THE ROLE OF THE NOTARY IN THE PROVINCE OF QUEBEC

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I.

It is the familiar and natural experience of the notary of the Province of Quebec in dealing with persons from outside that province, to find most of them quite mystified as to his background and legal qualifications, and as to the orbit of his professional functions. Sometimes, even, such persons are prone to assume that he is a sort of commissioner for oaths with no more specialized knowledge than would be required for that office. His legal *confrères* from the other provinces know better than that, but many, in my experience, would like to know more. Indeed, all to whom I have spoken evince a lively and gratifying curiosity on the subject, and it is hoped that what follows will help to show to them the Quebec notary in his own setting and in proper perspective.

II.

On what current of law and tradition has he been borne to the present as a legal practitioner, dissimilar in powers and functions from any other legal practitioner in Canada or the United States?

The area which later became modern France took over from the Romans not only the concept of their law but also, in modified form, the tradition of the scribes (*Tabelliones* or *Tabularii*) who wrote agreements and contracts. By 1270 A.D. in Paris, for instance, St. Louis set up for that jurisdiction sixty notaries who were charged to receive deeds and to give them the character of authenticity. Royal notaries were created at a later stage to serve in the provinces, but did not enjoy all the privileges of the Paris notaries. Also, the seigniors appointed seignorial notaries to draw up deeds relating to matters within the jurisdiction of the respective seigniories. Again, there were apostolic notaries who received

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their appointment from Rome and of whom several were established in France, being at the same time royal notaries. As apostolic notaries, their powers were confined to certain spiritual or quasi-spiritual matters.[1]

When the French came to the New World the functions which a notary would normally fulfil were first carried out by missionaries. In due time, however, the notaries appeared on the scene and it is of record that by 1663 there were twenty-two notaries in Quebec, three in Montreal and one in Three Rivers. Of these, one had begun his work as early as 1636, and two in 1637.[2]

Time brought to the notaries increasing prestige and expansion of their functions. This is the more understandable when one learns that, as a matter of policy, no advocates were permitted by the French government to enter and practise in New France. Mr. D. M. Rowat, in an article on "The Notarial Profession in the Province of Quebec"[3] sums up the situation thus: "The French Kings repeatedly declared in their edicts that they desired promptness in the decision of all cases. In its commentaries on the ordinances of Louis XIV, (1667), the Sovereign Council remarks with energy that there are no advocates or attorneys in the country and

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[1] It is interesting to note the development, while this was going on in France, of the notary in England. The Encyclopedia Britannica, 14th edition, at page 563 points out that he was and is an ecclesiastical officer nominated ever since the Peterpence Dispensations Act of 1533-4, by the Archbishop of Canterbury, although his functions are now mainly secular, the most important part of his duty being the noting and protest of foreign bills of exchange. The office is usually held by a solicitor. There the law does not give the same weight in evidence to the notarial act or deed as is given in many other countries and in the province of Quebec.

[2] I should like to express a few words of tribute to the zeal and scholarship of notaries both of these and distant days who in their writings have supplied the student of historical and legal questions, pertaining to the profession, with such a wealth of material for study. Thus, in the historical field, one thinks first of the four volumes of Roy's *L'Histoire du Notariat au Canada (1900)* where one may leave the highway and explore also an infinity of by-paths. A scholarly and fairly lengthy historical discussion going back to Roman times and beyond, will be found as well in Marchand's *Manuel et Formulaire du Notariat de la Province de Quebec* (1892). As recently as 1955, Me George Sylvestre has written on *Les Notaires de l'Antiquité à nos Jours* (1955), 1 *Les Cahiers du Droit* 183 while in *La Revue du Notariat*, a monthly periodical begun before the turn of the century, may be found, over the years, many articles on various facets of the history of the profession. We should note, in passing, the considerable indebtedness of the legal profession generally to this periodical, for the legal commentary found in its pages. For instance, one commentator (Me D. M. Rowat) pointed out years ago that of the twenty-six articles under the heading "Testaments" cited in J. J. Beauchamps' General Repertoire on Canadian Jurisprudence published in 1917, twenty-four had been written by notaries, most of them having appeared in the *Revue* and that of the seventeen legal treatises or articles referred to under the heading "Sale", fifteen were by notaries.

