# The Hearsay Rule in Quebec Law of Evidence in Civil Matters

Hon. G. R. W. Owen *

The Hearsay Rule is stated in Phipson, *Law of Evidence*,[1] to be

> Oral or written statements made by persons not called as witnesses are not receivable to prove the TRUTH of the facts stated except...

A comparatively recent judgment [2] has raised the question as to whether the rule of evidence excluding hearsay should be applied in civil matters in the Province of Quebec.

In *Marchand* v. *Begnoche* an action in damages was taken by the widow of the victim of an automobile accident against the heirs of the owner of the automobile in which the plaintiff's husband and the defendants' "auteur" were the only occupants. The owner of the automobile died immediately at the scene of the accident. The plaintiff's husband lived for two or three days after the accident. There was no other witness of the accident. The widow alleged that the owner of the automobile was driving at the time of the accident.

During the "enquête" the widow's attorney attempted to question a doctor with respect to statements, concerning the circumstances of the accident, made to the doctor by the plaintiff's husband at the hospital, shortly after the accident and shortly before his death.

The plaintiff's lawyer particularly wished to make proof of statements by the deceased as to who was driving the automobile. The defendants' attorney vigorously opposed this evidence on the ground that it was hearsay. The doctor would be testifying as to statements which he heard the deceased make, while the deceased was not under oath and was not subject to cross-examination, with the object of proving the truth of such statements.

The arguments of the plaintiff's lawyer in support of the contention that this evidence was admissible are summarized in the report of the case as follows:[3]

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* Of the Quebec Court of Appeal.

1 10th ed. (1963) para. 631.

2 *Marchand* v. *Begnoche* [1964] C.S. 369.

3 *Ibid.*, at pp. 370-371.

Dans des notes savantes et fort habiles soumises par l'avocat de la demanderesse, celui-ci suggère l'admissibilité de la preuve par ouï-dire dans un cas comme celui-ci, alors que la preuve directe par témoins visuels de l'accident qui constituerait la meilleure preuve ne peut être faite.

L'argument de l'avocat de la demanderesse est en substance le suivant:

(a) L'article 1204 C.C. qui défend une preuve secondaire ou inférieure la permet cependant s'il apparaît que la preuve originaire ou la meilleure preuve ne peut être fournie;

(b) Il n'y a pas de dispositions correspondantes dans le Code civil français dont on puisse affirmer que notre article a été tiré;

(c) Cette disposition particulière de notre article 1204 C.C. a des affinités avec la *best evidence rule* du droit anglais, mais non avec la *hearsay rule* du même droit, ce qui a permis à certains juristes québecois d'exprimer l'opinion que l'inspiration de notre article 1204 C.C. est anglaise;

(d) Il s'agit donc surtout d'une règle de preuve particulière à la loi de la Province de Québec qui, tout en se rapprochant de la règle de preuve anglaise connue comme *the best evidence rule*, est, cependant, propre à notre droit;

(e) Aucun texte de notre droit ne prohibe, en termes exprès, la preuve par ouï-dire.

L'avocat de la demanderesse s'appuie sur certains commentaires de Phipson,[4] Baker[5] et, tout particulièrement sur les commentaires de ce dernier dans lesquels l'auteur affirme que notre article 1204 C.C. ne reproduit pas la *hearsay rule*, laquelle est, prétend-il, à cause de son inflexibilité, une source d'injustice; l'auteur suggère qu'elle devrait être soit changée, soit abolie.

L'avocat s'appuie aussi sur un passage de Langelier[6] dans lequel cet auteur canadien *a)* rappelle que la règle qui exclut le ouï-dire n'existe pas en France et qu'elle n'est pas admise en Ecosse lorsqu'il s'agit de rapporter les déclarations d'une personne qui pourrait être témoin si elle était vivante, et *b)* suggère que nous devrions, comme en Ecosse et en France, admettre ce genre de preuve, du moins chaque fois qu'il serait impossible de faire entendre le témoin dont on veut rapporter les déclarations.

