THE QUEBEC LAW OF EVIDENCE COMPARED WITH THAT OF FRANCE.*

I.

PRELIMINARY REMARKS.

(1)

In the Chapter "Of Proof," our codifiers did not follow the French Code as closely as in most of the other branches of the Civil Law. Their observations in this connection read, in part, as follows : —

> " Dans le chapitre correspondant du code français, les règles du droit civil modifiées par les ordonnances et la jurisprudence de l'ancienne France, ont été suivies asses à la lettre, et ces dernières ont servi de base aux articles maintenant soumis en tant qu'elles font encore partie de notre droit. Les changements néanmoins, dont quelques uns ont été introduits par des statuts et dont d'autres sont le résultat d'une jurisprudence formée par l'expérience, sont si considérables qu'il est impossible d'adhérer strictement à la méthode et aux principes qu'on trouve dans le code français. Les Commissaires se sont, en conséquence, efforcés de rendre dans une forme aussi concise que possible les règles fondamentales sur cette matière, embrassant dans leurs articles non seulement celles du droit civil, mais encore les changements et additions qui ont surgi des sources mentionnées plus haut."

In commercial matters the English rules of evidence were introduced and retained after the Cession, and although, unlike France, we have no Commercial Code, our rules of evidence in such matters still differ from the rules in civil matters. The situation in this respect may be briefly set out as follows :

(a) Generally, in commercial matters, testimony is admissible. (article 1235 (1)).

(b) Under Article 1235 C.C. drawn from local legislation which was based on the English Statute of Frauds and Lord Tenterden's Act, when the sum or value in question exceeds fifty dollars, there must be a signed writing in the four special cases following : —

> 1. Upon any promise or acknowledgment whereby a debt is taken out of the operation of the law respecting the limitation of actions;

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* An essay prepared for the " Journées de Droit Civil " held under the auspices of the Montreal Bar in August, 1934.

2. Upon any promise or ratification made by a person of the age of majority, of any obligation contracted during his minority;

3. Upon any representation, or assurance in favour of a person to enable him to obtain credit, money or goods thereupon;

4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain.

(c. Apart from these special rules, the provisions of the Chapter " Of Proof " unless expressly or by their nature limited, apply in commercial as well as in other matters; but, "when no provision is found in this code for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England." (1206 C.C.)

(2)

As the English Trial System was adopted after the Cession, with many modifications, in the matter of examination of witnesses, production of documents, and rules of a procedural character generally, our law is based, broadly speaking, on that of England. Thus, on questions of relevancy, and on questions concerning the manner, time or order in which evidence should be introduced, when local rules or authorities are lacking, we look to England rather than to France for guidance.

(3)

So far as what may be termed the " substantive " law of evidence is concerned, however, our code is based, speaking in a very general way, on the French Code (apart, of course, from commercial matters). There are, nevertheless, important differences which arise partly from specific provisions adopted from the English law and partly from variations in the arrangement and phraseology of our articles as compared with those of the French Code in certain cases where the origin is common.

It may be interesting, in this connection, to note that there is a basic difference between the English Law of Evidence, and both the French and the Quebec Law. It would appear from Halsbury and other English authorities that there are, in the English Law only two fundamental rules of general application, namely that the evidence *must be relevant*, and that it *must be the best* of which the case in its nature is susceptible. There

are, in addition, various rules, statutory and otherwise, excluding verbal evidence or requiring written evidence in specific instances.

In Quebec, on the other hand, perhaps even more clearly than in France, written evidence is the rule, and Testimony the exception. Our article 1233 sets out in seven sub-paragraphs the cases in which testimony may be admitted, and proceeds: "In all other matters proof must be made by writing or by the oath of the adverse party." The practical effect is that the party offering verbal evidence must be prepared to justify its admissibility by some specific provision; whereas in England (it would seem) the party objecting to the verbal evidence would have to justify his objection.

(4)

Apart from our Civil Code, there are important rules of evidence in the Code of Procedure and in certain special statutes, particularly those regulating certain professions, and others in which presumptions are established, or the burden of proof is shifted. It is obvious that these various provisions cannot be included in this brief survey. Moreover, there are certain portions of the law of evidence concerning which a comparison would be of little value for our purpose, in view of the differences between the administrative and judicial systems of the two countries concerned.