[3] (1924-25), 27 R. du N. 285.

that they do not deem it expedient to permit of their establishment. Lawsuits were terminated in a brief and summary manner, seldom extending beyond a week or ten days. Although there were no advocates, the notaries frequently acted as such during the entire French regime." Professor Vachon of the Faculty of Letters at Laval University[4] quotes the following pungent statement from Baron LaHontan, writing from New France: "*Je ne vous dirai point si la justice est ici plus chaste et plus désintéressée qu'en France; mais au moins si on nous la rend, c'est a bien meilleur marché. Nous ne passons pas par les ongles des procureurs ni par les griffes des greffiers.*" To quote an epithet which, in a concluding phrase, he applied to these absent gentlemen, would be to ab se the hospitality of the pages of The Canadian Bar Review. Professor Vachon comments that LaHontan "*ne mâche pas ses mots*", a magnificent understatement!

The willingness of the authorities to entrust so much to the notaries stemmed in considerable part from the traditional tendency to regard the notary as a composer of differences. Thus in the preface to J. Massé's *Le Parfait Notaire* published in Paris in 1827 we find this encomium applied to the notarial profession: "*Cette magistrature volontaire qui règle et concilie les différends des citoyens; qui, plus heureuse que les tribunaux, éteint les procès au lieu de les juger; qui garantit par ses actes l'exécution des conventions; qui donne aux volontés particulières le caractère et la fixité de la loi; qui affermit les fortunes, assure le repos des familles, et forme, pour ainsi parler, le lien de la société civile.*"[5] Fulsome as such praise may be, it is but one of many statements to be found in French legal writing, sounding this same note, as to the utility of the notary in the settling of disputes and the avoidance of differences. More will be said later on in this article as to the scope which the notary allows himself today, in satisfying the just requirements of both parties in a deed in which he represents one only, and the trust so often accorded to him by the other.

Marchand tells us that the cession of New France to Britain "*n'opéra aucun changement dans les lois relative au notariat.*" However, it should be stated that by 1765, the British instituted the division of legal practice between advocates and notaries, for, as Rowat in his article goes on to say "evils had crept in." "Notaries," he says, "were to be found in court sometimes demanding the nullity of their own acts or sometimes defending faulty instru-

[4] *Le Notaire en Nouvelle France* (1955-56), 58 R. du N. 434.

[5] Quoted by Professor J. G. Cardinal of the Université de Montréal, in an article *Le Notaire* in the April, 1956, number of Thémis, at p. 209.

ments which had been drafted by them." Clearly the change was overdue.

It is interesting to note that of the forty-three notaries in Quebec on the coming of the British, only four returned to France. Me Victor Morin, writing on *Le Role du Notaire dans le Droit Civil* in the collection *Le Droit Civil Français* published by the Bar of Montreal, says (I translate): "All the rest remained faithful to the country of their adoption, and it is to these thirty-nine apostles that we owe the conservation of the French laws in Canada."

Of course the notaries thenceforward, until 1847, held their commissions from the Governor General, and new appointments were made. Rowat gives, as a charming footnote to history, the following translation from the Quebec *Gazette* of the 15th of August 1763, of the notice of one of these new appointments. It reads:

> Richard MacCarty, Notary Public, having been duly admitted to practise as such, attests deeds, wills, donations, codicils, agreements and contracts and makes all kinds of protests, notarial *actes* etc., drafts deeds of sales, leases, mortgages, constituted rents, and other writings generally in French and in English at the most reasonable prices. And should it happen that the two parties do not understand the same language he will execute their deeds in the two languages without charging them more than for one. His office is in his house at Chambly, District of Montreal, where business may be attended to at any hour of the day.

What could be fairer than that?

In 1785, by an ordinance of the Lieutenant Governor[6] which Rowat calls "perhaps the most important date in the history of the profession," notarial practise was restricted to those who qualified in the ways there specified. Thus, it was 173 years ago that notaries were first obliged, for instance, to serve a regular clerkship and to submit to examination as to their knowledge of the law.

