, in so far as could be, from the sum or amount under the policy, which would otherwise have been applicable to the purchase of paid-up or extended term insurance under the provisions of the policy. The total amount of advances and interest accrued thereon to that date was in excess of the sum or amount referred to; and there being in consequence no such sum, or amount,

or any balance of any kind remaining under the policy on August 18th, 1934, the policy had no further value or effect and became null and void under the terms of the policy; and accordingly, so it was contended by the Society, was not in force and was absolutely without effect at the death of the insured, which occurred on December 24th, 1936.

When, therefore, upon the insured's death, the respondent claimed the payment of the amount, the Society, relying upon the documents and facts above stated, refused to pay, on the ground that the policy had lapsed.

The respondent brought this action against the Society, alleging that the money advances made to the respondent by the Society on the strength of the policy were absolutely and radically null and void and of no effect as having been made contrary to the provisions of arts. 1265 and 1301 of the Civil Code of the province of Quebec as well as contrary to the *Husbands' and Parents' Life Insurance Act,* being chapter 244 of the Revised Statutes of the province of Quebec, 1925; that, therefore, these advances could not be taken into consideration by the Society; and that, if they were eliminated (as they should be), there would have been in the hands of the Society sufficient reserve to carry the policy on to the death of the respondent's husband; that, consequently, the policy must be held to have been still legally in force at the death of the insured and the Society must be condemned to pay the full amount provided for in the said policy.

Article 1265 of the Civil Code reads as follows:

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 1301 C.C. is as follows:—

1301. A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect, saving the rights of creditors who contract in good faith.

The argument of the respondent was based on the fact that, although admittedly the cheque for the money advanced was made to her order, she had immediately endorsed it over to her husband, who had deposited it in

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

his own bank account; she had not received one cent of the money thus advanced by the Society; and it followed that the whole transaction was: 1st, contrary to art. 1265 C.C., as being in some manner a benefit *inter vivos* conferred by the consorts upon each other and not in conformity with the provisions of the law under which a husband may insure his life for his wife; 2nd, a transaction whereby the wife had bound herself with or for her husband, contrary to the provisions of art. 1301 C.C.; 3rd, a transaction not in conformity with the provisions of the *Husbands' and Parents' Life Insurance Act* whereunder exclusively, so it was contended, the consorts were authorized by the Civil Code to confer benefits *inter vivos* upon each other.

The respondent was married to Mr. Larocque under a marriage contract stipulating separation as to property. The wife could not, therefore, bind herself with or for her husband under art. 1301 C.C.

The learned trial judge stated that the "special contract" of December 17th, 1930, was a writing whereby the respondent and the husband jointly transferred the insurance policy in question to the Society for a "cash advance"; and that, by this writing signed at her husband's request, the plaintiff clearly obligated herself with and for her husband, contrary to the provisions of art. 1301 C.C. (in support of which opinion the learned judge referred to the plaintiff's factum and to the authorities therein cited to form part of the judgment as if recited at length therein); that the respondent did not benefit in any way from "this loan"; that the Society did not plead its good faith

> and it is inconceivable that the Society was in good faith in making this loan. The loan was arranged with the husband, a cheque was handed to the husband, none of the Society's officials ever communicated with the plaintiff;

that the Company seemed to have wilfully closed its eyes to the true nature of the loan which the slightest inquiry on their part would have revealed; and that if anybody on behalf of the Society had interviewed the respondent, the truth would have immediately been known.

The parties had filed admissions of facts to the effect that the amounts and dates of the respective advances alleged by the Society were correct and that, in the event

of it being determined by final judgment that the advances were not to be taken into consideration as against the respondent on the ground of their being null and void, the policy of insurance was still in force and effect on the day of the death of Mr. Larocque, except in so far as they represented advances for the purpose of the payment of premiums in respect of the policy, in which case the policy was to be held still in force and effect on December 24th, 1936 (the date of the death of Mr. Larocque) and the amount payable thereon was $46,042.88, with interest thereon from the date of the demand, as claimed by the respondent's action.

Upon these admissions, and having come to the conclusion that the cash advance directly made to the respondent was void, but that the advances for the purpose of the payment of the premiums were to be taken into consideration, the learned trial judge maintained the action of the respondent to the extent of $46,042.88, with interest and costs.

In the Court of King's Bench (appeal side), this judgment was confirmed "sans admettre toutes les raisons données par la Cour inférieure"; but the reasons of the learned judges of the court of appeal show that they did not agree on the grounds upon which the judgment ought to stand.

Létourneau, J., based his judgment on all three points, to wit: arts. 1265 and 1301 of the Civil Code, and the *Husbands' and Parents' Life Insurance Act*. Galipeault and Walsh JJ., restricted their references to art. 1301 C.C. Barclay J., on the contrary, thought that this was not a case for the application of art. 1301 C.C.; but that nowhere in the *Husbands' and Parents' Life Insurance Act* was there any mention made of a permission to get advances whether by the assured or by the beneficiary, except for the purpose of paying the premiums. The consequence was that the advances made to the respondent, both under the special Insurance Act and under art. 1265 C.C., were totally null and void; McDougall J., sitting *ad hoc,* thought that, not only art. 1301 C.C. was an insuperable obstacle to the Society's pretentions, but, as pointed out by Barclay J., the nullity resulting from art. 1265 C.C. was equally fatal to them.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

This Court has had the benefit of a very exhaustive and extremely able argument by counsel both for the appellant and the respondent. It is now our duty to give our decision on the important points which have been raised at the argument and which are likely to affect, as we were told, a considerable number of transactions of the same character in the province of Quebec.

