THE McGILL LAW JOURNAL

VOLUME 4 AUTUMN 1957 NUMBER 1

TESTIMONY TO CONTRADICT OR VARY WRITINGS*

The Hon. George R. W. Owen†

It is stated in art. 1234 C.C. that:

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

The French version of this article is:

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

In spite of its apparent conciseness, this is perhaps the article on evidence which has given rise to the most conflicting jurisprudence. The rule can be discussed under five headings:

1. The source of art. 1234 CC.
2. The meaning of the term "valid written instrument."
3. The effect of 1233(7) on 1234 CC.
4. Is the rule of art. 1234 CC. one of public order?
5. Alternatives to "contradict or vary."

The cases cited are offered as illustrations and do not exhaust the list of leading cases.

1. THE SOURCE OF ART. 1234 C.C.

The French rule equivalent to art. 1234 C.C. is incorporated in art. 1341 of the Code Napoleon. The English rule is to be found in Greenleaf[1] and English authors. These two rules are not identical, and consequently the decisions and the doctrine in the two countries differ on certain points. Most of the differences of opinion in Quebec as to the interpretation of art. 1234

*A lecture given as one of a series, under the auspices of the Faculty of Law, McGill University, to the members of the Bar of the Province of Quebec, in February, 1957.

†The Honorable Justice George R. W. Owen of the Court of Queen's Bench, Montreal.

C.C are due to disagreement as to whether our article is of French or of English origin.

The Codifiers in their general notes on Proof say that they have not in the chapter on Proof adhered as closely as usual to the French method and principles.[1]

The French rule. The French rule was first enacted in the Ordonnance de Moulins of 1566. It was reproduced in the Ordonnance of 1667 and is now found almost in the same words in art. 1341 C.N., which reads as follows:

> "1341. Il doit être passé acte devant notaire ou sous signature privée, de toutes choses excédant la valeur de 5000 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 cinq mille francs.
> Le tout sans préjudice de ce qui est prescrit dans les lois relatives au commerce."

Pothier in this connection states:

> "L'Ordonnance (1667) ne se contente pas d'exclure la preuve par témoins en ce qui serait directement contraire à un acte; elle ne permet pas de l'admettre outre le contenu des actes, ni sur ce qui serait allégué avoir été dit *lors, avant* ou *depuis.*"[2]

Planiol explains that

> "Prouver *outre* l'acte, c'est ajouter quelque chose à ses énonciations . . . Prouver *contre* l'acte, ce serait établir par témoins qu'une de ses clauses est inexacte."[3]

There is a difference in the order of the articles in the Code Napoleon and our Quebec Code. In the French Code, article 1341, prohibiting testimony with respect to certain writings, is *followed* by articles 1342-48 which deal with the exceptional cases in which testimony is allowed. In the Quebec code, art. 1234, prohibiting testimony with respect to certain writings, is *preceded* by art. 1233 C.C. which sets out the seven exceptional cases in which testimony is allowed.

The *English rule.* Greenleaf, cited by the Quebec Codifiers, writes:

> "275. By written evidence in this place, is meant not everything that is in writing, but only that which is of a documentary and more solemn nature, containing the terms of a contract between the parties and designed to be the repositary and evidence of their intentions. . . . When parties have deliberately put their engagements in writing, in such terms as import a legal obligation ,without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole undertaking was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversations or declarations at the time or afterwards, as would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. In other words, as the rule is now more briefly expressed, parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."[4]

---

[1] *Codifiers Report,* First Report, p. 28.
[2] *Obligations,* Bugnet ed. (1861), no. 793.
[3] *Traité Elémentaire de Droit Civil* (1917), no. 1138.
[4] *On Evidence* (1848), no. 275.

View that the origin of art. 1234 C.C. is English. The following arguments are adduced in support of this view:

(1) The phraseology of our article follows Greenleaf. The last words of the passage of Greenleaf just cited are "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." Our article reads: "Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument." This phraseology differs from art. 1341 C.N. It does not prohibit expressly proof "par témoins outre le contenu aux actes" and "sur ce qui a été dit avant lors ou depuis les actes."