We shall, therefore, omit entirely all statutory provisions, questions of relevancy, requirements for authentic and semi-authentic acts, commercial matters and procedure. For the rest, we shall attempt to point out only those principal points of difference which appear to have a real and practical significance.

II.

A COMPARISON OF THE GENERAL ARRANGEMENT OF THE QUEBEC CODE WITH THAT OF FRANCE, IN THE CHAPTER "OF PROOF."

(NOTE: The letters C.N., in accordance with traditional practice in Quebec, are used to designate the French Civil Code, and the letters C.C. the Quebec Civil Code).

Before dealing with the specific points of difference in detail, it may be useful to compare the general sequence of our Chapter "Of Proof" with that of the French Code.

Of the two introductory articles of the C.N. 1315 deals with the burden of proof and 1316 mentions the different kinds

of proof. The C.C. opens with Section I. entitled "Dispositions générales" and consisting of articles 1203-1206. Articles 1203 and 1205 correspond broadly to 1315 and 1316 C.N. Article 1204 lays down the Best Evidence Rule and 1206 refers to commercial matters.

The first section of the French Code has the same title as Section II. of our Code (La Preuve Littérale), but the divisions are different.

C.N. Division I., Section I. (Du Titre Authentique, articles 1317-1321) defines the "acte authentique," declares when a defective authentic act may serve as a private writing, defines the probative force of authentic and private acts (referring to the suspension of the execution of authentic acts pending improbation proceedings) and defines the effect of counter-letters.

C.C. Division I., Section II. (1207-14) describes in detail those acts which are held to be authentic, defines their probative force, refers to the manner in which they may be contradicted or set aside, defines the effect of counter-letters and the probative force and effect of acts of recognition, ratification or confirmation.

Division II., Section I. C.N. (De l'Acte sous seing privé, articles 1323-32) defines the obligatory force of a private act recognized as genuine, refers to the necessity for a formal denial of the signature or writing thereof, describes the respective formalities required for bilateral and for unilateral agreements, provides specially for the case where a difference exists between the body of the act and the *bon*, deals with the question of the date of private acts, and with the books of merchants, domestic papers and endorsements on title.

Division II. of the C.C. (1215-15) deals with copies of authentic writings (corresponding as to subject matter with Division IV. of the C.N.), and Division III. (article 1220) concerns certain semi-authentic writings executed outside the Province, which make *prima facia* proof of their contents, and which may be contradicted only under certain conditions laid down in the Code of Procedure. There does not appear to be any article in the C.N. corresponding to article 1220 C.C. Division IV. of the C.C. corresponds in title and in subject matter generally to Division II. of the C.N.

Division III. of Section I. C.N., consisting of one article only, deals with "Tailles et Echantillons," giving effect to a usage which is apparently dying out in France, and which is not referred to in the C.C.

Division IV. C.N. (1334-6) deals with copies of titles and Division V. (1237-40) with acts of recognition and confirmation.

Section II. of the C.N. (De la Preuve Testimoniale, 1341-1347) corresponds in title and in subject matter, generally speaking, to Section III. of the C.C. (1233-1237), but the differences in arrangement and in phraseology are important. The respective texts will be given later.

Section III. (Présomptions, 1349-53) and Section IV. (De l'aveu de la partie, 1354-6) of the C.N. correspond respectively and broadly speaking to Sections IV. (1238-42) and V. (1243-5) of the C.C.

As to Section V. C.N. (Du Serment, 1357-69), our Code had originally a corresponding section VI. (1246-54) but it was repealed in 1897. It may be mentioned, however, that under our Code of Procedure a party can give evidence on his own behalf, can be examined by the opposite party, and also by the Court if there is some proof already in the record (C.P. 316, 371 and 372).

III.

TWO RULES OF THE QUEBEC LAW ADOPTED FROM ENGLAND.

The Best Evidence Rule and the rule excluding Hearsay Evidence are, admittedly, of English origin.

A. The Best Evidence Rule.

This rule is laid down by Article 1204 C.C. :

" 1204. The proof produced must be the best of which the case in its nature is susceptible.