Our attention should first be directed to the application in the premises of art. 1265 of the Civil Code.

So far as this case is concerned, this article may be viewed from two different angles: the transfer of the insurance policy by Mr. Larocque to his wife, the respondent, may be a benefit *inter vivos* conferred in contravention of the article; or the endorsement by the respondent in favour of her husband of the cheque issued by the insurance company may be looked upon as a gift *inter vivos* from the wife to the husband, contrary to the provisions of the article.

As to the first, the simple answer is that, by the very terms of art. 1265 C.C., a husband may, subject to certain conditions and restrictions, insure his life for his wife and children "in conformity with the provisions of the law". This is an exception expressly provided in art. 1265 C.C. The fact, therefore, that Mr. Larocque insured his life for his wife does not, in itself, contravene the rule laid down in the article. The only examination that remains to be made on that ground is whether this insurance is within the conditions and restrictions contained in the provisions of the law thereto relating. This examination will have to be made when we come to discuss the *Husbands' and Parents' Life Insurance Act,* the law which, as contended by the respondent, is referred to in art. 1265 C.C.

As to the second, it must be noted that the prohibition contained in art. 1265 C.C. is a prohibition addressed to the consorts themselves; they may not alter the covenants contained in their marriage contract, and they cannot in any other manner confer benefits *inter vivos* upon each other. This prohibition does not affect the Insurance Society, appellant in the present case, except possibly in so far as the Society may have acted as an accomplice to the contravention of the article by the consorts themselves. Such might perhaps be the explanation of the

judgment of the court of appeal in *Lacoste-Tessier* v. *La Banque de Montréal and The Great West Life Insurance Company* (1).

Here, the respondent might be taken to have made to her husband an illegal gift *inter vivos* of the sum of $15,244.21, represented by the cheque of December 17th, 1930, which she endorsed in favour of her husband. But that is not the point with which we are concerned in this case. The point is whether, by receiving from the Insurance Society an advance upon the insurance policy, the respondent bound herself, contrary to the express enactment contained in art. 1301 C.C.

It has been contended by the respondent that the *Husbands' and Parents' Life Insurance Act* in question is the only Act referred to as being "the law" in conformity with which a husband may confer a benefit *inter vivos* upon his wife. The same point was raised in this Court in the case of *Grobstein* v. *Kouri and The New York Life Insurance Company and The Bank of Montreal* (2); but it was not found necessary, in that case, to express any opinion upon it.

It is to be noted that sec. 2 of the Special Act (R.S.Q., 1925, c. 244) specifically states that

> Nothing contained in this Act shall be held or construed to restrict or interfere with any right otherwise allowed by law to any person to effect or transfer a policy for the benefit of a wife or children, nor shall it apply to any insurance made in favour of or transferred to a wife under the marriage contract.

Therefore, the *Husbands' and Parents' Life Insurance Act* does not apply in the case of an insurance made in favour of or a transfer to a wife made under a marriage contract. It seems also clear that there is nothing in the general law of the province of Quebec, or more particularly in art. 1265 C.C., to prevent a father or mother from insuring his or her life for the benefit of their children.

However, article 1265 C.C., in view of the exception specifically expressed, would seem to forbid a husband from insuring his life for the benefit of his wife, unless he does so within the terms of c. 244 of the Revised Statutes of Quebec, 1925; and, without formally deciding it, we will assume that that is so.

(1) (1935) Q.R. 61 K.B. 148. (2) [1936] S.C.R. 264.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

Under the provisions of this Special Act, a husband may either insure his life, or appropriate any policy of insurance held by himself on his life, for the benefit and advantage of his wife.

Such insurance may be effected either for the whole life of the husband or for any definite period; and the sum insured may be made payable upon the death of the husband or upon his surviving a specified period of not less than ten years.

The appropriation of the policy is made by a declaration in writing endorsed upon or referring and attached to the policy appropriated. A duplicate of the declaration must be filed with the company which issued the policy, and a note of the filing of such duplicate must be endorsed by the company on the policy or on the declaration.

The husband who has effected an insurance, or who has appropriated a policy of insurance for the benefit of his wife, at any time, and from time to time thereafter, may revoke the benefit conferred by such insurance or appropriation and may declare in the revocation that the policy shall be for the benefit only of

> a person or persons for whose benefit an insurance may be effected or appropriated under these provisions.

This means that the husband may revoke the benefit conferred upon his wife and declare that hereafter his children, or one of them, will have that benefit.

It is provided in the Act that the policy shall revert to the insured when the wife for whose sole benefit it existed predeceases her husband, with or without issue. When the policy does revert to him, either in whole or in part, the husband may then be treated as if the insurance had been effected and had always been held for his own benefit.

The *Husbands' and Parents' Life Insurance Act* then provides that the insurance may be made payable to trustees, for the appointment of such trustees and for the discharge of the insurance company in such a case.

The Act further prescribes how the payment of the insurance money is to be made to the persons entitled thereto, and, in the case of minors or persons disqualified from exercising their rights, it prescribes how such money shall be invested or applied.

Section 23 enacts that the husband who has effected or appropriated an insurance for the benefit of his wife may surrender the policy to the company and accept in lieu thereof a paid-up policy for such a sum as the premiums paid may represent, if he finds himself unable to meet the premiums. In such a case, the benefit of the wife shall then be proportionately reduced.