(2) The arrangement or order of articles 1233 and 1234 in our Code is in keeping with the English rule but differs substantially from the arrangement of the corresponding articles in the Code Napoleon. We saw earlier that in our Code art. 1234 comes *after* the seven exceptional cases in which testimony is admitted (art. 1233) whereas in the French Code the corresponding article 1341 C.N. comes *before* the exceptions.

(3) Langelier, in his work on the Quebec law of evidence, writes:

> "585. On voit que les rédacteurs de notre article 1234 ont copié la règle du droit anglais plutôt que celle du droit français. Cet article n'est même que la traduction littérale de la règle du droit anglais, telle que posée par Greenleaf d'après les autorités. Ceci est important à constater, car, puisque la règle est empruntée au droit anglais, elle doit, au cas de différence entre les autorités anglaises et françaises, être interprétée d'après les premières plutôt que d'après les secondes."[5]

(4) The view that the origin of the article is English also finds support in the jurisprudence. Sir Henry Strong, C.J. states in *Bury* v. *Murray*:[6]

> " . . . as article 1234 says that oral proof shall not in any case be received it must be interpreted as excluding all the cases mentioned in the next preceding article. It is not to the purpose to show that the French authorities are against this, for the French Code makes different provisions for such a case. Art. 1341 of that code which says that oral proof shall not be received against actes is followed by article 1347, which introduces an express exception in favor of the admission of such proof when there exists a commencement of proof in writing."

And in *Roy* v. *Doyen*,[7] Dorion J. said:

> "Il a toujours été prétendu que ces mots depuis les actes empêchaient toute preuve verbale de convention subséquente aux actes. L'Art. 1341 du Code Napoléon a reproduit les expressions de l'ordonnance, et presque tous les commentateurs du Code enseignent qu'il faut un écrit pour modifier un écrit.
>
> "Cependant, notre jurisprudence n'a pas accepté cette doctrine et avec raison. En effet, l'art. 1234 de notre Code civil n'a pas reproduit les termes de l'Ordonnance; elle a adopté une rédaction tirée de la jurisprudence anglaise, voulant en faire une règle commune au droit civil, basé sur le droit français et au droit commercial, basé sur le droit anglais en matière de preuve."

In an other case,[8] decided by the Quebec Court of Appeal in 1924, Howard J. expressly declares that our article is derived from English law and that

---

[5] *De la Preuve* (1894), no. 585.

[6] (1894), 24 S.C.R. 77, at p. 83.

[7] (1919), 55 S.C. 217. (Cour of Review).

[8] *The Perreault Printing Co.* v. *The Canadian Manufacturers Assoc.* (1924), 38 K.B. 154 at p. 157.

consequently English precedents have force in Quebec. Many other cases, while not stating clearly that the source of 1234 C.C. is English, nevertheless would not be consistent with the French rule.[9]

View that the source of 1234 C.C. is French. This contention has been put forward most forcefully by the then young lawyer Philippe Demers in 1895.[10] Dorion in his thesis on the admissibility of testimony expressed the opinion that, as article 1234 was not placed in square brackets, it followed French law. However, later, as a judge in the Court of Revision, in the case of *Roy* v. *Doyen*[11] he changed his mind and held the opposite view.

At the moment the guiding jurisprudence is to the effect that the source of art. 1234 C.C. is English.

2. *Meaning of the term "valid written instrument."*

It is not every piece of paper with words written on it that is considered to be a valid written instrument and to come within the terms of article 1234 C.C. The writing must to some extent be a formal one. It must have been drawn up with the intention of serving as evidence of an agreement. It should be what the French commentators call "une preuve préconstituée."

Langelier[12] states that the words means "un écrit qui réunit toutes les conditions voulues pour qu'il constitue une preuve par écrit, un écrit rédigé formellement et avec soin pour constater une convention."

Mignault[13] writes:

> "La première condition c'est qu'il y ait un écrit valablement fait, c'est-à-dire un écrit dressé avec soin, et qui prouve la convention. Un écrit informe, comme l'entrée dans un registre, pourrait certainement être contredit."

We saw that Greenleaf said:[14]

> "By written evidence, in this place, is meant not everything that is in writing, but only that which is of a documentary and more solemn nature, containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions."