Secondary or inferior proof cannot be received unless it is first shown that the best or primary proof cannot be produced."

The only source indicated by our codifiers under this article is Greenleaf, and the phraseology is practically copied from him. Greenleaf was a Professor of Law in Harvard College, and his first work on Evidence was published in 1842. Although he was an American, his work was, of course, based largely upon English Law and was indeed one of the first comprehensive treatises on the subject of Evidence.

As above stated, this rule is not to be found as such in the French Law, and a few words of comment may be in order.

According to Greenleaf, and all other leading commentators, the word " best " does not necessarily mean weightiest or most

convincing, but rather "primary" as opposed to "secondary." The real meaning of the rule, as Taylor puts it, is "That no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence is available.[1] And again, the rule "excludes evidence which itself indicates the existence of more original sources of information."[2]

The rule is chiefly invoked, under the English system, to restrict verbal evidence as to the contents of documents, and its importance in England appears to be less to-day than it was, in view of subsidiary rules which have been developed and judicially recognized. Phipson[3] says that the rule is becoming more and more relaxed and that all admissible evidence is equally receivable.

So far as Quebec is concerned, the rule, being specifically laid down in the Code, must be observed; but, as it is a rule of general character, its application is restricted by the specific provisions contained in the following articles, and more particularly in articles 1233-34. It is chiefly invoked in Quebec to exclude hearsay evidence in general and verbal evidence as to the contents of any writings, even those which are not "actes" (unless it first be established that the writing in question cannot be produced.) But it may be, and often is, invoked in other circumstances. For instance, in the case of *Murphy* v. *Murphy*[4] it was applied to exclude testimony to establish the insolvency of a party, on the ground that the best evidence would be a statement of his assets and liabilities.

B. The Rule Excluding Hearsay Evidence.

No specific text of our Code refers to hearsay evidence as such, but the rule is universally accepted and applied in this Province, presumably as a specific instance of the Best Evidence Rule (although some English commentators deal with it under the heading of "Relevancy"). The rule excluding hearsay evidence is succinctly expressed by Phipson, who says[5]: "Oral or written statements made by persons not called as witnesses are inadmissible to prove the truth of the matters stated." So far as written statements are concerned, our rule differs somewhat from the English law, but as to verbal hearsay it is the same.

[1] Taylor on Evidence, No. 391.
[2] *Ibid.* No. 393.
[3] 7th Edition 1931, p. 46.
[4] 23 K.B., 529.
[5] *Op. cit.* p. 212.

As appears from the wording of the rule, it may be admissible for a witness to report the statement of another person not before the court, as a proof, not that the statement was true, but merely that it was made, which fact may be relevant in cases of slander, and where the statement forms part of the *res gestae*. Such cases are not, of course, exceptions to the rule.

There are, however, several real exceptions to the rule, recognized in England. The chief exceptions of practical importance in this country are : —

(a) Matters of pedigree (Filiation), which are dealt with in articles 228 et seq. C.C.[6]

In the cases in which, under those articles, verbal evidence is admissible, hearsay evidence would doubtless be received, subject to the restrictions imposed in England, where the exceptional admissibility is restricted to statements made by persons *de jure* related by blood or marriage to the party in question.

(b) Declarations against interest.

This exception is expressed as follows, by Phipson[7] : —

> " Declarations, oral or written, made by deceased persons as to facts within their personal knowledge or belief, and consciously against their pecuniary or proprietary interests are admissible in proof of the matters stated."

This exception has been applied by our courts.

(c) Declarations in the course of duty.

To adopt Phipson's wording again, this exception admits "declarations, oral or written, made by deceased persons in the ordinary course of duty, contemporaneously with the facts stated and without motive to misrepresent" in proof of the contents of such declarations (*ib.* page 278).

The Quebec commentator Langelier[8] considers that these exceptions (and several others recognized in England which are of a lesser practical importance in this country) should be admitted in Quebec because the Best Evidence Rule, being of English origin should be interpreted as it is in England, and also because they come within the second paragraph of Article 1204 C.C. In *C.P.R.* v. *Quinn*,[9] Cross, J., expressed the view with regard to declarations in the course of duty, that they might

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[6] Compare C.N. 319 *et seq.*

[7] *Op. cit.* page 269.

