Writings and Oral Proof in Civilian Jurisdictions: A Theoretical and Historical Perspective

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WRITING REQUIREMENTS AND THE PAROL EVIDENCE RULE

A Student Symposium

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A THEORETICAL AND HISTORICAL PERSPECTIVE

Introduction

The organization and values of the state and society strongly influence the procedural framework governing the law of proof of a particular jurisdiction and are especially important in determining the weight of oral or parol evidence offered against a written instrument. The Louisiana law of parol evidence has been greatly influenced by a Roman and French tradition and reflects centuries of development in legal thought and in the organization of commerce and society. It is now firmly established in civilian jurisdictions that parol evidence by witnesses is admissible only as an exception to the general maxim of proof that writings are better than witnesses. Analysis of the specific rules of law governing the use of parol evidence in Louisiana must necessarily begin with an exploration of the historical and theoretical basis of this civilian maxim.

Historic Development: Writings v. Testimony

Roman Law

Civil proceedings in classical Rome were divided into two stages. In the first stage, the parties presented their claims and defenses to the praetor, a public official who had the power to grant

1. L. Wenger, Institutes of the Roman Law of Civil Procedure 293 (1940) [hereinafter cited as Wenger].

2. For a detailed analysis of the provisions of the Louisiana Civil Code see Comment, 35 La. L. Rev. 764 (1975) (arts. 2236, 2275, 2278); Comment, 35 La. L. Rev. 779 (1975) (art. 2276).

3. For the purpose of this discussion, classical civil proceedings should be thought of as spanning from the middle of the Republic (510-27 B.C.) until the end of the Principate (27 B.C.-284 A.D.).

4. See generally W. Buckland, A Manual of Roman Private Law 361 (2d ed. 1939) [hereinafter cited as Buckland]; M. Radin, Handbook of Roman Law 30 (1927) [hereinafter cited as Radin]; Wenger at 190.
provisional relief. 5 The praetor's main function, however, was to issue a formula, a written command similar to a modern jury charge, which set forth the applicable law and the issues as agreed on by the parties and the praetor. 6 The praetor then sent the prepared formula to the iudex, 7 a private citizen selected from an official list 8 with the consent of the parties. In the second stage of the proceedings, the parties sought to establish their respective allegations before the iudex, who heard the testimony of the parties, weighed the evidence and rendered a decision in accordance with the formula. 9 No appeal was provided for, but some extraordinary remedies were available against judgments rendered by corrupt judges. 10

No law of evidence, as we understand it, was practiced by the iudex; nor as a practical matter was there any means of effectively enforcing rules of evidence since the lay iudex was not necessarily schooled in the rule of law and his judgment was not appealable. 11 Thus, classical Roman procedure utilized the theory of "free weighing of proof," 12 allowing the iudex to weigh the evidence according to his own free will 13 and admitting every means of proof which contributed to persuade the iudex of the validity of a particular allegation. Since in ancient times, parties transacted business verbally, 14 relying on the presence and memory of witnesses to prove the existence and contents of an agreement, the iudex preferred the testimony of witnesses to written evidence or documents which most often were unavailable. 15

As Rome's commerce expanded, the simple formalistic verbal

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7. W. *Buckland* & A. *McNair*, *Roman Law and Common Law* 318 (1936) [hereinafter cited as *Buckland & McNair*].


9. *Buckland* at 419-20; *Radin* at 46; *Wenger* at 140-58.

10. *Herzog* at 40.

11. *Buckland* & *McNair* at 318.

12. Id. at 201.

13. Digest 22.5.3.2: "[Y]ou must decide from the opinion in your mind what you believe or what you view sufficiently probable." (All translations supplied by the author.)

14. One party would ask "do you promise?" (*spondesne?*), which was called the stipulation; the other would answer "I promise" (*spondeo*), which was called the promise. The entire transaction became known by the former name, *stipulatio*. See Digest 45.1.1.6; Code 8.37.10.

15. H. *Jolowicz*, *Historical Introduction to the Study of Roman Law* 188 (2d ed. 1952) [hereinafter cited as *Jolowicz*].
rituals, easily understood and witnessed by bystanders, became unsatisfactory as a method of transacting business, and parties increasingly reduced to writing the terms and nature of their transactions. Consequently, the iudex began to accord more weight to documentary evidence in his process of free weighing of proof, although as late as 317 A.D. documents and testimony of witnesses were given equal weight.