Basing himself on the text of the chapter in our Civil Code dealing with Proof (Arts. 1203 - 1245 C.C. and particularly Art. 1204 C.C.) Plaintiff's attorney contended that while the Best Evidence Rule is part of our law of evidence in civil matters the Rule excluding Hearsay is not.

The trial judge in maintaining the objection and refusing to admit the doctor's evidence gave the following reasons:[7]

Les propositions de l'avocat de la demanderesse seraient certes défendables si notre article 1204 C.C. était le seul sur lequel nous devrions nous appuyer; il existe, malheureusement pour la demanderesse, des articles du Code

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[4] *On Evidence*, 10th ed. (1963), pp. 627 *et seq.*

[5] *The Hearsay Rule*, (1950), pp. 7 *et seq.*, 15, 166 *et seq.*

[6] *De la preuve* (1894), n. 251, p. 105.

[7] *Marchand* v. *Begnoche* [1964] C.S. 369 at p. 371.

de procédure civile, notamment, les articles 314 et 321 et, plus précisément, cet article 343 C.P. qui ne peuvent permettre à un tribunal d'accueillir une preuve par ouï-dire. Il peut y avoir un conflit apparent entre les dispositions de l'article 1204 C.C. et celles des articles du Code de procédure civile; ce conflit semble avoir été résolu jusqu'à date de façon prépondérante en faveur des dispositions de notre Code de procédure civile. Aussi longtemps qu'un nouveau texte de loi ne sera pas promulgué, il n'est pas possible à un juge de sortir des sentiers battus de la jurisprudence.

Certes, la tâche du juge serait simplifiée s'il lui était loisible de recevoir en preuve les déclarations faites par le témoin d'un fait, avant son décès, dans les cas où non seulement une meilleure preuve mais aucune autre preuve de ce fait n'existerait, mais la réception de ce genre de preuve par ouï-dire pourrait être une source de grave injustice; en effet, de telles déclarations même faites volontairement, librement, et en toute connaissance de cause par un témoin, depuis lors décédé, peuvent avoir été volontairement fausses pour avoir été inspirées à celui qui les a faites soit par son propre intérêt, soit par celui de ses dépendants; pour accueillir comme vraies des déclarations faites par le témoin de certains faits à une autre personne qui les rapporteraient, le juge devrait forcément s'en remettre exclusivement à l'opinion que se serait faite cette autre personne quant à la véracité du déclarant et quant à la vérité de ses affirmations; cette seule constation suffit, semble-t-il, pour rendre inadmissible une telle preuve par ouï-dire en l'absence d'un texte formel la permettant.

This decision apparently concedes that the Rule excluding Hearsay is not to be found in Art. 1204 C.C. However it seems to find that the rule is part of our law of evidence in civil matters in virtue of the provisions of Art. 343 of the old Code of Civil Procedure which provided:

343. A deposition given at a former trial of the same action or of another action founded in whole or in part upon the same cause of action, may be given in evidence, if it is established that the witness who made it is dead, or is so ill as to be unable to travel, or is absent from the Province, and that the opposite party had a full chance to cross-examine the witness.

In the new Code of Civil Procedure Art. 320 is to the same effect.

The reasoning appears to be that if a deposition given at a former trial (which would be given under oath) cannot be received, even though the witness cannot be produced, unless the opposite party had a full chance to cross-examine, then there must be a general rule excluding proof of statements made by a person not called as a witness unless such statement was given under oath and was subject to cross-examination by the opposite party. If such an inference from the Code of Civil Procedure is in conflict with the substantive dispositions of the Civil Code, then the dispositions of the Code of Civil Procedure should, according to this decision, prevail.

I believe that the object of rules of evidence is to assist the courts in the search for truth. If the evidence of the doctor had been admitted in the *Marchand* v. *Begnoche* case this search might have been aided.

