ARTICLE 1234 C.C.

SOME ASPECTS REVISITED

MELVIN L. ROTHMAN
J.S.C.

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This paper is not intended as an exhaustive discussion of the parole evidence rule in Quebec. Examples of the application of the rule and of one or another of its exceptions are not difficult to find. The case law and authors on the subject are voluminous.

The purpose of this paper, therefore, will be to outline in, summary form, the general principles governing the application of the rule and some of the more common problems limiting its scope.

The Rule and its Sources:

Art. 1234 C.C. states the rule:

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

Although there are similarities between the rule contained in Art. 1234 C.C. and the French rule under Art. 1341 C.N. excluding testimony to contradict written agreements, it is now generally accepted, I believe, that our rule under Art. 1234 C.C. has its origins in English common law. (1)

That being said, however, I doubt that the source of the rule is of much more than historical significance at the present time. Given the indigenous development of the rule in Quebec and the large body of case law we now have here, Quebec courts rarely look to English common law authorities for assistance in interpreting the rule. In my view, while English common law and French authorities may, on occasion, be useful when examining analogous problems of application of the rule, one should not assume that the rule is identical in either case. It is to the Quebec jurisprudence that one must look for guidance.

What "writings" are covered by the rule?

Art. 1234 C.C. does not exclude proof by testimony to contradict every kind of writing. It is only a "valid written instrument" that is protected.

The writing must therefore be "valid" in the sense that it has not been induced by error, fraud, violence, fear or other cause of nullity which would prevent a valid consent from having been given. To be "valid", there must have been valid consideration supporting it.

Moreover, not every piece of paper with writing on it is a "written instrument". It must have some degree of formality: it must have been intended to serve as evidence of the agreement between the parties to it. Informal memoranda, preliminary notes or letters, entries in domestic records or bank pass books, none of these are considered "written instruments" and proof by testimony may be brought to vary or contradict them. (2) The same is true of incomplete instruments. Where, for example, a contract does not mention the price or consideration or the date or a custom or usage that was applicable, proof by witnesses may certainly be brought to complete these elements. (3)

But there is a difference between a written agreement that is obviously incomplete and an agreement that is complete on its face to which a party wishes to add additional terms and conditions which do not appear in it or to contradict conditions that do appear in it.

Where the contract is complete and unambiguous on its face, the parties cannot bring verbal evidence to add to or change its terms and conditions.

It has long been held, for example, that the maker of a promissory note or other bill of exchange cannot bring testimony to prove that the payment of the note was dependent on conditions that do not appear on the instrument itself. (4)

There are, of course, numerous examples of the same kind of prohibition in other kinds of contracts. (5)

When is the rule applicable?

Art. 1234 C.C. is not a rule of public order and the Court should not, in the absence of an objection by one of the parties, intervene to reject oral evidence which tends to vary or contradict a written agreement. (6) If no objection is raised by the parties, oral evidence may be received against their writings.

The prohibition applies both in civil and commercial matters, and even a commencement of proof in writing

under Art. 1233 (7) C.C. will not suffice to permit proof by testimony against a written instrument. Only a complete admission by the opposite party would be sufficient. (7)

The "Exceptions"

a) Testimony to complete an incomplete instrument

Unlike Art. 1341 of the Code Napoleon, our Art. 1234 C.C. does not expressly prohibit making proof of additional terms and conditions of a contract where the contract would be incomplete without them. Mignault (8) was of the opinion that testimony for this purpose could be given as long as it did not change or contradict the terms of the agreement.

Custom and usage may also be proved by testimony providing they have been specifically alleged in the proceedings. (9)

b) Testimony to Interpret an Ambiguous Agreement

Where an agreement is clear and unambiguous, it must be interpreted in accordance with its own terms, and no testimony would be permitted to interpret it. Where the terms

are unclear, obscure, or of a technical nature, they may require explanation or it may be necessary to establish the circumstances surrounding the execution of the contract in order to understand its purpose fully. (10)

C) Subsequent Oral Agreements

Our Courts have always permitted proof by testimony where its purpose was not to contradict the written agreement itself but to establish that it was modified, cancelled or replaced by a subsequent oral agreement, providing that the subsequent agreement is susceptible of proof by testimony. (11)

d) Error, Fraud, Violence, Fear and other causes of Nullity

Art. 1234 C.C. does not apply when the purpose of the testimonial evidence is to establish the nullity of an agreement on grounds of error, fraud, violence, fear or absence of consideration, (12) or even where the purpose is to correct an erroneous description in the object or the consideration of the agreement. The examples are legion.

Thus, in Versafood Services Ltd. v Alstar Industries, [13] proof by testimony was permitted to prove that the rental agreed upon by the parties was $2.40 per square foot and not $2.00 as set forth in the lease. In Edelstein v Bank of Nova Scotia, [14] testimony was admitted to prove that a deposit certificate was erroneously issued for $8,500. instead of $1,500.

In Lacroutz v Les Entreprises Immobilières R.G.D. Inc., [15] Art. 1234 C.C. was held inapplicable where the purpose was to prove fraud.