When the center of the Empire shifted to the more civilized East in the fourth century A.D., Roman law became influenced by Hellenistic and Byzantine ideas. As a result of the change in the organization of the Roman state from a Western Principate to an Oriental Monarchy, legislation became more absolutist and patriarchal, a development which in turn left its imprint on the legal system and the law of proof. Courts were established on a hierarchial basis, and appeals could be taken to higher courts, and ultimately to the Emperor. The function of fact finding, formerly performed by private citizens, was entrusted to a iudex who was a public official, usually a lawyer. Most significantly, the practice of free weighing of proof was gradually eroded by a bounded theory of proof which compelled the iudex to disregard his subjective convictions and follow statutorily defined rules of evidence.

The evidentiary weight accorded oral evidence and documents also underwent a marked change. In 334 A.D., Constantine announced that the evidence of only one witness was not to be considered. The growing distrust of oral evidence was further manifest in the Justinian legislation by the many rules governing the minimum number of witnesses, their capacity to testify, and the weight to be given their testimony. The equality of oral and documentary evi-

17. Wenger at 294.
18. Code 4.21.15: "In the administration of justice, documentary evidence has the same force as the depositions of witnesses."
20. Wenger at 293.
22. Id.
23. Jołowicz at 462; Wenger at 201.
25. Where the number of witnesses was not specified by law, two were sufficient. Many persons were absolutely disqualified from giving testimony: slaves who were not tortured, adulterers, Jews, heretics and infamous persons. The credibility of a particular witness varied according to his status in society and his wealth. See Code 1.5.21; 4.20.9; 4.20.17; 7.6.1; 8.18.11; Digest 22.5.3-.6; 22.5.12; Institutes 2.10.3; Nov. 90.1.1.
dence which had emerged in the last years of the Principate, quickly shifted to a preference for documents when the center of the Empire shifted. The simple and forceful opening fragment in the Justinian legislation, De Testibus, embodied this charge: "No nonwritten testimony shall be offered against written testimony." 

French Law: Middle Ages to Nineteenth Century

The collapse of the Roman Empire in the West brought an expansion of the adjudicatory powers of the ecclesiastical courts in France. Canon law procedure, used in the ecclesiastical courts, borrowed heavily from the Roman law and, in contrast to the Germanic-barbarian procedure of the feudal courts of France, it was predominantly a written procedure. Canon law used Roman means of proof, such as documents and witnesses, rather than the Germanic ordeal or judicial combat. As in Roman law, Canon law procedure employed a complex system of mechanical rules precisely determining the number and quality of witnesses necessary to prove an event or to overcome other evidence.

During the Medieval Period, however, written proof became distrusted primarily because of the abundance of forgeries and the not infrequent issuance of false documents purporting to be papal decrees. In 1029, a decretal of Pope Innocent III declared that the probative value of the depositions of four witnesses outweighed that of a notarized document. From the commingling of Roman and Canonical law came a retreat from the rule that documentary proof was superior to oral evidence and a return to the idea that a written document was merely another form of testimony. Thus, the rule received in the French customary law in the next century took its form in the maxim: "Witnesses are better than writings" (témoins passent lettres).

As a result of a weak monarchy, secular justice in France during the early Middle Ages was administered by the feudal lords who had

26. CODE 4.21.15. See text at note 19, supra.
27. CODE 4.20, Concerning Witnesses.
28. CODE 4.20.1: "Contra scriptum testimonium non scriptur testamentum haud profetur."
29. HERZOG at 41.
32. Id. at 146.
33. See A. LOYSEL, INSTITUTS COUTUMIERS, Liv. V, Tit. V, Loi V, n.° 774 (1608) [hereinafter cited as LOYSEL].
34. LEVY at 147.
acquired power to hold court.\textsuperscript{35} The feudal courts used the less-developed, non-written Germanic procedure rather than the written procedure of the ecclesiastical courts. However, St. Louis, dissatisfied with the Germanic methods of prooftaking, abolished judicial combat in the royal court of Paris in 1260 and replaced it with an inquest procedure.\textsuperscript{36} Likewise, in the feudal courts in the rest of France, Germanic procedure was gradually supplanted by Roman-canonical procedure; written pleadings replaced oral presentations and, as in the Roman and Canon law traditions, documents became an important means of proof.\textsuperscript{37} However, because of Canon law's influence on Roman law, the preference for witnesses over writings prevailed in French procedure.\textsuperscript{38}