In 1847, three boards of notaries were established[7] for the districts of Quebec, Montreal and Three Rivers[8] with one general annual meeting of notaries. This constituted the statutory regulation of the profession and later, as means of communication improved, it was possible to centralize this regulation further. In a word, the Order of Notaries is now, and has been for a long time, subject to substantially the same regulation by the Board of Notaries, its council, committees and officials as is the bar of each of the provinces through comparable controls.

[6] 25 Geo. III, c. 4.
[7] 10-11 Vict., c. 21.
[8] A fourth for the districts of Kamouraska and Gaspé was added by a further statute in 1853.

With this long history of a respected and well-defined profession, it is not surprising that a tradition emerged of successive generations of notaries in certain families. As one instance, not an isolated one, mention can be made of Me Marcel Faribault, a distinguished authority in the field of the law of trusts and now President of *Le Trust Général du Canada*, who represents the seventh generation of his family to be either a notary or a lawyer (five having been notaries), the first notary, Barthélmy Faribault, having conducted his practice in the years 1763 to 1801.

III.

The statute now governing the notarial profession is the Notarial Act.[9] Before we consider the content of this act I must point out that the notaries as a whole constitute the Order of Notaries, while the body which governs and represents them is The Board of Notaries, a civil corporation with its corporate seat in Montreal.[10]

Admission to the Profession[11]

We now pass to a consideration of the requirements which must be met before a candidate is admitted to the practice of the notarial profession. As will be seen, they are roughly similar to those required in Canada for admission to the bar.

First, the candidate, who may, since 1956, be of either sex, and who must be a Canadian citizen, must be admitted to study. To obtain this admission he must have taken and completed to the satisfaction of the Board, or of the committee delegated by it, a complete course of classical and scientific studies in French or English and must, in addition, be a bachelor of arts of one of certain specified French and English universities in the province, or of a university or college of which the diploma is recognized as equivalent, by one of them, for admission to its law course. When the candidate's file is completed to the Board's satisfaction, a fee is paid and a certificate of admission to study is granted.

A three-year law course, taken with aspiring lawyers, in a university or universities of the province, and leading to the same degree, then ensues, followed by the passing of a written examination set by the Board. A further course approved by the Board of

[9] Stats. of Que., 1-2 Elizabeth II, c. 54, assented to on the 26th February 1956, as amended by the 4-5 Elizabeth II, c. 63, assented to on the 23rd February 1956. In what follows, all references to sections are to sections of this Act as so amended, and all references to by-laws are to by-laws enacted by the Board of Notaries.

[10] Ss. 1 and 2.

[11] Ss. 35 to 47 and by-laws 64 to 70.

one more year, at such a university, in notarial training follows (the regular following of which course to be evidenced by a certificate from the university to that effect) and then a further examination, set by the Board on prac ical subject matters, must be passed.

The candidate having supplemented the *dossier* required at the time of his admission to study (which includes his birth certificate and B.A. diploma) by the production of,

(a) his law diploma,

(b) the certificate of completion of the one-year course,

(c) certificates of good conduct from each of two persons of full age domiciled in the province,

(d) a solemn declaration as to his retention of Canadian citizenship and continued residence in the province,

and having paid the prescribed fees for the two examinations is then sworn in (for he is deemed a public officer of the province) and admitted to practice.

The preceding recital of requirements does not, for reasons of space, describe the extreme care that is taken to see that the candidate's schooling and B.A. or equivalent degree meet the high standards exacted. For instance, if adequate courses in philosophy (to which, in the French tradition of the *cours classique*, great importance is attached) have not been taken at school or university, the admission to study may be granted subject to the necessity, before admission to practice is granted, of proof being submitted of the successful completion while the law course was also being taken, of satisfactory courses in philosophy.

The Functions, Privileges and Duties of Notaries[12]

The first three paragraphs of section 48 deserve to be quoted *verbatim*:

> Notaries are public officers whose chief duty is to draw up and execute deeds and contracts, to which the parties are bound or desire to give the character of authenticity attached to acts of the public authority and to assure the date thereof.
>
> Their duties comprise also the conservation of the deposit of such deeds, the giving of communication thereof and the issuing of authentic copies or extracts therefrom.
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> Notaries are appointed for life, with concurrent jursisdiction throughout the Province.