Under sec. 24, the husband who has effected an insurance with profits may either receive the same for his own benefit or may apply the same in payment or reduction of the premiums, or direct them to be added to the insurance money. This provision applies even in the case of profits accruing after a policy has been paid up.

The husband who finds himself unable to continue to meet the premiums may also borrow on the security of the policy such sum as may be necessary to keep the policy in force. In such a case, the loans must be evidenced by a writing, of which a duplicate must be filed with the company which issued the policy and be noted by the company on the duplicate retained by the lender. Such loans are secured by privilege on the policy, and the company shall retain a sufficient amount to repay them from the insurance money. If the loans be repaid before the death of the insured, the acquittance must be filed with the company.

Policies effected or appropriated under the Act are exempt from seizure for debt, either by the insured or by the persons benefited. The insurance money, while in the hands of the company, is free from and unseizable for the debts either of the insured or of the wife and must be paid according to the terms of the policies or of any declaration of appropriation or of any revocation of the same. Such exemption, however, does not apply to any policy, or to part thereof, which may have reverted to or be held by the insured.

By the last clause of s. 30:

> The insured and the parties benefited may join in assigning any such policy.

The above are the material enactments of the statute, 1925, R.S.Q., c. 244, in so far as this case is concerned. For the sake of brevity and clarity, we have omitted the

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

sections of the Act dealing with matters with which we are not presently concerned, and we have left out the references to insurance policies in favour of the children.

It is sufficient to add that this Court, in *La Banque Canadienne Nationale* v. *Carette* (1), has decided that the authority given by the Act to the insured and the parties benefited to "join in assigning any policy" does not prevail against the provisions of art. 1301 C.C. Further, the Act itself (s. 32) deals with the situation where it may be proved that the premiums were paid at a time when the person whose life was insured was insolvent, in fraud of the rights of his creditors. It is enacted therein that the creditors are entitled to recover and to receive out of the insurance money an amount equal to the premiums so paid.

It was decided by the majority of the court of appeal and it was strenuously argued in this Court by counsel for the respondent that the *Husbands' and Parents' Life Insurance Act* is a code by itself and that no insurance policy may be taken out by a husband in favour of his wife, unless it strictly and exclusively follows the provisions of the Act. As a consequence, so it was argued, any insurance policy in any way whatever detracting from the conditions specifically enacted in the statute must be held as forbidden and as contrary to art. 1265 of the Civil Code.

In connection with this argument, it must first be noted that art. 1265 C.C. does not specifically refer to a particular statute or Act under which a husband may insure his life for his wife consistently with the exception referred to in the article. The wording of the exception is: "in conformity with the provisions of the law". This language does not clearly exclude any other provision of the law which may be found to be applicable and which has not been expressed in the *Husbands' and Parents' Life Insurance Act*.

We doubt if it may be held that every possible conditions which may be inserted in the insurance policy taken out by a husband in favour of his wife are necessarily limited to those which are specifically mentioned in the Special Act and, as a consequence, have the effect of bringing the policy outside the requirements of the exception in article 1265 C.C.

(1) [1931] S.C.R. 33.

Provided the insurance policy does not infringe any of the "conditions and restrictions" essentially required under the statute, it does seem that the latter must be construed as authorizing the insertion of such accessory clauses as admittedly are usually to be found in ordinary insurance policies. It must not be taken to have been the intention of the legislature, for example, to exclude "the customary clauses which must be supplied in contracts, although they be not expressed" (art. 1017 C.C.) or such other provisions relating to life insurance in arts. 2585 & *seq.* of the Civil Code as are not specifically excluded by force of the Special Act.

Moreover, s. 3 of the Quebec statute authorizes a husband to

> insure his life or appropriate any policy of insurance held by himself on his life for the benefit of his wife.

The word "any" connotes the idea of an ordinary insurance policy containing the usual and customary clauses, except to the extent that they are specifically dealt with in the Special Act.

Finally, the respondent must be reminded that, but for the "extended term" clause whereby the policy might be maintained in force up to the death of her husband, admittedly she would have no claim against the Society, because default was made in payment of the annual premium on the said policy due on December 18th, 1933, and each subsequent year. The condition of the policy whereby the "extended term" is provided and by virtue of which the respondent is allowed to claim that, although the premium had not been paid since 1933, the policy was still in force at the death of her husband, is a condition which is not to be found in the *Husbands' and Parents' Life Insurance Act*. The necessary consequence of the respondent's argument would be that such a condition should not be read into the policy. It should be regarded as no longer written in it; and the very basis of her action, the clause upon which she relies for contending that the policy was still in force would accordingly disappear, thereby entailing a disastrous result for the respondent's claim.

It is our view, therefore, that these usual and customary clauses inserted in a policy coming under the provisions of the Quebec Act are to be held valid, provided they are not in conflict with the special provisions of the Act, and that they must be given effect to.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

In addition to what has just been said, the fact should not be lost sight of that the insurance policy now under discussion was taken out by the husband in the ordinary way and originally made payable to his executors, administrators or assigns. It cannot be disputed that, when issued, such a policy did not come under the *Husbands' and Parents' Life Insurance Act*. Its terms and conditions were undisputable at the time of the issue. It was only a little over four years afterwards that the policy was appropriated for the benefit and advantage of his wife.

The policy as issued was open to no criticism in respect of its legality and validity. S. 3 of the Quebec Act says that "any" policy of insurance on the husband's life may be appropriated for the benefit of his wife. Such language should be construed as authorizing the appropriation of the policy in question, provided the conditions and restrictions of the policy itself do not come into conflict with the specific enactments of the Act.