In addition to the evolution of civil procedure, another factor contributing to the use of documents in proceedings was the shift away from formalism in contract formation. Loysel's famous maxim, "as bulls are bound by their horns, so men are by their words," describes the essence of formalistic law.\textsuperscript{39} The will had no existence except to the extent to which it was expressed by exact words or acts. Matters such as good or bad faith, mistake, duress and fraud had no effect upon the formation of a contract or its interpretation because the strict tenor of the act, not intent, was all important.\textsuperscript{40} The use of symbols and solemnities compelled the parties to adhere strictly to prescribed words and acts, such as a blow with the palm of the hand. The problems inherent in such a system of contract formation, especially the desire to give effect to the intent of the parties, caused the Franks to abandon formalism and to adopt the Roman practice of written documentation in transactions.\textsuperscript{41}

While there was new ease in contract formation effected by replacing solemnities and symbols with a simple agreement between the parties, the increasing importance accorded the intention or will of the parties required that the law of proof, affecting the interpretation of contracts, become stricter. Correlatively, greater emphasis was placed upon drawing up documents to evidence intention and to avoid perjured testimony.\textsuperscript{42}

\textsuperscript{35} HERZOG at 42.
\textsuperscript{36} ENGELMANN at 651.
\textsuperscript{37} HERZOG at 43.
\textsuperscript{38} Id.
\textsuperscript{39} LOYSEL n° 357. Actually, Loysel attributed the verse to the glossators and ancient commentators of Roman law: "Verba ligant homines, taurorum cornua funes. Cornu bos capitur, voce ligatur homo."
\textsuperscript{40} J. BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 486 (1912).
\textsuperscript{41} Id. at 487.
\textsuperscript{42} Id. at 505.
The function of a document reciting a contract in Roman law was evidentiary, that is, it was a method of proof.\textsuperscript{43} The binding nature of the contract arose from a party's oral promise and not from the writing, which simply recited the promise.\textsuperscript{44} However, as formalism gave way to writing, the Franks did not distinguish clearly between the question of proof and that of the existence of a contract, and they equated the writing which recited the contract with the solemnities of formalism. An imperfect understanding of the Roman law convinced the Franks that for many contracts to be binding, they must be reduced to writing. Thus, some writings reciting contracts took on a cautionary dimension in the French customary law.

At the end of the Middle Ages, further growth in the use of documents was fostered by royal legislation of the French monarchy.\textsuperscript{45} Although royal legislation had been an unimportant source of procedural law during the Middle Ages,\textsuperscript{46} its contribution to that area of the law gained significance during the fourteenth and fifteenth centuries. The massive reform of the notary corps effected by royal legislation left an indelible imprint on contract formation by making notarized documents guarantees of authenticity. With the growth of the merchant class came a diffusion of education in the trading cities, helping to erode the medieval suspicion of writings. As contracts became more complex, merchants were less willing to rely on their memories and sought the assistance of the notary corps.\textsuperscript{47} Finally, in 1566, custom became consecrated into law by the royal \textit{Ordonnance de Moulins},\textsuperscript{48} which enshrined the superiority of written proof over oral testimony.\textsuperscript{49}

\textsuperscript{43.} But see W. Buckland, A TEXT-BOOK OF ROMAN LAW 461 (2d ed. 1950) for an enumeration of authorities who contended that the writing had become a substantive element of the contract.

\textsuperscript{44.} In the construction of contracts in the Roman law, intent was considered rather than what was stated in the writing. See \textsc{Code} 4.22.1: "In contractibus rei veritas potius, quam scriptura perspici debet."

\textsuperscript{45.} \textsc{Levy} at 149.

\textsuperscript{46.} \textsc{Herzog} at 45.

\textsuperscript{47.} \textsc{Levy} at 149-50.

\textsuperscript{48.} Contained in M. \textsc{Boicau et M. Danty}, \textsc{Traité de la preuve par témoins en matière civile} 26 (7e éd. 1789) [hereinafter cited as \textsc{Boicau et Danty}].