[8] *De la Preuve*, No. 315.

[9] 22 K.B., 428.

be admitted even if the person who made them were not dead, provided it was impossible to produce him as a witness. This extension of the exception, though reasonable on its face, does not appear to rest on any specific English authority.

There is, however, an apparent logical inconsistency in connection with hearsay evidence as a specific application of the Best Evidence Rule. Under the wording of the second paragraph of 1204 C.C., it would seem reasonable to admit hearsay evidence in any case where it is established that the person who made the statement cannot be produced as a witness. But this is not the law. Hearsay evidence is inadmissible, save in those exceptional cases specifically laid down. The only explanation which appears to have been offered of this inconsistency is that hearsay evidence is excluded not merely because it is not the primary evidence but also because the statement was (usually) not made under oath and because the person who made it was not (usually) subjected to cross-examination. These considerations are set aside in the exceptional instances referred to because the circumstances were such that in all probability the statement was true.

Of course, even in the recognized exceptional cases, oral hearsay could be admitted in Quebec only if the matter were one in which oral evidence in general is admissible under Article 1233 C.C.

IV.

CERTAIN DIFFERENCES IN THE RULES CONCERNING WRITTEN EVIDENCE.

Subject to the limitations above referred to, although the wording of the two codes on written proof is by no means identical, the following appear to be the only important points of difference.

A. The Probative Effect of Authentic and Private Acts.

(C.N. 1319, 1320, 1322 and 1328; C.C. 1210, 1222, 1225 and 1226).

The provisions of the two Codes in this respect are practically identical, and, according to most commentators they are both imperfectly worded. The only real difference that might exist would be in the probative effect with regard to third persons. On this point Langelier (*op. cit.* No. 438) considered that as we have adopted the Hearsay Rule of England, the recitals (énonciations) could have no probative effect as regards

third persons. The Supreme Court of Canada, confirming the Quebec Court of King's Bench, has, however, decided the contrary, at least for those recitals which have a direct connection with the obligation or the object of the deed. (*La Corporation de la Paroisse de St-Joseph de Coleraine* v. *Colonial Chrome Co., Limited.*)[10]

B. Denial of the Signature of Private Acts.

(C.N. 1323, 1324; C.C. 1223, 1224, Quebec Code of Civil Procedure 208).

There appears to be some difference on this point. The C.N. exacts a formal denial in the case of the party himself. This does not seem to mean anything more than an explicit and categorical denial. The C.C. refers to the Code of Procedure, which, in turn, requires that the denial be accompanied by an affidavit. Under both systems, if the denial is made in the form respectively required, the validity of the signature is decided by the Court, which may hear experts, but is not bound to follow their opinion. The burden of proving the signature is on the party invoking the document.

In Quebec, according to our recent jurisprudence, if the denial is not accompanied by an affidavit, the party cannot adduce testimony to disprove his signature.[11] Many of the earlier decisions were to the effect that the lack of the affidavit merely shifted the burden of proof to the defendant.

C. The Date of Private Acts.

The text of Article 1225 C.C. differs in one very important particular from 1328 C.N. The first paragraph is practically the same, but we have a second paragraph, reading as follows :— "La date peut néanmoins en être établie contre les tiers par une preuve légale." We are not, therefore, restricted in Quebec to the specific circumstances enumerated in the first paragraph of the article. It would seem that if the matter involved were one concerning which testimony is admissable, the date might be proved by testimony; otherwise not, unless there were a commencement of proof in writing.

D. Formal Requirements for Private Acts.

Articles 1325-6 C.N. contain provisions governing the form of certain private acts. There are no similar provisions in our

[10] [1933] S.C.R., page 13.

[11] *Vipond* v. *Finestone* 53 K.B., 59; *St. Henry Syndicate* v. *Chadillon*, 55 K.B., 563.

Chapter "Of Proof." Apart from wills, acts which may be made as private writings are not subject to any special formalities.

V.

THE PRINCIPAL DIFFERENCES AS TO THE ADMISSIBILITY OF TESTIMONY.