The only other alternative—if the appropriation of such a policy be not authorized under the Quebec Act—would be that the appropriation is illegal and invalid. Such a result evidently would not help the respondent. It would mean that the appropriation must be disregarded as contrary to public order and thereby ineffective. The wife, or the respondent in this case, would have acquired no rights whatever as a consequence of the appropriation and her case would fail entirely.

We were asked by counsel for the respondent to consider yet another alternative. This would be that, when a policy of the nature and character of that which was issued here by the appellant Society was subsequently appropriated for the benefit of the wife, it ought to be read as *ipso facto* amended so that all the clauses and conditions therein which are not specifically provided for in the *Husbands' and Parents' Life Insurance Act* should be disregarded as if they had never existed.

We would think that, in order to hold the parties to a contract so amended, one should find in the document of appropriation very express terms indicating that the parties, and in particular the Insurance Society, intended to have it so considered.

It is useless to say that no such express terms appear in the declaration in writing whereby the appropriation was

made in this case. It is abundantly clear, from the subsequent dealings of the parties and from the circumstances, that it never occurred to the husband, or the wife, or the Insurance Society, that, as a consequence of the appropriation or subsequent thereto, the insurance policy was to be regarded as amended in the manner suggested by counsel for the respondent. It does not appear anywhere that the parties, or either of them, consented to such a view of the contract. Even if one of them had any such consequence in view, the Insurance Society, at least, never assented to it. In that situation, the minds would not have been *ad idem* or, as it is usually expressed, there would not have been such meeting of minds as is necessary to constitute a contract binding on the parties. The appropriation would be null, with the result already above mentioned of defeating the respondent's claim.

The insurance policy, in this case, may not, therefore, be looked upon, as a consequence of the appropriation under the *Husbands' and Parents' Life Insurance Act,* to have been amended so as to conform with that Act, as the respondent, in this Court, wished it to be interpreted, both because no mutual consent to that effect appears to have existed and because a court of justice cannot be asked to make a contract for the parties.

The argument on that point must, therefore, be eliminated. Either the insurance policy was appropriated in the form and with the conditions on which it was originally issued, and it must be given effect to as it stands; or it could not legally be appropriated in the form in which it was, and, barring consent of all the parties, it must be held to be an invalid appropriation and contract, as a result of the *Husbands' and Parents' Life Insurance Act.*

For, if the conditions which the respondent asks the Court to disregard are in conflict with the *Husbands' and Parents' Life Insurance Act* or, as an indirect consequence, in conflict with art. 1265 C.C., they are contrary to public order; and such conditions render void the appropriation itself, under arts. 760, 989 and 990 of the Civil Code. It is only in a will that unlawful conditions, or conditions contrary to public order, should be considered as not written and do not annul the disposition.

It need only be added that if the appropriation for the benefit of the wife was null and void as being contrary

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

to the *Husbands' and Parents' Life Insurance Act*, then the husband remained entitled to the benefits of the policy. The money advanced by the Insurance Society went to the husband, and the wife respondent has no ground for complaint herein.

We conceive that there is only one section of the Quebec Act which might have come in conflict with the policy now before us. Section 4 of the Act provides that the insurance covered by it may be effected either for the whole life of the person whose life is insured, or for any definite period; and that the sum insured may be payable upon the death of such person or upon his surviving a specified period of not less than ten years.

Upon that ground, it may be argued that the Quebec Act does not permit of the advances being made under the policy before a period of less than ten years. The point may be left for consideration when it occurs in a concrete case. It does not arise here, since the cash advance made by the Society to the respondent was made only after the policy had been in force for almost fourteen years. Under the circumstances, the point has no practical application.

There remains to discuss the last argument urged by the respondent, and that is that the cash advances made upon the strength of the policy by the Society to the respondent was a loan whereby the respondent bound herself either with or for her husband otherwise than as being common as to property and that the obligation contracted by her is accordingly void and of no effect, so that the payment of $17,000, or, in the alternative, $15,244.21, should be disregarded and the Society must still be held liable for the total face amount of the policy, notwithstanding the fact that it had otherwise lapsed; and that even the amount already paid should not be deducted.

On this point, reasons for the judgment in the court of appeal are largely, if not altogether, based on certain judgments of this Court and of the Privy Council:

Hamel v. *Panet* (1); *Trust & Loan Co. of Canada* v. *Gauthier* (2); *Laframboise* v. *Valliéres* (3); *Rodrigue* v. *Dostie* (4); *Banque Canadienne Nationale* v. *Carette* (5);

(1) (1876) 2 App. Cas. 121; 3 Q.L.R. 193.
(2) [1904] A.C. 94.
(3) [1927] S.C.R. 193.
(4) [1927] S.C.R. 563.
(5) [1931] S.C.R. 33.

Banque Canadienne Nationale v. *Audet* (1); *Daoust, Lalonde & Cie* v. *Ferland & New York Life Insurance Co.* (2).

to which may be added:

Lebel v. *Bradin* (3), a decision of the court of appeal of Quebec, and *Joubert & Turcotte* v. *Kieffer* (4) by Lafontaine J., and several other decisions of the Quebec Superior Court, including that of *Lacoste-Tessier* v. *The Bank of Montreal and the Great West Life Insurance Company* (5).