\textsuperscript{49.} The classical raison d'être for this legislation was the fear of perjury and subornation. See \textsc{Boicau et Danty} at 25. It should not be assumed, however, that the \textit{Ordonnance de Moulins} was an impulsive enactment resulting from a sixteenth century epidemic of mendacity. In 1245, article 157 of the Statuts d'Arles had prohibited oral evidence where the value of the object of the agreement exceeded one hundred sous. See P. \textsc{Viollet}, 3 \textsc{Les Établissements de Saint Louis} 143 (1881). Similar statutes had been enacted in Bordeaux in the sixteenth century and in Champagne in the fourteenth century. See P. \textsc{Viollet}, 1 \textsc{Les Établissements de Saint Louis} 324 (1881).
Article 54 of the Ordonnance de Moulins included two measures: (1) contracts involving more than one hundred livres must be drawn up before notaries; (2) no testimony by witnesses shall be received beyond what is contained in such contracts. These provisions, in amplified form, were inserted in the Ordonnance civile touchant la reformation de la justice of Louis XIV, which codified civil procedure throughout France, and are presently included in article 1341 of the French Civil Code. Thus, since the enactment of the Ordonnance, a wide field has existed in which documents alone are entitled to recognition as a means of proof.

50. "[D]e toutes choses excédant la somme ou valeur de cent livres pour une fois payer, seront passés contrats pardevant notaires et témoins, par lesquels contrats seulment sera fait et reçue toute preuve desdites matières, sans recevoir aucune preuve par témoins, outre le contenu audit contrat, ni sur ce qui seroit allégué avoir été dit ou convenu avant icelui lors et depuis . . .." Found in Boiceau et Danty at 26.

51. Title XX, art. 2: "Seront passés actes pardevant notaires ou sous signature privée, de toute choses, excédant la somme ou valeur de cent livres, même pour dépôt volontaire; et ne sera reçue aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui seroit allégué avoir été dit avant, lors, ou depuis les actes, encore qu'il s'agisse d'une somme ou valeur moindre de cent livres, sans tontefois rien innover pour ce regard, en ce qui s'observe en la justice des juges et consuls des marchands." See Boiceau et Danty at 26.

Note that article 54 of the Ordonnance de Moulins applied only to agreements, because it provided that "contracts shall be passed" (seront passés contrats). Title XX extended the scope of the provision to include not only agreements, but "generally all things of which the party demands permission to make proof, and of which he could have procured proof in writing" by providing that "acts shall be passed of all things" (seront passés actes . . . de toutes choses). 2 Oeuvres de Pothier n° 785 (2e éd. 1861) [hereinafter cited as Oeuvres]. Another difference of some significance is that article 54 of the Ordonnance de Moulins only prohibited the testimony of things beyond the writing (contre et outre le contenu); Title XX also proscribed proof against the writing (contre et outre le contenu). 2 Planiol, Civil Law Treatise pt. 1 no. 1138 at 646 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as Planiol].

52. French Civ. Code art. 1341: "Il doit être passé acte devant notaires ou sous signatures privées de toutes choses excédant la somme ou la valeur de 50 F, même pour dépôts volontaires, et il n'est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur se qui serait allégué avoir été dit avant, lors ou depous les actes, encore qu'il s'agisse d'une somme ou valeur moindre de 50 F. Le tout sans prejudice de ce qui est prescrit dans les lois relatives au commerce."

"There must be documents executed before notaries or under private signature, for all things exceeding the sum or value of 50 francs, even for voluntary bailments, and no proof shall be received by testimony contradicting and beyond the contents of the document, nor concerning that which is alleged to have been said before, at the time or since the documents, although the sum or value was less than 50 francs. All of this is without prejudice to that which is prescribed in the laws relating to commerce."

53. Engelmann at 720.
A rule providing that a juridical act or contract be in writing may be either an evidentiary or a substantive requirement. When a writing serves an evidentiary function (ad probationem), its omission does not render the act void, but merely hazardous or impossible to prove. When the requirement of a writing is substantive, it serves a cautionary function (ad solemnitatem), and its omission precludes the existence of a valid legal act.\textsuperscript{54} The writing requirement of article 1341 of the French Civil Code is of an evidentiary character; it is a prerequisite intended to prohibit admission of parol evidence to prove an obligation, not one upon which the existence and validity of an obligation depends.\textsuperscript{55}

Article 1341 which forms the basis of the entire French theory of evidence relating to civil matters\textsuperscript{56} includes three measures: (1) juridical acts involving more than fifty francs must be evidenced by documents executed before a notary or under private signature;\textsuperscript{57} (2) no testimony by witnesses may be received against (contre) or beyond (outre) notarial or private acts, even if the value of the object of the juridical act is less than fifty francs;\textsuperscript{58} and (3) no testimony by witnesses may be received as to subsequent verbal transactions that modify or add to any written agreement.\textsuperscript{59} The practical result of these provisions is that parties must "establish in advance" the proof of legal acts in writing, \textit{i.e.} pre-constituted proof. However, the Code and French courts have established a certain number of well-defined exceptions.