Of course, a notary must keep secret the confidences made to

[12] Ss. 48 to 66.

him in his professional capacity,[13] and under section 50, the provisions of article 332 of the Quebec Code of Civil Procedure which declares that a witness "cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal adviser, or as an officer of state where public policy is concerned," are specifically declared to apply to notaries.

The fees they charge are regulated by a tariff established by the Board, which comes into force following approval by the Lieutenant-Governor in Council, fifteen days after the last publication thereof in two consecutive numbers of the Quebec Official Gazette. The present one came into force on the 19th of April 1957, replacing one which had not been altered since 1945. The provisions of this tariff must be complied with, and any breach of duty in this regard is regarded as an act derogatory to professional honour[14] and is punishable by a fine.[15]

Other duties as defined in section 62 include the duties reading as follows:

> To observe, in the practice of their profession the rules of the most scrupulous honesty and impartiality.
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> To submit to the orders and by-laws of the Board; and to answer, within a reasonable delay, the demands of the president of the Board or of its officers;
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> To avoid all occasions of dispute, and to maintain the most perfect courtesy in their relations with each other;
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> To have their office in a suitable place and there keep their minutes, repertory and index in a proper state of preservation in a fire-proof and damp-proof vault or safe; the whole to the satisfaction of the Board;
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> To keep their repertory and index in the form required by this act;
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> To pay, without delay, any contribution required by the Board;
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> To keep account of all sums and valuables received or collected by them for others;
>
> To accept office as a member or officer of the Board.

Here it should be pointed out that notaries, as other professional practitioners, are subject to the provisions of article 1053 of the Civil Code of the Province of Quebec which reads as follows:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

It is doubtful whether any article of the Code has been the subject of greater legal commentary or has been invoked more in litigation. In an article of the present broad sweep, the tempta-

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[13] S. 62. [14] By-law 131. [15] By-law 145.

tion to turn aside to discuss the manner of its application to legal practitioners in general, and notaries in particular, must be resisted.

Incompatibility[16]

The practice of the notarial profession is incompatible with certain functions, professions and offices, including, to name only some, the profession of advocate, doctor, pharmacist, bailiff, dentist, land surveyor, architect and civil engineer and the functions of a minister of any cult or religion, sheriff, prothonotary, registrar, public curator, succession duty collector or tax collector at Montreal, but this incompatibility does not apply to ministers of the Crown nor to notaries named as members or secretaries of, or legal advisers to, commissions and like bodies created by the federal or provincial government.

The latter phrase recalls the fact that Me Joseph Sirois, who succeeded the Honourable Newton Rowell to the chairmanship of what came to be called the Rowell-Sirois Commission, was a notary.

It is to be observed that the rule of incompatibility does not preclude the possibility of one and the same person having been *successively* an advocate and a notary. Indeed, a notary who was also a King's Counsel, though, of course, no longer practising as such, has not been unknown.

Illegal Practice of the Profession[17]

The members of this, as of other professions, enjoy the protections of the law against encroachment from without. Thus, under section 94, every person becomes liable to fines (of increasing severity for successive infractions) who, not being a practicing notary "practises the notarial profession . . . usurps its functions" or even "acts so as to induce the belief that he is authorized to perform its functions."

An instance of the pitfalls which lie in wait for the imprudent may be given: A few years ago a member of another profession was working on the winding up of an estate governed by the terms of a notarial will. He had, quite permissibly, a number of copies made of a notarially certified copy of the will, as there were a number of different stocks to be transmitted. Alas for him! Without realizing the enormity of his sin, he went further, and subscribed his name to subjoined wording: "Certified a true copy." One of these copies came under the eye of the notary who held the original

[16] Ss. 67 to 70 and by-law 130.

[17] Ss. 94 to 96.

will and who alone could properly certify such copies. He was not amused, and the transgressor quickly found a fine clapped on him. A cautionary tale!

The Relation of the Notary to Each Party in a Deed

The party, in each class of deed, who is entitled to choose the notary to pass the deed, in the absence of special agreement between the parties, is laid down in considerable detail, in section 173 of the Act. For example, in the case of a deed of sale, the choice is with the purchaser if the price is paid in full at the time, otherwise with the vendor. More often than not, by the way, it is the party other than the one choosing the notary, who must pay for the deed.