On that point, it may be noted that Barclay J. differed from the other judges of the court of appeal and said that art. 1301 C.C. had no application to this case. The learned judge based his judgment entirely on art .1265 C.C. and the *Husbands' and Parents' Life Insurance Act.*

At the outset, it should be remarked that, in none of the cases which have come before the courts, and in particular in none of the cases referred to in the reasons for judgment of the court of appeal, did the question arise of the effect of advances made by an insurance company upon a policy similar to the one now before us. In every one of those cases, a loan had been made by a third party, generally a bank, on the security of the policy. The lender was at perfect liberty to make the loan or not to the wife. The transaction which the courts, in each of these cases, had to consider was not covered by an anterior contract. These circumstances are of primary importance as distinguishing those cases from the present one.

Of course, what must first be inquired into in the premises is whether, by what she has done, the respondent bound herself with or for her husband; and the emphasis must be put on the word "bound". That is the mischief, and the only mischief, which art. 1301 C.C. is intended to prevent. In the French version of the Code, the word is "s'obliger".

The meaning of that word in art. 1301 C.C. has been defined in all the cases we have just referred to. In a general way, these judgments have adopted with approval the view of Chief Justice Lafontaine in *Joubert and Turcotte* v. *Kieffer* (6).

(1) [1931] S.C.R. 293.
(2) [1932] S.C.R. 343.
(3) (1913) 19 R.L.n.s. 16.
(4) (1916) Q.R. 51 S.C. 152.
(5) (1935) Q.R. 61 K.B. 148.
(6) 1916) Q.R. 51 S.C. 152, at 157.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

Une chose certaine et unanimement admise, c'est que l'acte juridique que le législateur a voulu proscrire en le frappant de nullité, c'est le contrat de garantie ou de sûreté. Or, les garanties ou sûretés en usage pour assurer le paiement d'une créance sont de deux espèces: les unes sont personnelles et les autres sont réelles. Le contrat de garantie ou de sûreté personnelle s'appelle le cautionnement. Le contrat de garantie ou de sûreté réelle s'appelle tantôt le gage et tantôt l'hypothèque.

Faut-il distinguer entre ces deux espèces de garantie ou de sûreté pour proscrire l'une et admettre l'autre, lorsqu'il s'agit d'une femme mariée qui a contracté pour son mari?

D'abord la prohibition est générale, ce qui serait conclusif, puisque la loi ne distingue pas et qu'il ne faut pas distinguer là où elle ne le fait pas, suivant la règle d'interprétation bien connue. On sait, en effet, que, suivant les auteurs, les mots obligation et engagement sont synonymes et sont souvent employés l'un pour l'autre (Larombière, vol. 7, p. 389) et que l'on peut s'obliger, c'est-à-dire s'engager, ou contracter, soit à titre personnel, soit à titre réel.

L'application de la prohibition de l'art. 1301 à ces deux espèces d'engagement s'impose également. En effet, l'objet de la loi est la conservation du patrimoine des femmes, en les soustrayant à l'influence toute puissante et aux obsessions d'un mari dissipateur, mauvais administrateur et aux abois, en les protégeant contre le danger des entraînements inconsidérés et des consentements donnés par faiblesse, sous l'assurance, et avec le secret espoir, que l'engagement n'est que temporaire et fait pour traverser une période de gêne simplement, mais que le débiteur fera honneur à sa dette, et que le garant ne sera jamais appelé à payer. Or, ces motifs sont également applicables au gage et à l'hypothèque comme au cautionnement, et il y a lieu, par conséquent, de suivre la règle *Ubi eadem ratio, ibi idem jus.*

Aussi, bien que ces deux espèces de contrats varient par leur nature et que leurs conséquences diffèrent, au fond comme résultat pratique, c'est bien la même chose, et le donneur de gage ou d'hypothèque, comme la caution, est appelé à payer et c'est le patrimoine qui répond et s'en va.

Celui qui en cautionnant s'oblige à titre personnel oblige le sien, par conséquent oblige sa chose et confère un gage à son créancier.

Celui qui donne sa chose en gage ou en hypothèque l'oblige au paiement d'une dette suivant la définition même de l'hypothèque que les auteurs appellent l'obligation d'une chose "obligatio rei", et de même il s'oblige personnellement d'une façon indirecte, au moins, puisqu'il est tenu au sacrifice de sa chose, si le débiteur ne paie pas; et d'une façon directe, même, puisque pour la sauver, en la dégageant, il est tenu de payer la dette. Il y a là suivant l'expression des auteurs *obligatio propter rem,* mais obligation tout de même. D'ailleurs ces deux catégories, espèces d'obligations, obligations personnelles, obligations réelles, sont les deux espèces d'un même genre, savoir, les obligations du patrimoine.

For the purpose of applying art. 1301 C.C. in the light of the doctrine above expounded, we must assume, of course, that the insurance policy in favour of the respondent was appropriated under the terms and conditions therein contained, since, as we have seen, if these terms and conditions were unauthorized and illegal under the *Husbands' and Parents' Life Insurance Act,* the appropriation ought to be held invalid and consequently void.

It was undoubtedly a term and condition of the policy that, at each of the periods mentioned in the "Table of loan and surrender values", the Society would advance on proper assignment and delivery of the policy a certain sum stated in the table, in the column under the head "The loan value is 95% of the cash value, less interest".

This was one of the benefits and advantages conferred by the policy. It was, therefore, one of the benefits and advantages appropriated by Mr. Larocque to his wife, the respondent.

The contrary was contended for by the respondent; but this was on the ground that a condition of that nature, though in plain terms in the policy, ought to be construed as not written and eliminated from the contract, as a result of the construction put upon the *Husbands' and Parents' Life Insurance Act* suggested by the respondent; and we have already decided against such a construction.