The first exception to article 1341 is that where there exists a "beginning of proof in writing" (\textit{commencement de preuve par écrit}),\textsuperscript{60} parol evidence is admissible to supplement the writing. Article 1347 defines "beginning of proof in writing" as "a written document emanating from the person against whom the claim is made, 

\textsuperscript{54} 1 S. Litvinoff, Obligations § 341 in 6 Louisiana Civil Law Treatise 593 (1969) [hereinafter cited as Litvinoff]. There is a fine line of distinction between the prerequisites for the validity of an obligation and those which merely relate to the method of proving it.

\textsuperscript{55} 4 Aubry & Rau, Droit Civil Francais § 306 (6th ed. Bartin 1942) in A. Yiannopoulos, 1 Civil Law Translations 93 (1965) [hereinafter cited as 4 Aubry & Rau].


\textsuperscript{57} See 1 Planiol no. 354.

\textsuperscript{58} See J. Domat, The Civil Law in its Natural Order no. 2022 at 802 (Strahan transl. 1859) [hereinafter cited as Domat]; 2 Planiol no. 1138.

\textsuperscript{59} 2 Planiol no. 1139.

\textsuperscript{60} 2 Planiol nos. 1117, 1124-25; J. Sicard, La Preuve en Justice nos. 334-50 at 236-44 (6e éd. 1960) [hereinafter cited as Sicard].
or from the person whom he represents, which makes the fact alleged probable.\(^6\) French doctrine has declared that such things as books of commerce, a contract invalid for failure to meet formal requirements, letters from the party to be charged, even if unsigned,\(^6\) and writings prepared after commencement of litigation, such as answers to interrogations, all may form the beginning of written proof.\(^6\) Whether the writing actually renders probable the fact alleged is a question of fact left for resolution by the lower courts.

Under the second major exception to article 1341 parol is admissible when it has been impossible to procure written proof of the act to be established,\(^4\) for instance, when obligations arise out of quasi-contract, delicts or quasi-delicts.\(^6\) It is not enough to show that the obligation arose from a quasi-contract, such as negotiorum gestio, to avoid the application of article 1341; it must also be shown that procurement of written evidence was not possible.\(^6\)

The exception of the impossibility of procurement of written proof also extends to transactions, written proof of which has been lost as a result of force majeure\(^6\) and to those alleged to be tainted by fraud, duress, mistake or misrepresentation.\(^6\) In cases involving fraud, even an authentic act is subject to the exception,\(^9\) but, as in all instances under the exception, the plaintiff must establish the impossibility of procurement of written proof. In general, the decisions of French courts have been liberal in construing the meaning of the impossibility of procurement of written proof, perhaps in order to liberate themselves from the principle of formality of proof and thus broaden the possibilities of investigation of fact.\(^7\)

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61. French Civ. Code art. 1347. A beginning of written proof has also been defined as incomplete written proof. Herzog at 323.

62. Herzog at 323. The requirement that the beginning of a written proof emanate from the person against whom a claim is made has been construed liberally. A post card written by a wife who was acting on behalf of her husband has been held to come from the latter. Civ. 1er, July 7, 1955 [1955] D.S. Jur. 1, 737.

63. 12 Aubry et Rau, COURS DE DROIT CIVIL FRANÇAIS no. 764 at 346 (5e éd. 1922) [hereinafter cited as 12 Aubry et Rau].

64. French Civ. Code art. 1348. See also Sicard no. 351.


66. O. Bodington, An Outline of the French Law of Evidence 52 (1904) [hereinafter cited as Bodington]. That the drafters of the Code explicitly included torts within the exception indicates how far reaching the policy underlying article 1341 was intended to apply, since the article, on its face, is applicable only to juridical acts.