What are the duties of a notary to each party? The point has been made earlier in this article that traditionally he is supposed to compose differences. His primary responsibility clearly must be to the one who chooses him, and, if he thinks that any such reminder of the fact is needed by the other party, especially where the circumstances of the case are involved, he should give this reminder, pointing out that it is this other party's right to call in a legal adviser, (notary or advocate) of his own.[18] Such is the strength of the tradition, however, that in practice, unless the other party be a large corporation, or the matter be of some magnitude or complexity, another legal adviser is seldom called in.

How far, in fairness to each party, may the notary in preparing his deed, expand, through the introduction of conditions and the like, the bare outline of the preliminary agreement, written or oral, between the parties? It would scarcely, I think, be questioned, that where, in a deed of sale of real estate there was to be an unpaid balance of price to be secured by a charge on the property, the notary might properly introduce the customary obligations imposed on the purchaser to keep the property insured, to pay the taxes, and so on.

If I may be pardoned for citing an example from my own practice: I had alone represented a company having its head office in another province, in the making of a deed of lease, pursuant to a bare outline agreement with the lessee. In due time, after the copy of the lease which had been signed by the lessor's local representative had gone forward, I was asked specifically by the company's head office solicitors how it was that I, who was representing the lessor, had imported into the deed a waiver by it

[18] He may thus have two legal bills to pay!

of the presumption arising from article 1629 of the Quebec Civil Code which reads:

> When loss by fire occurs in the premises leased, there is a legal presumption in favour of the lessor, that it was caused by the fault of the lessee or of the persons for whom he is responsible; and unless he proves the contrary he is answerable to the lessor for such loss.

Had the lessee, I was asked, requested this waiver?

I replied that no such request had been made, but that, on the contrary, as this presumption was considered unfair to the lessee, as inverting the ordinary rule that the burden of proof of fault by another lies on the complainant, I had introduced the waiver on my own initiative; that by custom such waiver was commonly given in notarial leases; and that as a matter of custom and equity, I had, on the other hand, included in the deed a dozen and more conditions imposed on the lessee which were ordinarily deemed proper for the lessor's protection (though not found in the preliminary agreement nor envisaged by the Civil Code) and which in fact had been agreed by the legal adviser, whom, in this instance, the lessee had retained.[19]

If this answer failed to give satisfaction, I was never made aware of the fact. The case in point is as good a one as I can think of to illustrate the recognition by a notary of his duty to both parties, in adding the requisite flesh and blood in his deed to the bare bones of the preliminary agreement. This duty is not without its subtleties, and the subject does not lend itself to discussion in general terms.

The Rule of the Board of Notaries[20]

The Board is composed of,

(a) *de jure* members in the persons of its former presidents during the three triennial terms following their presidency;

(b) thirty-eight members, each elected for a three-year term, from certain defined districts, the more populous districts electing more members than the others.

It is laid down as one of the duties of a notary to accept office as a member or officer of the Board.[21]

General sessions are held each year and special sessions, when determined by the council (of which mention is made below.)

A president, vice president and syndic are elected by the Board from among its members for the three-year term.

[19] As one of a dozen examples of such conditions, one might cite the prohibition to keep on the leased premises more than a stated minimum quantity of combustible compounds.

[20] Ss. 2 to 34.

[21] S. 62.

They choose a secretary and a treasurer (or a secretary-treasurer) and an inspector from among the practising notaries, and fix their salaries.

Those chosen must thereupon cease practice and hold no other remunerated position without permission.

The Syndic has the special duty of supervising the discipline of the profession, prosecuting in the Board's name all notaries against whom accusations are brought.

The powers of the Board include *inter alia* the power to:

(a) fix the annual subscription;

(b) enact by-laws for the administration and internal management of the matters under its control and for the carrying out of the provisions of the Act;

(c) impose penalties for by-laws and the provisions of the Act;

(d) order notaries to use uniform books and systems subject to inspection;

(e) determine and define professions, trades, etc., incompatible with the functions of a notary;

(f) determine acts derogatory to the honour of the profession;

(g) determine the teaching programme;

(h) determine the programme of examinations;

(i) provide for the establishing of a system of guarantee in connection with funds entrusted to notaries in the exercise of their duties;

(j) enact all by-laws deemed expedient respecting the choice, government and direction of inspectors of records.