A. The Two Texts Compared in Detail.

As the two codes are so differently arranged and as there are also important differences in the phraseology on this branch of the subject, it may be interesting to set out the texts *in extenso*.

C. N.

Art. 1341. Il doit être passé acte devant notaires ou sous signature privée, de toutes choses excédant la somme ou valeur de cent cinquante francs, même pour dépôts volontaires; et il n'est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes, encore qu'il s'agisse d'une somme ou valeur moindre de cent cinquante francs;

Le tout sans préjudice de ce qui est prescrit dans les lois relatives au commerce.

Art. 1342. La règle ci-dessus s'applique au cas où l'action contient, outre la demande du capital, une demande d'intérêts qui, réunis au capital, excèdent la somme de cent cinquante francs.

Art. 1343. Celui qui a formé une demande excédant cent cinquante francs, ne peut plus être admis à la preuve testimoniale, même en restreignant sa demande primitive.

Art. 1344. La preuve testimoniale, sur la demande d'une somme même moindre de cent cinquante francs, ne peut être admise lorsque cette somme est déclarée être le restant ou faire partie d'une créance plus forte qui n'est point prouvée par écrit.

Art. 1345. Si dans la même instance une partie fait plusieurs demandes dont il n'y ait point de titre par écrit, et que, jointes ensemble, elles excèdent la somme de cent cinquante francs, la preuve par témoins n'en peut être admise, encore que la partie allègue que ces créances

C. C.

1233. La preuve testimoniale est admise :

1 De tout fait relatif à des matières commerciales;

2 Dans toute matière où le principal de la somme ou la valeur demandée n'excède pas (cinquante piastres);

3 Dans les cas où des biensfonds sont occupés avec la permission du propriétaire et sans bail, tel que pourvu au titre DU LOUAGE;

4 Dans les cas de dépôt nécessaire ou de dépôts faits par des voyageurs dans une hotellerie, et autres cas de même nature;

5 Dans le cas d'obligations résultant des quasi-contrats, délits et quasi-délits, et dans tout autre cas où la partie réclamante n'a pu se procurer une prevue écrite;

6 Dans les cas où la preuve écrite a été perdue par cas imprévu, ou se trouve en la possession de la partie adverse, ou d'un tiers, sans collusion de la part de la partie réclamante, et ne peut être produite;

7 Lorsqu'il y a un commencement de preuve par écrit.

Dans tous les autres cas la preuve doit se faire au moyen d'écrits ou par le serment de la partie adverse.

proviennent de différentes causes, et qu'elles se soient formées en différents temps, si ce n'était que ces droits procédassent, par succession, donation ou autrement, de personnes différentes.

Art. 1346. Toutes les demandes, à quelque titre que ce soit, qui ne seront pas entièrement justifiées par écrit, seront formées par un même exploit, après lequel les autres demandes dont il n'y aura point de preuves par écrit ne seront pas reçues.

Art. 1347. Les règles ci-dessus reçoivent exception lorsqu'il existe un commencement de preuve par écrit.

On appelle ainsi tout acte par écrit qui est émané de celui contre lequel la demande est formée, ou de celui qu'il représente, et qui rend vraisemblable le fait allégué.

Art. 1348. Elles reçoivent encore exception toutes les fois qu'il n'a pas été possible au créancier de se procurer une preuve littérale de l'obligation qui a été contractée envers lui.

Cette seconde exception s'applique:

1 Aux obligations qui naissent des quasi-contrats et des délits ou quasi-délits;

2 Aux dépôts nécessaires faits en cas d'incendie, ruine, tumulte ou naufrage, et à ceux faits par les voyageurs en longeant dans une hôtellerie, le tout suivant la qualité des personnes et les circonstances du fait;

3 Aux obligations contractées en cas d'accidents imprévus, où l'on ne pourrait pas avoir fait des actes par écrit;

4 Au cas où le créancier a perdu le titre qui lui servait de preuve littérale, par suite d'un cas fortuit, imprévu et résultant d'une force majeure.

Le tout néanmoins sujet aux exceptions et restrictions spécialement énoncées dans cette section et aux dispositions contenues dans l'article 1690.