Taylor[15] defines it as follows:

> " . . . The term "written instrument," as used in the rule, includes not only records, deeds, wills, and other instruments required by the statute or common law to be in writing, but every document which contains the terms of a contract between different parties, and is designed to be the repository and evidence of their final intentions."

It should be noted that a writing might serve as a commencement of proof and yet not be a valid written instrument within the meaning of art. 1234 C.C.

---

[9]See, for instance, *Dassylva* v. *Dassylva,* 1951 K.B. 608, at p. 610.

[10]*Commencement de Preuve par écrit,* (1895), 1 R.L.n.s. 166 and 435.

[11](1919), 55 S.C. 217.

[12]*Op. cit.,* no. 587.

[13]*Le Droit Civil Canadien,* (1908), vol. 6, p. 83.

[14]*Op. cit., loc. cit.*

[15]*Treatise on the Law of Evidence,* (1920), vol. 2. no. 1133.

For instance, it has been held[16] that credit entries in a bank book can be contradicted by testimony, i.e. a bank book is not a "valid written instrument." But it could be a commencement of proof in writing provided the other requirements were met.[17]

There is some difference of opinion as to receipts. According to our jurisprudence, it would seem that an informal receipt at the bottom of an account may be contradicted by testimony, but not one which is formally drawn up to establish the situation between the parties.[18] In this connection, then, the term "valid written instrument" means a writing, to some extent a formal one, drawn up with the intention of serving as evidence of an agreement.

3. *The effect of 1233(7) C.C. on 1234 C.C.*

Art. 1233(7) C.C. permits proof by testimony when there is a commencement of proof in writing. The rule in our Code prohibiting testimony to contradict or vary the terms of a valid written instrument follows immediately the enumeration of the exceptional cases in which parol evidence is admitted. Art. 1234 begins with the words: "Testimony cannot *in any case* be received . . . " According to Langelier[19] this means that even in any of the seven cases mentioned in 1233 C.C., if there is a valid written instrument, testimony cannot be offered to contradict or vary the writing.

The question has arisen as to whether verbal evidence is admissible to contradict a written instrument where a commencement of proof in writing existed. The headnote of *Bury* v. *Murray*[20] reads in part: "Verbal evidence is inadmissible to contradict an absolute notarial transfer even where there is a commencement of proof in writing. Article 1234 C.C." On the question of evidence, Chief Justice Strong stated:

> "It has been determined . . . that there was no sufficient commencement of proof in writing to he found in the deposition of the respondent to let in the testimony of witnesses. Whether this is so or not, can, in the view I take, make no difference, for even assuming that there was a perfectly good commencement of proof in writing, verbal evidence would still be inadmissible. Article 1234 of the C.C. says: (citation)."

The Chief Justice then asks whether it is permissible, notwithstanding article 1234, to receive verbal testimony to alter or contradict a deed or other writings on the ground that there is a commencement of proof in writing. . . He says:

> "By article 1233 seven cases are enumerated in which testimonial proof is admissible; one of them is the case where there is a commencement of proof in writing. Then as article 1234 says that oral proof shall not in any case be received it must be interpreted as excluding all the cases mentioned in the next preceding

---

16*Pyke* v. *Sovereign Bank* (1915), 24 K.B. 198.

17*Boisclair* v. *Commissaires d'école de St-Gérard de Magella,* (1920), 57 S.C. 335.

18Langelier, *op. cit.,* p. 248; Mignault, *op. cit.,* p. 83, footnote (b); *Keller* v. *Esmond Garment Inc.,* [1953] R.L.n.s. 113; *Beauchamp* v. *Lazar,* [1951] R.L.n.s. 570.

19*Op. cit.,* pp. 246, 258, 259.

20(1894), 24 S.C.R. 77.

article. It is not to the purpose to show that the French authorities are against this, for the French code makes different provision for such a case. Art. 1341 of that code which says that oral proof shall not be received against actes is followed by article 1347, which introduces an express exception in favor of the admission of such proof when there exists a commencement of proof by writing. This question is ably treated in a work on the law of evidence in the province of Quebec lately published (Langelier, de la Preuve, arts. 584-640); and in the absence of judicial decisions to the contrary I adopt the learned author's conclusions, inasmuch as they appear to be founded on unanswerable arguments."