It could have helped the Court, in considering the question at to who was driving, to know what statements were made by the deceased to the doctor and at what time and under what circumstances these statements were made. The problem as to what weight should be attached to these statements is distinct from the problem as to their admissibility.[8]

In connection with this case it is interesting to note that in *Roy* v. *Levasseur*,[9] the Court of Appeal, in a case where there was no direct proof as to which of the two occupants of an automobile was driving, held that the evidence gave rise to a presumption of fact that the owner of the car had been driving.

The *Marchand* v. *Begnoche* case indicates that there may be some doubt as to whether the Hearsay Rule applies in civil matters in the Province of Quebec and also that if it does apply there is difficulty in putting one's finger on the text which justifies the application of this rule of evidence in civil matters in this Province.

Our Civil Code sets out the *Best Evidence Rule.*

> Art. 1204. The proof produced must be the best of which the case in its nature is susceptible.
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> Secondary or inferior proof cannot be received unless it is first shown that the best or primary proof cannot be produced.

This Rule was taken by our codifiers from the English common law in 1866. This article has no counterpart in the Code Napoleon. The codifiers indicate Greenleaf as the source and make no comment on the rule. It is obviously of English origin. Greenleaf (whose work was first published in 1842) expresses the rule as requiring "the best evidence of which the case in its nature is susceptible". Since that time the Best Evidence Rule has fallen into disrepute and disuse in England. Phipson states:[10]

> 133. The maxim that "The best evidence must be given of which the nature of the case permits", has often been regarded as expressing the great fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject, the maxim at the present day affords but little practical guidance.
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> 136. In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced.

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[8] C.f. *Southern Canada Power* v. *Conserverie de Napierville* (a judgment of the Quebec Court of Appeal rendered the 6th of March 1967, No. 8337 Montreal, not reported at this time), which has been appealed to the Supreme Court of Canada.

[9] [1964] B.R. 629.

[10] *On Evidence*, 10th ed. (1963).

In 1866 it was fairly generally accepted that the Best Evidence Rule included the Hearsay Rule.[11]

> 134. ... Great prominence was given to the doctrine by the publication of Chief Baron Gilbert's work on Evidence in 1756, the following statement and comment from which have been adopted, almost without question, by text-writers down to the present day: 'The first and most signal rule in relation to evidence is this, that a man must have the utmost evidence that the nature of the fact is capable of... The true meaning of which is that no such evidence shall be brought which *ex natura rei* supposes still a greater evidence behind in the party's own possession or power' (1st ed., p. 4). By evidence which supposed a greater behind, Gilbert apparently referred to the three great classes of 'substitutionary evidence', i.e. hearsay, secondary evidence, and proof of attested documents otherwise than by the attesting witnesses.

Baker states:[12]

> When textbooks on evidence first began to appear as reasoned treatises during the middle years of the nineteenth century, an attempt was made to rationalize the Hearsay rule as being part of the Best Evidence rule, which required the hest evidence that the nature of the case would afford; if the best evidence could not possibly be produced the next best was admitted. Stephen, Powell, Best, and Taylor all connected the Hearsay rule with the Best Evidence rule.

On the basis of the thinking of that day a strong argument could be made that by Art. 1204 C.C. our codifiers incorporated in our law of evidence in civil matters two English common law rules, the Best Evidence Rule and the Hearsay Rule. However today the generally accepted view is that the Best Evidence Rule and the Hearsay Rule are autonomous rules with distinct origins.

In some instances the two rules produce contradictory results. Under the Best Evidence Rule if the primary evidence cannot be produced the secondary evidence can be received. Under the Hearsay Rule even though the primary evidence cannot be produced the secondary evidence cannot be received unless the case falls within one of the recognized exceptions to the Hearsay Rule.

On the basis of the thinking of today the proposition can be advanced that in Quebec we have Art. 1204 C.C. which sets out the Best Evidence Rule, that the Hearsay Rule is not part of the Best Evidence Rule, and that Art. 1024 C.C. does not justify the application of the English Common law Hearsay Rule with its exceptions in civil matters in the Province of Quebec.