1234. Dans aucun cas la preuve testimoniale ne peut être admise pour contredire ou changer les termes d'un écrit valablement fait.

1235. (omitted, as it refers exclusively to commercial matters. Vide supra).

1236. La preuve testimoniale ne peut être admise sur la demande d'une somme n'excédant pas (cinquante piastres), si cette somme est la balance ou fait partie d'une créance en vertu d'un contrat qui ne peut être prouvé par témoins.

Le créancier peut néanmoins prouver par témoins, la promesse du débiteur de payer telle balance si elle n'excède pas (cinquante piastres).

1237. (Si dans la même instance une partie fait plusieurs demandes qui réunies forment une somme qui excède cinquante piastres, la prevue par témoins peut être admise, si ces créances procèdent de différentes causes ou ont été contractées à des époques différentes et étaient originairement chacune d'une somme moindre que cinquante piastres.

B. Matters Under Fifty Dollars.

(C.N. 1341-1345; C.C. 1233(2), 1236-7.

(1) Though 1233 (2) C.C. can be traced to the Ordonnance de Moulins of 1566, the context and phraseology differ from those of 1341 C.N. Moreover we have no article corresponding to 1342 C.N., and this omission, together with the word "principal" in article 1233 (2) C.C. appears to settle in the negative the question as to whether interest is to be included in calculating the amount. Such, at least, is the view of Mignault (*op. cit.* page 71); Langelier (No. 514) is of the contrary opinion.

(2) It will be seen that the second paragraph of 1236 C.C. admits testimony in circumstances where, presumably, it would not be receivable in France.

(3) It is also apparent that by enacting 1237 C.C. we have adopted a rule contrary to that of 1345 C.N.

(4) Although we have no article corresponding to 1343 C.N. it is clear that the principle laid down therein is admitted in Quebec.

C. PERMISSIVE TENURE (C.C. 1233 (3)).

The C.N. contains no provision corresponding to our third exception, but, according to Langelier (No. 526) it was unnecessary to make a special exception as the case involves " un fait matériel."

D. NECESSARY DEPOSITS, ETC.

(C.N. 1348 (2) & (3) C.C. 1233 (4)).

The provision of the C.C. does not enumerate the cases of necessary deposit, but article 1813 defines necessary deposit as " celui qui a lieu par une nécessité imprévue et pressante provenant d'un accident ou de force majeure, comme dans le cas d'incendie, naufrage, pillage ou autre calamité soudaine."

E. QUASI-CONTRATS, ETC. (C.N. 1348(1); C.C. 1233(5)).

Although the wording of the two codes is different the substance appears to be the same. The commentators of both countries appear to agree that for those parts of the claim where it was possible to obtain written proof, the general rules would apply. Indeed, some go as far as to say that it was not necessary to enact this exception since the basis of the obligation is a " fait matériel " (e.g. Planiol et Ripert, Oblig. 2, No. 1535).

F. WHEN THE WRITTEN PROOF HAS BEEN LOST. ETC.

(C.N. 1348 (4); C.C. 1233 (6)).

It will be seen that the Quebec provision is not quite so exacting as the French with regard to the cause of the loss; and it also allows testimony when the writing is in the hands of another—under certain conditions.

An interesting point was raised under 1233 (6) C.C. by the commentator Langelier as a judge of the Court of Review in *Lafrance* v. *Larochelle*[12]. In that case Plaintiff had purchased a

[12] 27 S.C. 153 (1905).

cheese factory from Defendant (who was illiterate). Plaintiff had made a contract in duplicate and one copy was delivered to Defendant. Plaintiff subsequently sued Defendant for breach of a subsidiary clause in the contract, which clause Defendant alleged was not in his duplicate. He had lost his copy of the contract, but adduced four witnesses who had seen it. This evidence was taken under objection, and the Trial Judge held it to be illegal, because Defendant had not proved that he had lost the document by a "cas imprévu." The Court of Review overruled this decision and Langelier said, at page 155 of the report:—