Fournier, Sedgewick & King JJ. concurred with the Chief Justice without any remarks.

Taschereau J. says: "For the reasons given by the S.C. in its formal judgment, I am of the opinion that this appeal should be dismissed with costs.

"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 arts. 1233, 1234, 1235 of the Code where there is a commencement of proof in writing. The solution to this question is not necessary to determine the cases and it was not argued before us, nor determined by the courts below."

This decision and Langelier's views were criticized by Philippe Demers[21] who said that the Supreme Court adopted Langelier's view on the ground that there were no decisions to the contrary. Demers then cited nine decisions which he said were to the contrary. He denied that article 1234 C.C. reproduces the English rule and also rejected the view that 1234 C.C. applies to all the cases mentioned in 1233 C.C.[22]

Mignault[23] refers to decisions laying down the principle that the commencement of proof in writing constituted by the admission of a party may serve to allow testimony against a writing and comments as follows:

> "Je n'admets pas la doctrine de ces arrêts. Ou bien l'aveu constitue une preuve complète, et alors la partie qui le fait ne peut pas invoquer l'acte qu'elle a contredit elle-même; ou bien, l'aveu ne constitue qu'un commencement de preuve, insuffisant pour établir le fait allégué, et alors, il serait suprêmement illogique de se fonder sur cette preuve incomplète, pour autoriser une preuve testimoniale qui, aux termes de l'article 1234, ne peut être admise."

Bury v. *Murray* was followed by the Court of Appeal in *St. Martin* v. *Mathieu*[24] where one of the three judges, Allard J., considered that a commencement of proof in writing should admit verbal evidence, but felt nevertheless bound to follow *Bury* v. *Murray*. His colleague, Rivard J., concluded that in the circumstances of the case there was no commencement of proof and declined to decide the other point. Hall J., dissenting, cited two old cases which undoubtedly implied that partial admissions would suffice to admit verbal evidence.

The matter came before the Superior Court in the case of *Petit* v. *Auger*[25] and Mr. Justice André Demers held:

---

[21]*Loc. cit.*

[22]Langelier replies to this article at page 355 of (1895), 1 R.L.n.s.; Demers's rebuttal appears at page 435 of the same volume.

[23]*Op. cit.*, vol. 6 p, 86, footnote (c.)

[24](1924), 36 K.B. 421.

[25][1953] S.C. 203.

"Si l'on s'en tient à l'art. 1234 C.C. il est indiscutable qu'aucune preuve ne peut être admise à l'encontre d'un écrit, valablement fait, il s'agit d'un acte authentique dans la présente cause.

"C'est d'ailleurs l'opinion de Langelier dans son Traité de la Preuve, page 258, nos 610 et 611, lorsqu'il dit que hors l'aveu de la partie, aucune preuve testimoniale ne saurait être admise.

"La Cour Suprême, dans *Bury* v. *Murray,* suit l'opinion de Langelier . . . Notre Cour d'Appel a suivi ce jugement de la Cour Suprême dans *St. Martin* v. *Mathieu,* mais le juge Allard y a exprimé une opinion contraire et le juge Hall était dissident. L'opinion contraire, à savoir qu'on peut contredire un écrit lorsqu'il y a un commencement de preuve, a été soutenue par de nombreux jugements jusqu'à celui de *Bury* v. *Murray.*

"Quelle que soit notre opinion sur la question, nous nous croyons liés par l'autorité de la cause de *Bury.* Il est indiscutable que le demandeur n'a pas obtenu l'aveu et que, dans les circonstances, l'objection à toute preuve testimoniale doit être maintenue et l'action rejetée."

4. *Is the rule of 1234 C.C. a rule of public order?*

If proof by testimony to contradict or vary a valid written instrument is made without objection should the Court on its own initiative disregard such evidence? Langelier[26] cites the old French law and concludes that the rules set out in art. 1233 are of public order. The same reasoning would apply to art. 1234 C.C. Mignault[27] takes the opposite view. It is this view which has been followed by the courts.