Certain articles of our Code of Civil Procedure have been invoked as a basis for excluding hearsay evidence. Reference has been made

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[11] *Ibid.*, No. 134.

[12] *The Hearsay Rule* (1950), p. 15.

to the reasoning in the Superior Court judgment in *Marchand* v. *Begnoche* which rejected hearsay evidence mainly by reason of the provisions of Art. 343 of the former Code of Civil Procedure.

Neither the Civil Code nor the Code of Civil Procedure contain a clear statement as to whether or not there is a general rule excluding hearsay evidence in civil matters in Quebec or as to the exceptions to that rule if it does exist.

With respect to what may be called "written hearsay" we have the provisions of articles 1207 *et seq.* C.C.

With respect to statements (oral and written) made by persons who are not parties to the action and who are not called as witnesses, our courts have ruled on the admissibility of such statements to prove the truth of the matters stated. Some of these decisions may be referred to by way of examples.

In the case of *C.P.R.* v. *Quinn*,[13] the question arose as to the admissibility of a hospital chart with entries on it by nurses, one of whom was not available as a witness at the trial. The Superior Court held that the chart could not be admitted as evidence. Cross J. of the Court of Appeal, after citing American authority (p. 430), stated that in his opinion the entries should be admitted, not only in the case where the person who made them is dead, but likewise if the person is alive but not available as a witness. However on the ground that "the existence of the conditions requisite to render the entries admissible as evidence, such as the fact of the entries having been made immediately upon the occurrence of the facts recorded, was not so definitely established as to enable us to say that the chart ought to have been admitted as evidence", Cross J. agreed that the chart had been properly excluded.

In the case of *Bean* v. *Asbestos*,[14] the problem arose as to whether statements, made by the victim, at the time of an accident, to his foreman, as to the manner in which the accident occurred, could, in an action taken by the victim's widow, be proved by a person who heard the statements made. The Superior Court, Pouliot J., recognized the rule excluding hearsay evidence but admitted proof of the statements in question, after citing English authors and Langelier, apparently as being original evidence, acts forming part of the *res gestae*, and not hearsay evidence.

In a somewhat similar case in the Superior Court, *Little* v. *London & Lancs. Guarantee & Accident*,[15] E. M. McDougall J., allowed evi-

[13] (1913) 22 B.R. 428.
[14] (1915) 21 R.L. n.s. 378.
[15] (1940) 7 I.L.R. 281.

dence to be made of a statement made by a deceased person at the time of an accident as to what happened on the ground that the statement was part of the *res gestae*. The Court agreed with the decision in *Bean* v. *Asbestos*.

From the cases considered above it will be seen that our Courts have both allowed and disallowed statements made by persons who are not parties and who are not called as witnesses, which are offered as proof of the truth of the matters stated. The grounds for the judgments have varied - Art. 343 C.P., the Best Evidence Rule, the Hearsay Rule, and that such statements form part of the *res gestae*.

Quebec authors on numerous occasions have stated that the Hearsay Rule forms part of our law of evidence in civil matters. However there is considerable variation when they refer to the text which they claim embodies or constitutes the basis of this rule.

*Langelier* after citing Art. 1204 C.C. states that this rule was borrowed from the English law, there being no similar provisions in French law ancient or modern.[16] Langelier expresses the opinion that it is by reason of the Best Evidence Rule (1204 C.C.) that hearsay evidence is excluded.[17]

> C'est parce qu'il faut toujours produire la meilleure preuve possible, qu'en général la preuve par ouï-dire n'est pas admise.

Langelier writes that Art. 1204 C.C. not only introduced the English Hearsay Rule but also the English exceptions to that rule.[18]

The late Chief Justice Tyndale in his paper published in the *"Livre-Souvenir des Journées du Droit Civil Français"*, 1934, under the heading - "Two Rules of the Quebec Law adopted from England" writes [19] "The Best Evidence Rule and the rule excluding Hearsay Evidence are, admittedly, of English origin." His opening comment with respect to the rule excluding hearsay evidence is [20]

> 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...