The Board is required to maintain discipline among notaries and to mete out punishment to offenders. Disciplinary penalties extend even to removal from office.

The Board is represented by a council of not more than eight, or less than six, of its members, of which its president and vice-president are members and over which its president presides, the others being appointed by the Board at the first session of each three-year term. While the Board is in vacation the council possesses all the powers of the Board, including the power to enact by-laws which remain in force until the Board's next session. It sits on the dates and at the places fixed by it or its president.

Every practising notary pays in advance an annual fee fixed by the by-laws. This fee is currently fifty dollars, except for notaries in their first two years of practice who pay twenty-five dollars.

IV.

Notarial Deeds[22]

We have seen from the passage quoted above from section 48 that it attributes—and quite rightly—first importance to the distinguishing characteristic of the notary's work; that is, the making of deeds to which, and to the copies of which, certified by him, are imparted the character of authenticity. As to the legal effect of authenticity, articles 1210 and 1211 of the Quebec Civil Code have this to say:

> 1210. An authentic writing makes complete proof between the parties to it and their heirs and legal representatives:
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> 1. Of the obligation expressed in it;
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> 2. Of what is expressed in it by way of recital, if the recital have a direct reference to the obligation or to the object of the parties in executing the instrument. If the recital be foreign to such obligation and to the object of the parties in executing the instrument, it can serve only as a commencement of proof.
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> 1211. An authentic writing may be contradicted and set aside as false in whole or in part, upon an improbation in the manner provided in the Code of Civil Procedure and in no other manner.

Improbation proceedings and the circumstances which give rise to them are rare, and the discharge of the burden of proof by the plaintiff is not easy.

As might be imagined, the responsibility imposed on the notary in respect of the preparation and execution of documents to which the law gives such a character is a heavy one. Thus, it is his duty to identify the parties who appear before him and to describe them in precise terms. There must be a "due reading" of the deed, and each must sign in the presence of the notary who also signs it, and the deed must recite that this took place, and must, of course, mention the place and date of execution. In the case of the authentic deed *en minute* (in contra-distinction to the authentic deed *en brevet*, mentioned briefly below) the notary must set out in words the minute number given to the deed. The notary also counts all words and letters struck out, and the number of valid marginal notes (all of which must be initialed by the parties and the notary) and subscribes a statement of the number of each. The Notarial Act even imposes the duty to use regulation paper and good ink, to fill in all blanks, avoid the use of abbreviations, and so on. If typing is used, none but a ribbon copy (to the exclusion of carbon copies) may be used for the notarial original. The original deeds are entered in a volume of certain requisite form and quality,

[22] Ss. 169 to 176, 179 to 204, 64 and 65.

called a *répertoire*, in strict chronological order of their completion, each, as has been said, being given a minute number following such chronological sequence. Each deed is also indexed in this volume under the name of each party thereto. As many copies as may initially be required are then made, and a *verbatim* comparison with the original made, following which such copies are certified by the notary and sent where needed. The original deeds are filed in numerical sequence in a fireproof vault, as required by law.

The fact that the signed original deed *en minute* is seldom put to use, except as a text from which copies are made, permits it to be completed with words struck out and initialed marginal insertions; in short, in a form that simply would not do if it, instead of the notarial copy, were to be registered or otherwise recorded or put in general use.[23] This system permits last-minute changes to be incorporated in a deed, or last-minute deletions made, at the final reading, without any delay while a new typing is prepared for signature. Were not these originals understood in the light of the system of authentic copies, the final appearance of some would cause raised eyebrows.

The Custody of Notarial Records[24]

The notary's *repértoire* or *repértoires* and all his deeds executed *en minute* make up what is called his *greffe*. This is proper to each notary as a separate public officer, irrespective of any partnership in which he may be associated. When he dies or retires, if he has not exercised a statutory right to transmit them to another notary by will or assignment, the council or the president of the Board of Notaries may appoint as provisional guardian of his records another notary who may certify copies of his deeds and give such copies like authenticity for a time, but eventually the *greffe* is deposited in the archives of the Superior Court of the judical district in which the deceased or retired notary last practised. Thereafter the Prothonotary of the court certifies any copies required.