Thus, it was held in *Schwersenski* v. *Vineberg*[28] that

"the prohibition of art. 1234 C.C. against the admission of parol evidence to contradict or vary a written instrument is not *d'ordre public,* and that if such evidence is admitted without objection at the trial it cannot subsequently be set aside in a Court of Appeal."

The Supreme Court reiterated this view in *Gervais* v. *McCarthy,*[29] when it was held that

"the prohibition of parol testimony, in certain cases, by the Civil Code is not a rule of public order which must be judicially noticed, and where such evidence has been improperly admitted at the trial without objection, the adverse party cannot take objection to the irregularity on appeal."

More recently, the Court of Appeal[30] held that

"an additional reason for permitting verbal evidence is the fact that it does not appear from the record that any objection was made to verbal testimony. The rule that proof must be made by writing is not of public order. If no objection is taken, the proof by testimony is valid.[31]

5. *Alternatives to "Contradict or Vary."*

But one cannot always depend on one's adversary to introduce testimony or to permit — without objection — the introduction of testimony in con-

---

[26]*Loc. cit.*

[27]*Op. cit.,* pp. 58, 59.

[28](1891), 19 S.C.R. 243.

[29](1904), 35 S.C.R. 14.

[30]*McCallum* v. *Babineau,* [1956] K.B. 774.

[31]To this effect: *Allen* v. *Cardin* (1927), 42 K.B. 362; *Collège Ste-Marie* v. *Racette,* [1941] R.L.n.s. 129; *St-Georges* v. *Auger,* [1943] K.B. 241; *King* v. *Savard,* [1944] K.B. 328; *Fortin* v. *Veilleux,* [1946] K.B. 142; *Beauvais* v. *Filiol,* (1924), 36 K.B. 344.

travention or in avoidance of the provisions of art. 1234 C.C. Much ingenuity has been displayed in piloting testimony into the record without foundering on the prohibition of art. 1234 C.C.

This article states that one cannot by testimony *contradict or vary* the terms of a valid written instrument. It is not surprising that many attempts have been made to introduce testimony with respect to written contracts; not, of course, for the purpose of contradicting or varying that writing, but for allegedly entirely different purposes such as:

(a) completing an incomplete writing;
(b) interpreting an ambiguous writing;
(c) proving a subsequent oral contract;
(d) proving collateral contracts;
(e) proving error, fraud, violence or fear as a cause of nullity of a written contract.

The decided cases do not necessarily establish fundamental principles but they do illustrate different ways in which testimony has been introduced with respect to writings without contradicting or varying such writings.

(a) *Testimony to complete terms of a written instrument.* Our Code in 1234 does not specifically prohibit proof by testimony "outre le contenu" of writings as does the corresponding article (1341) of the French Code. Mignault[32] writes:

> "Je crois qu'on peut prouver *outre* le contenu d'un acte lorsque cette preuve ne tend pas à *contredire* ou a *changer* les termes de cet acte."

Two other articles of the Code must not be forgotten in this connection. Art. 1017 C.C. provides that:

> The customary clauses must be supplied in contracts, although they be not expressed.

and art. 1024 says:

> "The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature."

For instance, in *Dominion Gresham Guarantee and Casualty Co.* v. *Crooks*[33] testimony was allowed to prove a custom or usage to the effect that when a contract of insurance is cancelled by one party the insurance agent is entitled to retain only a part of the commission in proportion to the premium earned.

In *Rainboth* v. *O'Brien*[34] Cross J. said:[35]

> "Proof of attendant facts and circumstances may show that the real contract entered into differs from that which the writing purports to have disclosed. Proof is not to be made in contradiction of the covenants of the writing. The appellant

[32] *Op. cit.*, vol 6, pp. 83-84.
[33] (1933), 55 K.B. 528.
[34] (1915), 24 K.B. 88.
[35] At page 92.

> objected to evidence on that ground. But proof of accompanying circumstances can be made and the effect of such proof may be enhanced by elements of ambiguity or inadequacy or incompleteness in the writing."