> "Il y a ici une erreur; le tribunal de première instance a confondu deux cas parfaitement distincts: celui où, comme ici, on veut prouver par témoins le contenu d'un écrit perdu, et celui où l'on veut faire une preuve par témoins, non pas du contenu d'un écrit, mais du fait que ce écrit établissait, et dont la preuve par témoins n'était pas permise. En ce dernier cas, celui qui veut faire la preuve par témoins n'y peut être admis que s'il est établi que l'écrit a été perdu ou détruit par un cas imprévu. (Code civil, art. 1233, parag. 6). Mais il en est tout autrement lorsqu'une partie veut faire, comme ici, la preuve secondaire du contenu d'un écrit perdu: il suffit qu'elle n'ait pas pu le trouver, bien qu'elle ait fait dans ce but des efforts que le tribunal juge suffisants. Si elle fait cette preuve, elle est admise à faire la preuve secondaire, alors même que l'écrit aurait été perdu par sa faute.[13]

It is clear from the authorities mentioned in the citation and from other English commentators (e.g. Phipson, pages 525-6) that under the English law it is not necessary to prove loss by unforseen accident. Proof of loss without fraud and proof of a reasonably dilligent search would be sufficient.

With great respect for the learned Judge and commentator, the writer is of the opinion that his ruling in this instance was unsound. It is true that the codifiers cite Greenleaf; but they also cite Pothier (No. 815), and it appears that by adopting the French phraseology in 1233 (6) and in drafting 1233 generally in a form which makes testimony the exception, they intended to adopt the French doctrine rather than the English. As was stated above, the Best Evidence Rule, as found in 1204 C.C. is one of general application and must yield, if necessary, to the special provisions of 1233.

It would, therefore, seem reasonable to conclude that no testimony may be received in Quebec concerning the contents

[13] *Taylor*, On Evidence, No. 429 and *Greenleaf*, On Evidence, vol. I., No. 558.

of a document, unless the conditions of 1233 (6) are first established. (Saving, of course, the cases in which one of the other exceptions of 1233 would apply to admit it). This view is supported by the following Quebec decisions :—*Ciroux* v. *Martin*[14] *Brodeur* v. *Larivière*[15]; *Ball* v. *Rolland*[16]; *Coté* v. *Cantin*[17].

G. When there is a Commencement of Proof in Writing.

(C.N. 1347; C.C. 1233 (7)). The only difference here is that, as is frequently the case throughout the Code, our codifiers have not reproduced the definition of the C.N. Nevertheless, our courts readily accept it, as the exception is so obviously of Frenchorigin.

Testimony in Contradiction, etc., of Writings.

(1) It is quite clear from the disposition and the wording of the relevant articles of the C.N. (1341 and 1347) that testimony may be received to establish something " contre et outre le contenu " or something which was said " avant, lors ou depuis les actes," when there is a " commencement de preuve par écrit."[18] In Quebec, however, the situation is different. The fact that 1234 comes immediately after the enumeration of the cases in which testimony is admitted and the phraseology of the article itself appear to the writer to exclude the possibility of introducing testimony even with a " commencement de preuve par écrit."

The question has been vigorously debated on more than one occasion. Langelier's " De la Preuve " was published in 1894 and that same year the majority of the Supreme Court of Canada accepted and approved his view that a " commencement de preuve par écrit," unless it amounted to an admission, would not suffice to admit testimony.[19] Taschereau, J., however, said, at page 85 of the report : " I express no opinion one way or the other on the point determined by the majority of the Court as to the admissibility of verbal evidence under articles 1233, 1234 and 1235 of the Code where there is a commencement of proof in writing. The solution of the question is not necessary to determine the case and it was not argued before us nor in

[14] 24 R.L. n.s. 195.
[15] 36 K.B. 280.
[16] 24 R.L. n.s., at page 180.
[17] 21 S.C. 432.
[18] *Planiol et Ripert*, Oblig. 2 no. 1531.
[19] *Bury* v. *Murray*, 24 S.C.R. 77.

the Courts below." Langelier's opinion and the decision of the majority of the Supreme Court were vigorously attacked in several articles in the first volume of La Revue Légale, nouvelle série, by the then young lawyer Philippe Demers, who has since become one of the most learned jurists of our Superior Court. Langelier replied to these attacks with equal vigour, but the point has not since come before the Supreme Court. Our Court of Appeal (3 Judges division, since abolished) dealt with it in 1918 in the case of *St Martin* v. *Mathieu*.[20] The Judge of first instance did not consider that a "commencement de preuve" existed and so did not pass on the point. In Appeal, Rivard, J. was of the same opinion and declined to pass upon the admissibility question; Allard, J., was personally of the opinion that a "commencement de preuve" should admit testimony, but felt that he was bound by the Supreme Court decision of *Bury* v. *Murray;* Hall, J., dissented definitely.