The Chief Justice, however, is not completely satisfied with this suggestion that Art. 1204 C.C. introduced The Hearsay Rule into our law as part of the Best Evidence Rule as may be seen from his comment:[21]

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[16] *De la preuve* (1894), n. 234, p. 99.
[17] *Ibid.*, No. 250, p. 105.
[18] *Ibid.*, No. 315, p. 135.
[19] At p. 349.
[20] *Ibid.*, at p. 350.
[21] *Ibid.*, at p. 351.

> 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 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.

Fernand Choquette (now a judge in the Quebec Court of Appeal) in an address to the Junior Bar [22] on the subject of "La Preuve par Ouï-dire" stated that the Hearsay Rule is part of the Quebec civil law of evidence in virtue of the Best Evidence Rule (1204 C.C.). He cites Langelier and Tyndale.

Walter S. Johnson in "Sources of Quebec Law of Evidence" writes [23]

> We regard the best evidence rule as necessarily excluding hearsay.

Ducharme [24] writes that he sees no objection to the explanation that the Hearsay Rule was introduced into our law of proof etc. by Art. 1204 C.C.[25]

Ducharme also refers to Art. 340 C.P. (1897) as a text or basis justifying the application of the Hearsay Rule in Quebec.[26]

In the new Code of Civil Procedure, which came into force in the Province of Quebec on the 1st September 1966, the former Article 340 has been replaced by Art. 314 reading:

> 314. When a party has ceased examining a witness he has produced, any other party with opposing interests may cross-examine such witness on all the facts in issue and may also establish in any manner whatever grounds he may have for objecting to such witness.

Commenting on this change the commissioners in their report state:

Article 314:

> Unlike Article 340 C.C.P. which limits cross-examination to the facts raised in examination in chief, the suggested text permits cross-examination on all the facts in the case. The Commissioners are of opinion that the search for the truth, which is the sole object of the trial, should not be handicapped

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[22] (1935) 14 Rev. du Dr. 65.
[23] [1953] Can. Bar Rev. 1000 at p. 1017.
[24] Nadeau & Ducharme, *La Preuve* (1965), p. 128.
[25] C.f., p. 106.
[26] *Ibid.*, p. 139.

by a rule which has no justification and which never existed in Canada outside the Province of Quebec. It is well known that this rule was taken from the United States, where it is no longer in force in a large number of States (See the article by Watt [1960] R.L., p. 123).

This modification of the article in the Code of Civil Procedure does not add any weight to the proposition that it is the basis of the Hearsay Rule in Quebec.

From an examination of our Codes, decided cases, and authors, it appears that there is no specific text setting out a rule excluding hearsay evidence in civil matters in the Province of Quebec.

Furthermore this is hardly a case where it can be said that even though we may have no specific text enunciating the principle nevertheless the rule excluding hearsay evidence is of such universal application and is so obviously essential to the proper administration of justice that in any event our courts should apply it.

Broadly speaking there is no general rule excluding hearsay evidence in Europe.

Langelier writes: [27]

La règle qui exclut le ouï-dire n'existe pas en France, et n'est pas admise en Ecosse lorsqu'il s'agit de rapporter les déclarations d'une personne qui pourrait être témoin si elle était vivante.

Lord Maughan in "Observations on the Law of Evidence", states: [28]

I will begin with some remarks on the important subject of hearsay. Our general rule, as you well know, is that oral or written statements by persons not called as witnesses are not admissible as evidence of the truth of the matters stated. This rule is peculiar to our law and does not obtain on the continent of Europe.

Baker states: [29]

In that oft-referred-to case, the Berkeley Peerage Case, Lord Mansfield pointed out that the English rule excluding hearsay is one peculiar to English law, at the same time demonstrating the reason why the law in Scotland and on the Continent was different.