In *Jarry* v. *Jourdain*[36] there was a writing whereby defendant recognized that he owed plaintiff a 1949 Meteor car or the value thereof and undertook to deliver it on a certain date. Proof by testimony was allowed to show that the indebtedness arose out of an illegal lottery and plaintiff's action was dismissed.

(b) *Testimony to interpret an ambiguous writing.* Here again, the argument runs that testimony is offered not to contradict or vary the writing but merely to interpret ambiguous provisions contained in the writing. Art. 1016 C.C. states the rule that "Whatever is doubtful must be determined according to the usage of the country where the contract is made." Oral evidence is admissible to prove such usage.

The House of Lords admitted oral evidence to explain the meaning of the terms in a lease "payable in Chile by first class bills on London."[37] Viscount Sankey said in that case:

> "Without endeavouring to give an exhaustive definition of what evidence may be admitted, there are in cases like the present three conditions precedent to its being accepted:
> 1. the evidence must not conflict with a statutory definition;
> 2. the evidence must be of a usage common to the place in question; and
> 3. the evidence must expound and not contradict the terms of the contract."[38]

A decision of the New Brunswick Court of Appeal allowed testimony in view of the recoguized ambiguity of the terms of a written contract dealing with the scaling of logs.[39] In another case, testimony was permitted to help determine whether the word "dollars" used in the writings meant American or Canadian dollars.[40] Testimony was allowed where one defendant signed a lease without indicating in what quality he did so and there was a dispute as to whether he signed as a witness or as a guarantor.[41] Where a written contract for the sale of a car included an extra item for "financial charges" the buyer was permitted to testify that the vendor's agent had explained that this term included insurance.[42]

(c) *Testimony to prove a subsequent oral contract.* Parties to a valid written contract are almost always at liberty subsequently to change the agreement, or even to annul it. The proof of the second agreement may be merely the setting up of something which the parties did later and not a case of offering evidence to contradict or vary the terms of the first written

---

[36][1950] S.C. 11. See also *Siscoe Gold Mines* v. *Bijakowski,* [1935] S.C.R. 193.
[37]*DeBeeche* v. *North American Stores et al.,* [1935] A.C. 148.
[38]At page 158.
[39]*Mann* v. *St. Croix Paper Co.,* (1912), 5 D.L.R. 596.
[40]*Tracy* v. *Hyde,* [1943] S.C. 272.
[41]*Bohemier* v. *Lefebvre* (1933), 71 S.C. 289.
[42]*Wareloo Motors* v. *Flood,* (1931), 1 D.L.R. 762.

agreement. Strictly speaking it could be said that the question of subsequent oral contracts comes under art. 1233 C.C. rather than 1234 C.C. In other words, the problem is whether the second agreement falls within one of the seven exceptional cases of art. 1233 C.C. in which proof by testimony is permitted.

In one case,[43] decided by the Court of Appeal in 1919, the buyer had a written contract covering the purchase of 500 boxes of tomatoes. He alleged that only 200 boxes had been delivered and asked for damages. The seller admitted the written contract but alleged a subsequent oral contract whereby the quantity was reduced to 200 boxes. Objection was taken that the proposed testimony was inadmissible since it would contradict or vary the terms of the written contract for 500 boxes. But the Court allowed verbal evidence of the subsequent contract on the grounds that it was a commercial contract being a sale between dealers and susceptible of proof by testimony under 1233(1) C.C. and that it did not fall under the prohibition of art. 1234 C.C.

(d) *Collateral contracts.* A contract may be composed of more than one agreement. For example, there may be two writings or there may be a writing and an oral agreement. Such collateral agreements can be proved by oral testimony. Langelier[44] writes:

> 591. Ce n'est pas, non plus, contredire ou modifier un écrit, que de prouver qu'avant sa confection, ou lors de sa confection, les parties ont fait une autre convention sur des matières collatérales à celle qui en fait l'objet, ou bien ont fait une convention verbale qui constitue une condition d'où dépend l'accomplissement de la convention écrite. Par exemple, on peut prouver qu'elles sont convenues verbalement que l'écrit qu'elles rédigeaient ne les lierait que si une certaine condition s'accomplissait; ou bien qu'un billet a été endossé pour un objet particulier, et à condition que l'endossement ne vaudrait que si une certaine condition était accomplie."