Mr. Larocque conferred upon his wife all the benefits and advantages of the policy, amongst which the right to this cash advance is to be found; and we see no reason why she should not have been at liberty to claim that benefit and advantage—at least after the expiration of ten years of the life of the policy.

The right of the respondent to a cash advance was a benefit and advantage conferred upon her at the date of her acceptance of the appropriation of the policy to her,—subject, of course, to the terms and conditions of the policy under which such an advance would be made. The maximum advance which she could secure would be the amount indicated in the table inserted in the policy; and the advance would be made

> on proper assignment and delivery of the policy * * * interest shall be at the rate of 6% per annum and shall be payable on the premium anniversary date of this policy. The loan may be increased by the cash value of the dividend additions credited to the policy, if any, failure to repay loan or to pay interest thereon shall not avoid this policy unless the total indebtedness hereon shall equal the total loan value, nor until thirty-one days after notice shall have been mailed to the insured, and the assignee of record, if any, to their addresses last known to the Society.

Moreover,

> except as herein expressly provided, the payment of any premium or instalment thereon shall not maintain this policy in force beyond the date when the succeeding premium or instalment thereof becomes payable.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

Even if the conduct of the respondent be treated as an agreement by her to permit the Society to set off the amount of an advance and interest thereon against any reserves under, and dividend additions to, the policy, such agreement was made at the time she accepted the appropriation of the policy; and in any view of the matter, it was an undertaking on her own behalf and for her own benefit and not for the benefit or for the purposes of her husband.

We do not find any new obligation in the document which the respondent signed on December 17th, 1930, when she received from the Society the cash advance made on that date and in which she acknowledges receipt thereof.

That document, called "Special contract", begins by stating that she assigns the policy and the dividend additions thereto to the Society as security for the repayment of said advance and all additional advances which may be made hereafter. That is, as we have seen, a condition of the policy itself.

The document goes on to say that interest shall be payable to the Society from the date of such advances at the rate of 6% per annum and that such interest shall be payable upon the next premium anniversary date annually thereafter. That is also in the policy. The interest, if not paid when due, shall be added to the existing loan and shall bear interest at the same rate. That condition is implied in the policy; but, at all events, it is in favour of the respondent; for, if it were not there, the policy would have lapsed upon the failure to pay the original interest.

Then the document stipulates that, unless repaid to the Society prior to default in payment of any premium, while the policy is in force, all the advances and any interest thereon shall become due to the Society:

(*a*) When the total of said advances and interest shall equal or exceed the loan value of said policy and of the dividend additions thereto, if any. In that event, the policy and dividend additions shall be cancelled without notice, or upon such notice as is stated in said policy;

Or (*b*) Upon maturity or termination of the policy. In that event, the total of all advances and interest thereon shall be deducted from any sum otherwise payable under the policy and the dividend additions thereto, if any;

Or (*c*) Upon default in payment of any premium on said policy. In that event, the total of all advances and any interest thereon shall not be repayable in cash but shall be deducted by the Society from any sum otherwise applicable to the purchase of paid-up or extended term insurance.

All these conditions were already inserted in the policy either expressly or impliedly.

Then the document or "special contract" provides that, if the policy has not been assigned, the beneficiary shall have the sole and exclusive right, from time to time, without the execution of any other additional agreement, to apply for and to receive other additional advances upon the security of the value of said policy and the dividend additions thereto, if any, until the total advances and interest thereon shall equal the then loan value thereof, it being understood that the Society is thereby authorized to make such additional advances to and upon the sole application of the beneficiary.

That provision was part of the policy and does not add anything thereto.

In clause 4 of the "Special contract", the Society is given the power necessary to effect repayment of all advances and any interest thereon—which means that the Society may repay itself of all the advances and interest in the manner already provided for on the policy—a power which, of course, it already had under the clauses of the policy.

Then the Special contract stipulates that nothing therein shall restrict any right of revocation or change of beneficiary reserved in the policy, provided, of course, that the new beneficiary will then be entitled only to the benefits and advantages remaining in the policy by taking into account the advances already made. For the due performance of the conditions consented to by the respondent, she agrees to effect and deliver to the Society all other and further agreements as may be required; and then follows a stipulation with regard to the place where payments are to be made.

Mr. Larocque became a party to the document for the purpose of authorizing his wife and to give "his consent in writing". This was done in order to fulfil the requirements of article 177 C.C.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

By a further addition called "Special assignment", Mr. Larocque consented to the conditions of the agreement, to the assignment of the policy, and to the advance made in accordance with the agreement; and did himself assign to the Society the policy and the dividend additions thereto, if any, for the repayment of the advance. This was made necessary, not for the purposes of the respondent, but because, notwithstanding the appropriation of the policy made in favour of his wife, he himself held rights under the policy, such as the right of revocation and the reversionary right in his favour, if his wife should predecease him.

With respect, we are unable to find in the transaction thus made an agreement whereby the respondent bound herself ("se serait obligée"), either with or for her husband. No new obligation was assumed by either of the parties in the "Special contract". The respondent did not, by that document, or on that date, or in respect of the advance payment made to her, bind herself to anything to which she was not already subject by having accepted the appropriation of the policy.

The policy calls this cash advance a "loan", and the respondent makes much of that appellation to induce the Court to regard the cash advance as a transaction whereby the respondent borrowed money from the Society. But we need not repeat here what this Court already said in *Rodrigue* v. *Dostie* (1) that:

> En pareille matière, l'enquête du juge ne saurait être limitée par les énonciations du contrat, ni se laisser arrêter par les expressions contenues dans les actes.