In jurisdictions where it has been applied there have been forceful criticisms of the hearsay rule.

(a) Lord Maughan.

It must be admitted that this rule of exclusion often rules out statements of great probative value. For example, a parol statement by a person with no motive to misrepresent the fact is a thing we all act upon without hesitation in the ordinary affairs of life. If a man says that he called at B's house and was told that B was away in the country, we all credit the statement that B was away in the absence of any ground for doubting it.

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[27] *De la preuve* (1894), n. 251, p. 105.
[28] (1939) 17 Can. Bar Rev. at p. 473.
[29] *The Hearsay Rule* (1950) at p. 167.

If a man tells you that he is fifty years of age, we believe him none the less that his knowledge of his age will generally depend on the statements of his parents, or others who may have known the approximate time of his birth. If the question is whether A ordered certain goods from B, a statement that a man came with a cart with A's name painted on it and said that A, who was his master, has told him to fetch away the goods is surely some proof that A ordered the goods. On an issue whether an attested deed is forged, some weight would be attached by sensible persons to the fact that the attesting witness (now deceased) admitted that the deed was forged. Yet in all these cases, and a hundred other instances could be given, the evidence is wholly excluded as being hearsay. One cannot therefore be altogether surprised that the rule has not been universally adopted in all civilized countries.[30]

I came to the conclusion many years ago that the law of evidence on these subjects required amendment, and I also found that the exceptions I have mentioned had grown up in the most haphazard fashion, and they seemed to me to be based on principles which had little regard for the true probative value of the evidence in question.[31]

### (b) S.J. Helman.

Every practitioner is only too familiar with those unhappy cases where the victim of an accident dies after having made a statement which, under the present state of the authorities, is not admissible because it was made after the accident took place. If the deceased, as often happens, is the only person present when the accident occurred and was therefore the only person who could tell how the accident happened, the representatives of the deceased are deprived of their just claims. Not many of these cases are to be found in the reports because when such a case arises the legal adviser of the claimant must reluctantly tell his client that the proposed litigation will not be successful and so the claimant must either abandon his claim or take such settlement as a generous opponent may see fit to grant him. Justice demands that such statements should be admitted.[32]

In Scotland the general rule has been that an oral statement by a deceased person is admissible in evidence, and no inconvenience has followed from the adoption of this practice.

That the law in England is deficient in this regard and should be amended has also long been recognized. Indeed, Chief Justice Cockburn in the *Bedingfield Case* expressed regret that "according to the law in England any statement made by the deceased should not be admissible", and in *Sugden* v. *Lord St. Leonards*, Lord Justice Mellish stated: "If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements made by the persons who are dead respecting matters of which they had personal knowledge and made *ante litem motam*, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence." And in the

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[30] "Observations on the law of Evidence", (1939) 17 Can. Bar Rev. 469 at p. 474.
[31] *Ibid.*, p. 479.
[32] "The Reform of the Law of Hearsay" (1939) 17 Can. Bar Rev. 302.

same case, Jessel, M.R. said: "Now, it might well have been that our law, like the law of some other countries, should have admitted as evidence the declarations of persons who are dead in all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, whether in writing or oral, made by the deceased persons, are not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule."[33]

(c) Baker.

During the course of the treatment of the exceptions to the Hearsay Rule it became apparent on numerous occasions just how arbitrary, unreasonable and unjustifiable are many of the limitations and conditions of admissibility, how often valuable testimony is excluded and how sometimes injustice is caused by the inflexibility of the present law relating to hearsay.[34]

The origin of the Hearsay Rule was to protect the jury from untrustworthy evidence. Today the standard of education and intelligence of juries is much higher than it was in the eighteenth century when the rule appears to have been established in England. Today the great majority of civil cases in Quebec are heard without a jury by a judge who does not require the same protection against untrustworthy evidence that an eighteenth century jury did.