It will thus be seen that the law has taken great care that all the deeds executed *en minute* of all the notaries in the Province of Quebec, even from earliest times, are preserved. One can imagine the rich deposits of historical material available to the historian in these records and far from completely "worked" as yet.

[23] In the notarial copy, of course, the words in the marginal notes are typed in at the appropriate points and a neat document results, often contrasting sharply in appearance with the original.

[24] Ss. 71 to 93.

Wills and Codicils[25]

As to wills or codicils made in authentic form, requirements peculiar to these deeds are laid down in the Civil Code. In these cases, the document must be completed before two notaries, or before a notary and two witnesses, the notary reading the deed aloud to the testator in the presence of his colleague (or of the two witnesses, as the case may be) the testator and the notaries (or notary and witnesses) then signing, each in the presence of the others, the deed reciting that all these formalities have been complied with. Surrounded by these precautions, the notarial form of will does not need to be probated, and as the executor or, where there is none named, the heir, needs neither any sanction of any Quebec court to administer and wind up the estate nor, in the absence of unusual circumstances, any court approval of his accounts, no recourse to the courts at any stage in the settlement of any estate under a notarial will is ordinarily necessary. The English form of will (before two witnesses) and the holograph will (written throughout by the testator in his own handwriting and signed by him) are both recognized by Quebec law, but wills in either of these forms require probate in the court of the jurisdiction of the testator's domicile.

It is interesting to observe that as early as 1850 a statute of the province of Canada was enacted[26] by which notarial copies of instruments passed in Lower Canada might be received in evidence in Upper Canada. The substance of this enactment is retained in the present Evidence Act of the province of Ontario[27] which reads:

> A copy of a Notarial act or instrument in writing made in Quebec before a Notary and filed enrolled or enregistered by such Notary, certified by a Notary or Prothonotary to be a true copy of the original thereby certified to be in his possession as such Notary or Prothonotary, shall be receivable in evidence in the place and stead of the original and shall have the same form and effect as the original would have if produced and proved.

Deeds en brevet[28]

Mention was made above of a second form of authentic deed—the deed executed *en brevet*. In this form the same precautions as to reading and signing are carried out, but the original deed is

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[25] Articles 842 to 855 of the Civil Code.
[26] 13-14 Vict., c. 19.
[27] R.S.O., 1950, c. 119, s. 35. Substantially similar provisions exist in other provinces, see for instance Alberta Evidence Act, R.S.A., 1955, c. 102, s. 45.
[28] Ss. 177 and 178.

delivered to whomsoever may need it. It is not entered in the *répertoire*, nor may authentic copies be made of it. The Notarial Act enumerates those deeds which *must* be in this form and those which *may* be. Suffice it to say that these are deeds where, from their nature, it is anticipated that no copy will ever be needed, or where the court wishes to hold the signed record—for example, the preliminary declaration, and the *procés-verbal* of a family council advising as to the appointment of a tutor to a minor, both of which are later filed in court in support of the petition for the homologation of the advice given. Deeds in this form are relatively few.

Inspection of Records[29]

The enactment of legislation requiring the maintenance of certain standards in the preparation, execution and safe custody of deeds would be of doubtful efficacy were no steps taken to see that these provisions were complied with.

Accordingly, the Board is empowered to order the inspection of notarial records and to provide for the appointment of inspectors chosen from among the practising notaries, and to determine their powers and attributions. The inspector visits the offices of the notaries of the province, examining into, and reporting to the Board on such matters as whether the *repértoires* and indexes are kept in accordance with the law, whether the deeds are duly numbered and signed and kept in a good state of preservation; whether a regular office is kept in which the deeds are preserved; and whether regular accounts are kept in trust matters in accordance with the by-laws of the Board. The inspection, in fact, extends "to all the duties imposed by this act, the by-laws of the Board, or any other act."[30]

The inspection is mandatory upon the Board, if a sworn complaint in proper form be lodged, alleging any breach on the part of a notary of any of his duties under the Act.

In what has gone before there has been much emphasis on the form of notarial deeds. We may now consider their content.