Illegal consideration [16] or absence of consideration, [17] similarly, may be proved by testimony.

Simulated Contracts

Art. 1234 C.C. has been held to prevent proof by testimony, as between the parties, to establish that the agreement between them was simulated or fictitious, except where the agreement is one made in fraud of the law. (18)

In Borduas v Ouimet, [19] a husband was prevented

from proving by testimony that he was the real owner of a property registered in the name of his wife and that she was merely a prêt-nom for him, Similarly, in Matte v Matte, (20) the Court of Appeal applied Art. 1234 C.C. to exclude testimony from an uncle to establish that the sale he had made to his nephew was a fictitious sale and that he had only put the property in his nephew's name to conceal it from his wife. The same principle was applied in Iarrera v Guinta.(21)

However, in Provincial Hardwoods Inc. v Morin,(22) the Supreme Court held that oral proof was admissible to establish that a son who purchased from a trustee certain assets of a bankrupt company formerly controlled by his father was merely acting as a prêt-nom and that he had agreed to reconvey the assets to his father on demand. Mr. Justice Fauteux was of the opinion that the purpose was not to contradict the contract but to establish another verbal agreement between father and son. Since there was a commencement of proof in writing under Art. 1233 (7), he concluded that the evidence was admissible.

Art. 1234 C.C. only applies to the parties. Third parties would always be entitled to establish by witnesses that a contract was simulated or fictitious. (23)

The parties to a simulated contract, on the other hand, would not be entitled to invoke this simulation against third parties. (24)

Admissions and Presumptions

Art. 1234 C.C. does not apply to proof by presumption, providing, of course, that the facts from which the inference is to be drawn are "graves, precises and concordants". Nadeau & Ducharme (25) suggest that cases in which that kind of proof will be relied on to contradict a writing will be rare. Undoubtedly they are right.

Nor will Art. 1234 C.C. apply to exclude an oral admission of the opposite party providing the admission is complete. (26) A party is entitled to seek to obtain a judicial admission from the opposite party. An extra judicial admission must be proved by a writing (Art. 1244 C.C.).

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(2) (Nadeau & Ducharme, Supra Pg. 385; Mignault, Droit Civil Canadien, T 6 Pg. 83; Owen, Supra, Pg. 4)

(3) (Owen, Supra, Pg. 8)

(4) (Huberdeau v Pinsky 1975 C.A. 438; Grynwald v Playfair Knitting Mills Ltd 1959 C.S. 200; Laroche v Descormiers 1953 C.S. 446; Segal v Bleau 1953 C.S. 137; Vineberg v Jones 22 K.B. 128; Lord v Sugar 1936 74 C.S. 159)

(5) (Nadeau & Ducharme, Supra, Pg. 388)

(6) (Schwersenski v Vineberg 1891 19 S.C.R. 243; Pesant v Robin 1918 53 S.C.R. 96; Bellavance v Canadian Acceptance Corp. 1956 B.R. 407; McCallum v Babineau 1956 B.R. 775; Gervais v McCarthy 1904 35 S.C.R. 14)

(7) Bury v Murray 1895 24 S.C.R. 77; Matte v Matte 1962 B.R. 521; Martin v Mathieu 1924 36 B.R. 421; Petit v Auger 1953 C.S. 203)

(8) Mignault, Supra, T 6 Pg. 83 & 84)

(9) (Art. 1017 C.C. and 1024 C.C. ; Dominion Gresham Guarantee & Casualty Co. v Crooks 1933 55 K.B. 528)

(10) (Nadeau & Ducharme, Supra Pg. 390 - 392)

(11) (Mignault, Supra, T 6 Pg. 85; Nadeau & Ducharme Pg. 393; Owen, Supra, Pg. 9; Les Entreprises Pabi Inc. v Cassulo & Copeman Inc. 1977 C.A. 522)

(12) (Dassylva v Dassylva 1951 B.R. 608; Nadeau & Ducharme, Supra, Pg 395; Owen Supra, Pg. 11)

(13) (Versafood Services Ltd. v Alstar Industries 1976 C.A. 389)

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(16) (Periard v Paiement 1979 C.A. 213)

(17) (D'Aoust v Kidd 1962 B.R. 515; La Corporation de Placements Renaud v Charron (unreported, Quebec C.A. No. 500-09-000547-810, 17 Feb. 1982)

(18) (Nadeau & Ducharme, Supra, Pg. 398)

(19) (Borduas v Ouimet 1973 C.A. 163)

(20) (Matte v Matte 1962 B.R. 521)

(21) (Iarrera v Guinta 1975 C.S. 490)

(22) (Provincial Hardwoods Inc. v Morin 1966 S.C.R. 58)

(23) (Nadeau & Ducharme, Supra, Pg. 399 - 402)

(24) (Linval Acceptance Corp. v Branchaud 1972 C.A. 552)

(25) (Nadeau & Ducharme, Supra, Pg. 401)

(26) (Nadeau & Ducharme, Supra, Pg. 401)