*Baker* in the closing chapter of his work *The Hearsay Rule* discusses the future of the Hearsay Rule and foresees two possible courses of development:

a) retention of the present rules with modifications

b) abolition of the present rules and substitution of a new principle.

(a) Modification of the Present Rules

So long as all questions of fact were decided by the jury it was reasonable to exclude much testimony that would otherwise have been admitted, but in many present-day civil cases there is no jury and the judge decides questions of fact. Further, the standard of education, general knowledge and experience of jurors are now at a much higher level than at the time when many of the existing rules were originated and developed. In view of these two facts the following modifications to the present law are suggested —

(1) An enlargement and liberation of the present exceptions along the lines suggested during their individual treatment.

(2) The opening of the field for new exceptions. This would entail the adoption of an approach such as that made by Jessel, M.R., in *Sugden* v.

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[33] *Ibid.*, pp. 304-5.

[34] *The Hearsay Rule* (1950) p. 167.

*Lord St. Leonards* and the rejection of that made by Lord Blackburn in *Sturla* v. *Freccia*.

(3) The introduction of a general rule that all statements made by persons of competent knowledge in good faith and before the beginning of the suit, such persons being now deceased, are admissible. This would follow the form of a Massachusetts Statute of 1898 and would have the support of dicta of Jessel, M. R., and Mellish, L. J., in *Sugden* v. *Lord St. Leonards* and of Lord Herschell in *Woodward* v. *Goulstone*.

(4) A general discretion to be allowed to the judge to admit hearsay testimony when it consists of casual details necessary for the complete comprehension of a witness's evidence.

(b) Abolition of the Present Rules

In view of these two changes, considerable support is given to the contention that the historical development of the Hearsay rule should be reversed and the principle should be established that all relevant evidence should be admissible unless some rule of policy excludes it. This, in effect, would mean the abolition of the present rules and the substitution of an approach similar to that laid down for Similar Facts evidence in *R.* v. *Sims*. Instead of being bound by rigid technical rules the judge could then take a broad liberal stand.

The Indian Evidence Act of 1872 adopted such an approach. Under Sect. 5 relevancy is made the test of admissibility whilst later sections set forth affirmatively the canons for testing and determining what facts are relevant.

Such a change in the English rules could only be accomplished by statute, for the body of law dealing with hearsay is too vast and complicated for a completely new approach to be accomplished by the judiciary. With the increasing tendency in civil cases to proceed to trial without a jury, the reversal of the general principle has much to be said in its favour, but it is felt that the strong practical, empirical attitude of English lawyers would not allow such a radical step. Yet, it is submitted, that should be the ultimate aim; in the meantime such changes and improvements as are suggested in the preceding pages should be capable of reasonably rapid achievement.

Operating under a civil law system and being free from the empirical attitude of English lawyers, it might be easier for us, when revising the Civil Code, to take the radical step of setting up the new principle that all relevant evidence should be admissible unless some rule excludes it, if such a step is thought to be desirable.

In the preparation of the new Civil Code consideration might be given to the problem as to whether we should have both a Best Evidence Rule and a Rule Excluding Hearsay, or only one of these rules, or neither of these rules. If we had neither of these rules and only a Rule of Relevancy then all relevant evidence would be admissible and the weight or probative force to be attributed to such evidence would be left to the discretion of the Court.

If we decide to have a general rule excluding hearsay evidence the next problem would be a statement of the exceptions which could be done either -

(a) by a statement of principle e.g. "where the circumstances were such that in all probability the statement was true" or

(b) by an enumeration of the exceptions along the lines set out in common law text books and perhaps terminating with a general clause e.g. "and in all other cases of like nature."

Consideration might also be given to providing in the new Civil Code that insofar as hearsay evidence is concerned the rule would be the same for both civil and commercial matters.

There is some doubt as to whether we have a rule excluding hearsay in civil matters and it is a good time to consider whether we want one.