It may be permitted to the writer, in support of his own view that our article is of English origin, to quote the Engish text of 1234 C.C. and an extract from Greenleaf on Evidence, No. 275. (Note: Greenleaf, as well as various French authorities, is cited by the codifiers).

1234 C.C. reads: "Testimony cannot in any case, be received to contradict or vary the terms of a valid written instrument."

Greenleaf, No. 275 (*in fine*): "..... parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

If the rule is, in fact, drawn from the English law, this would be a further argument in support of Langelier's view, because the "commencement de preuve," as such, is unknown in English law.

(2) It is apparent that our article 1234 is less extensive in restricting testimony in connection with valid written instruments than is 1341 C.C. As we have seen, the phraseology of 1234 C.C. is such that it is reasonable to believe that it comes from the English law, through Greenleaf; and our Courts have allowed testimony in circumstances where it would not appear to be admissible under the French law. For instance :

(a) When a document is *incomplete*, and apparently not intended to include all the terms arranged between the parties, testimony may be admitted with respect to the terms omitted. (*Pelletier* v. *Lamarre* 50 S.C. 441; *Rainboth* v. *O'Brien* 24 K.B. 88, confirmed by the Supreme Court).

[20] 36 K.B. 421.

(b) A *subsequent* contract, changing the terms of the former, may be proved by testimony if the matter thereof be itself susceptible of proof by testimony. (*Forest* v. *Galbraith* 26 R.L. n.s., 235, a decision of the Court of Appeal in 1919).

As is apparently the case in France, testimony may be admitted to prove the meaning of technical or ambiguous terms in accordance with custom and usages.

VI.

PRESUMPTIONS.

(C.N. 1349-1353; C.C. 1238-1242).

In substance the provision of the two codes do not differ essentially except on one point. Our articles are less detailed than those of the C.N. and in particular our codifiers did not attempt to bind the courts by requiring specifically that presumptions of fact must be "graves, précises et concordantes." However, in practice, our judges are not inclined to accept presumptions that do not possess the three attributes mentioned by the C.N.

The one point of essential difference above mentioned is that our Code does not restrict the admissibility of proof by presumptions to cases in which testimony would be received. In the opinion of our two leading commentators, the omission of this restriction of the C.N. means that in Quebec proof by presumptions may be made in all cases[21].

ADMISSIONS.

(C.N. 1354-6; C.C. 1243-5).

The principal difference between the two codes on this subject is that the C.N. declares categorically that the judicial admission is indivisible, whereas C.C. provides that an admission is divisible : —

> ". . . . . dans les cas suivants, d'après les circonstances et suivant la discrétion du tribunal :
> 10 Lorsqu'il contient des faits étrangers à la contestation liée;
> 20 Lorsque la partie contestée de l'aveu est invraisemblable ou combattue par des indices de mauvaise foi ou par une preuve contraire;
> 30 Lorsqu'il n'y a pas de connexité ou de liaison entre les faits mentionnés dans l'aveu."

It appears, however, that the difference in practice is not so great as a comparison of the two texts would lead one to believe. See particularly Planiol et Ripert, Oblig. 2, no. 1570.

[21] Langelier No. 217, Mignault, tome VI., pages 113-114.

VIII.

OF THE OATHS OF THE PARTIES.

(C.N. 1357-1369; C.C. 1246-1256—repealed).

As we have said, the articles of the C.C. on this subject were repealed in 1897. See pages 5 and 6 above.

The foregoing is offered, not, of course, as an exhaustive treatment of an interesting and rather difficult subject, but simply as a preliminary survey which may serve as the basis for a more detailed study. In the meantime, the writer craves the indulgence of his confrères for all omissions and inaccuracies.

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