The substance of the transaction and not merely the form, is what must be looked at.

Here, notwithstanding the word "loan", we have no doubt that the true character of the cash advance made by the Society is not that of a loan under the provisions of the Civil Code (arts. 1762 to 1786 inclusive).

Under the Quebec law, it is of the essence of a loan that one party, called the lender, gives to another, called the borrower, a thing to be used by the latter for a time and then to be returned by him to the former (art. 1763 C.C.).

(1) [1927] S.C.R. 563, at 570.

It may be a loan of things which may be used without being destroyed, in which case it is called a loan for use; or there may be a loan of things which are consumed by use and that is called a loan for consumption (art. 1777 C.C.). In the former case, the borrower must return the identical thing; in the other case, the borrower must return a like quantity of things of the same kind and quality. In each case, however, there is an obligation to return either the thing itself or a like quantity of things of the same kind and quality. That is the fundamental character of a loan under the Code (arts. 1763 and 1777 C.C.).

There was here, in respect of the cash advance, no obligation on the part of the respondent to repay the money received from the insurance Society. The Society could not sue the respondent for the repayment of the money. Indeed, in an insurance contract of this nature, the insurer has no action to recover even the premiums.

The default in the payment of the premiums operates as a cancellation of the policy. The default to repay the cash advance, which is exclusively at the option of the insured or beneficiary, is twofold: Either, if the insurance contract continues in force, the advance is deducted from the total amount payable at the maturity of the policy; or, if the insurance contract does not continue in force, on account of the premiums not being paid or of the reserves being insufficient to extend the term, the policy is cancelled; but the insurer, at least under a policy such as we have here, is without recourse for the repayment of the cash advance either against the insured or against the beneficiary who has received the same. The insurer has paid a sum represented by the cash advances. It is entitled to deduct it when called upon to pay the total sum insured for at the maturity of the policy; or, if the policy does not reach maturity by force of the terms of the contract, the policy lapses; and that is the end of the respective rights of the parties to the insurance contract.

The respondent points to the fact that there was a stipulation of interest upon the cash advance, and argues from that that the advance partook of the nature of a loan. But interest in itself is not of the essence of the contract of loan. It may, in certain instances, be an element for the purpose of ascertaining whether there was or not a loan. A loan may be considered as such without any

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

stipulation of interest. Conversely, interest may exist, either conventionally or legally, without there having been a loan, as, for example, what is well known under Quebec law as "dommages-intérêts".

In the present case, interest on the cash value was provided for because the insurance Society was requested to pay the amount before the maturity of the policy. Under the normal terms thereof, it had been contemplated that the Society would have been called upon to pay the amount insured for only at the death of Mr. Larocque. The premiums and all the other conditions of the policy had been stipulated on the basis of that occurrence. The Society, however, had agreed to make a cash payment in advance according to computations stated in the table inserted in the policy. Being requested to make this payment before the date of the maturity, the parties stipulated that such an advance would carry interest, not recoverable against the insured or the beneficiary personally, but exclusively against the amount held in reserve by the Society and, so far as the insured or the beneficiary were concerned, to be paid by them only if either of them wished to repay the cash advance and thus to reinstate the policy on the basis which it would have had if no advances had been made.

It will be noted that a stipulation of that kind is along the lines of what is known in Quebec law as a sale with the right of redemption (arts. 1546 & *seq.* of the Civil Code), where the seller stipulates the right to take back the thing sold upon restoring the price of it and reimbursing to the buyer the expense of the sale and other costs. The seller is not obliged in such a case to reimburse the buyer. He may do so in order to take back the property under his right of redemption; but he may not be condemned to effectuate the reimbursement; and if he fails to exercise his right of redemption within the stipulated term, the buyer remains the absolute owner of the thing sold. In sales of that character, interest is always, or at all events generally, stipulated on the principal amount to be reimbursed, but nevertheless such a stipulation is not regarded as having the characteristics of a loan, there is no recourse for the repayment either of principal or interest, and the only consequence of the failure to pay them is that the buyer remains absolute owner of the thing sold.

We have come to the conclusion that the cash advance, in this case, was not a loan within the meaning of that word; and we have reached that conclusion upon the construction of the insurance contract or policy and also of the special contract. This is the proper course to follow when there exists a contract between the parties. But we may add that, both in France and in the United States, where that form of policy was drafted, a cash advance of a similar character is not considered a loan.

Without referring to all the French commentators on the matter, we mention Lefort, Nouveau Traité, tome 2, p. 75, and Dupuich "L'assurance-vie", pp. 200 to 209 inclusive. He says:

> La majorité des décisions se refusent à voir dans l'avance sur police autre chose qu'une avance proprement dite, c'est-à-dire un simple paiement anticipé d'une somme due par l'assureur à l'assuré.

And again:

> L'avance sur police par laquelle l'assureur se désiste par anticipation de la réserve dont il avait la gestion et jouissance à charge par l'assuré de l'indemniser de ce sacrifice par un paiement d'intérêt ne constitue pas un prêt, puisqu'un débiteur ne saurait prêter à son créancier ce qui fait l'objet même de la créance, alors surtout qu'aux termes du contrat, dans aucun cas, l'assuré ne peut être contraint de reverser à la compagnie le montant de l'avance, ni de payer les intérêts stipulés, la résiliation de l'assurance étant la seule sanction du non paiement de ces intérêts; l'avance sur police serait plutôt un paiement anticipé imputable soit sur le capital assuré, soit sur la valeur de rachat, suivant que le contrat est ou non continué jusqu'à son terme (D.P. 1913, 2.289).