By far the largest class of deeds which the notary prepares and executes in authentic form relate to real estate. Indeed all conventional hypothecs (or mortgages in the nearest common-law equivalent) *must* be in that form. The overwhelming majority of deeds of mutation of title to land—sales, transfers and the like—are in this form, although a deed under private signature if prop-

[29] Ss. 147 to 161. [30] S. 154.

erly witnessed and authenticated may still be accepted for registration. As, under a change enacted some few years ago, the document deposited in the Registry Office must be on paper of prescribed quality and dimensions with margins of fixed width, the proportion of such deeds in other than notarial form becomes relatively less and less, and they are mainly confined to a few rural districts. Declarations of transmission of real estate by will or abintestate succession must be in notarial form, the will (if there be one) being also registered. As the lessee, in the case of important leases, may wish to preserve his rights by registration against possible new owners of the property leased, such leases, too, are often in notarial form, though the registration of leases under private signature is also possible, where certain authenticating procedures are followed.

It is not unnatural that the notaries, being so much concerned with land titles, should be turned to (though here sharing the field with the advocates) title examinations and reports. This work bulks large in the practice of a city notary.

The advantages of the notarial will to testators domiciled in the province of Quebec are, I hope, manifest from what has been said above, and the high proportion of important estates in that province governed by wills in this form, bears witness to the fact that these advantages appear to be widely recognized. The notary, too, winds up estates, although in the cities, at least, an increasing proportion of this work goes to the trust companies.

Another class of document in which the authentic form *en minute* is mandatory, is the marriage contract, whereby intending consorts, if the future husband be domiciled in the province of Quebec, derogate by agreement from the *régime* of community of property in which they would find themselves in the absence of such a contract. It would appear that one of the consequences of increasing industrialization of the province, with greater concentration of population in the towns, is that an increasing percentage of married people prefer something other than the legal community of property which is, in effect, the law's estimate of the *régime* either best suited to, or desired, by the majority of the population. Such a contract usually provides also for the creation of a money obligation by the husband in favour of the wife with mandatory payment deferred till the husband's death. This is because sale or gift between consorts after marriage is prohibited under article 1265 of the Civil Code.

The notary, under article 83 of the Quebec Code of Civil Proce-

dure, may prepare certain types of noncontentious proceedings requiring court rulings, and submit them to the judge or prothonotary. Such proceedings include the appointment of tutors to minors, and of curators to otherwise incapable persons, the sale of the property of such incapables, and so on. The notary may even sign, in the name of the petitioners, all petitions necessary for such proceedings.

V.

To recapitulate somewhat: although, as has been indicated, there are certain fields, such as title examination, where both advocates and notaries may act, the one person cannot simultaneously practice the two professions, and, of course, there are large areas of function exclusive to each profession. Thus, except as mentioned, the notary may not appear before the courts, nor may he engage in a professional capacity in contentious proceedings. Conversely, the advocate may not execute "authentic" deeds.

Traditionally, the notary has concerned himself with the investment of his client's money, and may operate trust accounts for that purpose.

In closing, a word should be said of the varying ways in which notarial practice is conducted. In Montreal, especially, where the pressure of events, in a rapidly growing city, is felt by many notaries, hard put to it, in recent years, to get their clients work done in time, there has been in some firms, marked expansion of numbers, greater use of mechanical aids, and some tendency to specialization by individual practitioners. For these, administration of estate funds no longer holds its former attractions. Most others have chosen the continuance of an individual practice. Both in different ways, fulfil needs asserted by the communities in which they practise. But it is in the smaller municipalities that the notary is found, whose knowledge of the people whom he serves, their needs and their problems, is probably the most intimate, and who is ready and willing to offer the widest scope of service, in the tradition of the notary of another day. Here, not only are the deeds prepared and executed, but lender and borrower, buyer and seller, lessor and lessee may be brought together through the notary's good offices, insurance placed where needed, the client's investments looked after with scrupulous care, and much wise counsel given. His community looks to him in its temporal concerns as it looks to its *curé* in spiritual matters, and with a confidence no

less justified. It is in the country notary at his best, as in the country lawyer at his best, that, in terms of human values, the practice of his profession may be seen in perhaps its finest flower.