In *Hyman Ltd.* v. *Jones Bros.*[45] defendant had written plaintiff a letter dated February 23rd in which he quoted a price for fixtures in a cigar store and which contained a guarantee that the fixtures would be set up by the 27th of April. An order was signed on behalf of plaintiff on February 24th. A condition in fine print stipulated that "It is agreed that delivery shall be made as soon as possible, but that delivery at any specified date is waived."

Mr. Justice Guerin rendered judgment on behalf of the majority of the court and stated at page 281:

> "A contract may be evidenced and established through the medium of several writings, as well as by one document, and the import of a written paper purporting to contain the terms of a contract may be controlled, altered or extended by a contemporaneous agreement in writing, provided that it be shown that both papers refer to the same subject matter, persons and things.
>
> "If a written document amounts to a mere admission or acknowledgement of certain facts forming a link only in the chain of evidence by which a contract is

[43] *Forest* v. *Galbraith* (1919), 26 R.L.n.s. 235. See also *Dorval Equipment Co. Ltd.* v. *Franki Pressed Pile Co.*, [1953] Q.B. 787.

[44] *Op. cit.*, p. 250.

[45] (1916), 51 S.C. 279.

> sought to be established, it may be given concurrently with, and be aided and supported by other evidence, even by oral evidence, when the contract is not required by law to be in writing."

The principle was also upheld in *Lachance* v. *Petit*.[46] In another case[47] a minor signed a contract with a company by which the latter agreed to provide correspondence courses in accountancy. The minor contended that his consent was given under the clear and positive understanding that he would take the course only if he secured a better position through the company's intervention. It was held that such understanding constitutes a separate agreement which can be proved by verbal testimony if the evidence of the agent contains sufficient admissions to constitute a commencement of proof in writing.

(e) *Proving error, fraud, violence or fear as a cause of nullity.* In this case the suggestion is made that it is not a contradiction of a valid written instrument to show that what purports to be so is void for want or valid consent.[48] Error, fraud, violence and fear as causes of nullity in contracts may be proved by testimony under art. 1233(5) C.C. which is as follows:

> "Proof may be made by testimony: . . .
> (5) In cases of obligations arising from quasi-contracts, offences and quasi-offences and all other cases in which the party claiming could not procure proof in writing."

Langelier[49] is of the opinion that:

> "592. Ce n'est pas contredire ou modifier un écrit, que de prouver que la convention qu'il constate est le résultat de la fraude, de la violence, de l'erreur, ou qu'elle est contraire à la loi, ou que cet écrit lui-même a été fabriqué ou contrefait, ou altéré."

In *Schwersenski* v. *Vineberg*[50] Taschereau J. says:

> "According to the case of *Aetna Life* v. *Brodie*, and in this court it is settled law that the evidence now objected to here by the appellant was perfectly legal and rightly admitted, and that in commercial matters parol evidence can be adduced to prove error in a written instrument. How far this rule as to proof of error in writing can be extended to non commercial matters, as falling within the cases in which the party claiming could not procure proof in writing, we have not here to consider."

The Court of Review in *Church* v. *Laframboise*[51] allowed testimony to prove that plaintiff had been led into error by the false representations of defendant. The court said that error, like violence and fraud, is always susceptible of proof by testimony. In an earlier case[52] the Court had upheld very much the same view:

---

[46](1917), 53 S.C. 368.
[47](1934), 73 S.C. 97.
[48]Cf. Arts 991 to 1000 C.C.
[49]*Op. cit.*, p. 250.
[50](1891), 19 S.C.R. 243.
[51](1916), 50 S.C. 385.
[52](1907), 32 S.C. 500 at p. 502.

> "Il est vrai que l'article 1234 empêche la preuve testimoniale pour contredire ou changer les termes d'un écrit valablement fait; mais cet article n'empêche pas la preuve sous l'opération de l'article 1233 des faits de fraude ou d'erreur qui peuvent empêcher un contrat écrit d'avoir été valablement fait, et il est évident que la fraude et l'erreur ne peuvent être prouvées autrement que par témoin."

It is hoped that the above will be of assistance in considering the admission of testimony with respect to writings.