In the same sense do we find a decision of the Tribunal civil de la Seine (J.A. 1904-70) and also one of the Tribunal civil d'Alger, Kanoui; and, upon appeal, on the 18th October, 1909 (J.A. 1910, 163):—

As Dupuich points out (No. 179):

> Il est vrai que dans l'avance sur police, à la différence de ces divers cas, la convention comporte, pour celui qui se fait escompter son dû en retirant sa mise, la faculté (non pas l'obligation, remarquons-le bien) de reverser à la compagnie le montant de l'avance. On a voulu voir là le remboursement d'un prêt, mais il s'agit de tout autre chose: l'assuré se réserve tout simplement la faculté de reconstituer sa police, si cela lui convient, conformément au principe constant que le paiement de la prime est facultatif.

And further:

> 182. Il est donc presque toujours impossible de traiter l'avance sur police comme un prêt.
>
> En tout cas, alors même que, par exception, elle serait un prêt, une chose est certaine, c'est que ce n'est jamais un prêt sur gage. Il est bien

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

vrai que l'assureur, en consentant l'avance, exige comme garantie que la police lui soit remise; mais cela ne veut pas dire qu'il la reçoive en gage, car, de même que toute avance n'est pas un prêt, toute garantie n'est pas un gage. Si la compagnie s'est fait déposer la police, c'est par un sentiment de précaution; ce n'est pas parce que, comme en matière de gage, le détention de la police lui assurera le recouvrement de son avance (recouvrement que la convention ne lui permet pas d'exercer); c'est pour ne pas laisser circuler un titre ayant déjà fait l'objet d'un paiement partiel.

Similarly, in the United States,

where a policy holder simply withdraws a portion of the reserve on his policy for which the life insurance company is bound and there is no personal liability,

it is not considered as a loan. (*Board of Assessors of the Parish of New Orleans* v. *New York Life Insurance Company* (1).

In that case, Mr. Justice Holmes, delivering the opinion of the United States Supreme Court, said at page 522:

This is called a loan. It is represented by what is called a note, which contains a promise to pay the money. But as the plaintiff never advances more than it already is absolutely bound for under the policy, it has no interest in creating a personal liability; and, therefore, the contract, on the face of it, goes on to provide that, if the advance is not paid when due, it shall be extinguished automatically by the counter credit for what we have called the reserve value of the policy. In short, the so-called liability of the policy holder never exists as a personal liability; it never is a debt but is merely a deduction on account from the sum that the company ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have mentioned, but the item could never be sued for, any more than any other single item of a mutual account that always shows a balance against the would be plaintiff. In form, it subsists as an item until the settlement, because interest must be charged on it. In substance, it is extinct from the beginning, because, as was stated by the judges below, it is a payment, not a loan.

And Chief Justice Hughes, delivering the opinion of the United States Supreme Court, in *Williams* v. *Union Central Life Insurance Company* (2), says:

As this Court pointed out in *Board of Assessors* v. *New York Life Insurance Company* (1), such advances being against the surrender value do not create a "personal liability" or a "debt" of the insured; but are merely a deduction from the sum that the company "ultimately must pay". While the advance is called a "loan" and interest is computed in settling the account, "the item never could be sued for" and, in substance, "is a payment, not a loan".

(1) (1910) 216 U.S. Rep. 517. (2) (1934) 291 U.S. Rep. 170, at 179.

Although the decisions of the United States Supreme Court are not binding on this Court, they are, it need hardly be stated, entitled to the greatest respect.

In the present case, the Society, when making the cash advance, was merely carrying out the contract which it had made long before with the insured and with the beneficiary. It was bound to carry it out. It could have been compelled to carry it out at the suit of the beneficiary. Therefore, it was merely fulfilling its contract. It was not making to the respondent a loan in any sense of the word. It could not have successfully contended that it could refuse the cash advance to the respondent beneficiary. How then can it be said to have participated in a transaction whereby the respondent was binding herself with or for her husband? And, more particularly, how can it be held not to have paid "in good faith"? It could not do otherwise than pay. It was exactly in the position of an ordinary debtor of the wife who would be paying his indebtedness.

Under such circumstances, not only was it not put upon inquiry as to the use that the respondent would make of the money so paid, but it had no business to inquire.

The situation was the same in that respect as that referred to by Lord Wrenbury, delivering the judgment of the Privy Council in *Corporation Agencies Limited* v. *Home Bank of Canada* (1):

> When C. paid that cheque into his account at the defendant's bank, suppose the bank had asked "For what is this cheque given", would he have been bound to answer? The cheque might have been for salary or for a sum due to C. Jr. on any other account. The defendant bank had no duty to inquire as to the obligation in respect of which the cheque was given.

The Society here was only paying its debt to the respondent beneficiary. It was none of its concern what the respondent would do with the money. This payment was clothed with all the terms and conditions of the insurance Society's contract which had been made before with Mr. Larocque and which the respondent had accepted when she became beneficiary thereof.

This case, upon its facts, is not characterized by any of the circumstances which were present in the cases decided against a lender under art. 1301 C.C.

(1) [1927] A.C. 318, at 324.

1942

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Rinfret J.

For these reasons, the appeal ought to be allowed, the judgments appealed from reversed and the action of the respondent dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Wainwright, Elder & McDougall.*

Solicitors for the respondent: *Beauregard, Laurence & Brisset.*