68. French Civ. Code art. 1353; See Sicard no. 332.


70. Giverdon, The Problem of Proof in French Civil Law, 31 Tul. L. Rev. 31, 33
Although parol evidence can not be admitted between the parties to establish a simulation since the parties could have proved their agreement by drawing up a counter-letter at the time of the transaction, another exception to article 1341 permits third parties to prove simulations by testimony. However, if the simulation is contained in an authentic act, those recitals made by a notary within his personal knowledge can only be attacked by the cumbersome proceeding called inscription de faux.71

The last major exception to the general rule of article 1341 admits parol evidence in the instance of commercial transactions72 to encourage the free flow of commerce with its concomitant elements of speed and multiplicity of transactions. The exception in the case of commercial law is curious since the superiority of writing as proof is attributable in no small way to the custom of merchants. However, because merchants in fact seldom transact business orally and are required by law to keep books,73 this exception is somewhat circumscribed by custom and law.

Article 109 of the Commercial Code governs proof in commercial cases by providing that in purchases and sales, parol evidence is admissible when the court thinks it proper to admit such evidence.74 Although the provisions of the article refer specifically only to “purchases and sales” (achats et les ventes), the exemption is recognized as applying generally to all commercial matters.75 However, a limited and specified number of commercial transactions do require writing for their validity, such as agreements creating commercial companies or partnerships76 and hypothecations of ships.77 As a practical matter, it should be noted that any transaction of importance is likely to be recited in some form of writing.78

In a transaction involving a merchant and a non-merchant, the

(1956) [hereinafter cited as Giverdon]. The principle of the formality of proof is expressed by the rule that the judge may consider a fact as established only insofar as its existence has been shown by one of the methods of proof fixed by law.

71. HERZOG at 327-28.
72. FRENCH CIV. CODE art. 1341: “Les tout sans prejudice de ce qui est prescrit dans les lois relatives au commerce.” See also SICARD no. 333.
73. FRENCH C. COM. arts. 8-9.
74. FRENCH C. COM. art. 109: “Les achats et les ventes se constatent... Par le preuve testimoniale, dans le cas où le tribunal croira devoir l’admettre.”
75. BODINGTON 83; F. LAWSON, A. ANTON AND L. BROWN, AMOS AND WALTON’S INTRODUCTION TO FRENCH LAW 344 (3d ed. 1967) [hereinafter cited as LAWSON, ANTON & BROWN]; 2 PLANIOL no. 1140.
76. FRENCH CIV. CODE art. 1834.
77. Id. art. 2120.
78. LAWSON, ANTON & BROWN at 345.
permissible mode of proof depends upon which party is seeking to establish the agreement; if the merchant is the plaintiff, he must prove his case in accordance with the general rules of article 1341, but if the merchant is the defendant, the non-merchant may take advantage of the less strict commercial rules of proof. 79

Louisiana Law: A Convergence of Theories

Oral Proof and the Theory of Contract Formation

The Louisiana law pertaining to parol evidence is found in articles 2275-2279 of the Civil Code, which are descended from Roman and French law. 80 In addition, Louisiana has followed the civilian theory of the consensual nature of contracts which declares that agreements need not be in writing to be binding, but may arise from the mere exchange of the parties’ consent. 82 The theory was implicitly adopted by the exclusion of a writing requirement from the article 1779 requisites for a valid contract. 84

Adoption of the civilian theory of the consensual nature of contract formation in Louisiana, however, did not prevent the redactors of the Code from according some weight to the objective manifestation of the parties’ will. In contrast to the French who follow the subjective will theory and thus assert that parties are bound by their will and that the declaration of the real will, that is, the objective manifestation is of secondary importance, Louisiana Civil Code arti-

79. Bodington at 85.
80. As a commentator of Roman law, Pothier is the polestar of the modern French jurists. His works exercised the most immediate influence upon the French Civil Code and it is said that three-fourths of the Code were literally extracted from his treatises. See W. Hunter, Roman Law 104 (3d ed. 1897).
81. See Moreau-Lislet, A Digest of the Civil Laws Now in Force in the Territory of Orleans 311-12 (1801) [the de la Vergne volume]. Moreau-Lislet's annotations opposite articles 241-49 under the title De la Preuve Testimoniale indicate that Pothier and Domat were the sources of those articles. In fact, an examination of the articles reveals that they were patterned after articles 1341-48 of the French Civil Code. Moreau-Lislet also cites Las Siete Partidas bk. 3, tit. 18, L. 114; 3.16.32; 3.18.117 (Moreau-Lislet & Carelton transl. 1820) and D. Febrero's Liberia De Escribanos 3.1.7 nos. 330-31, 351 (1790). Those citations pertain to the number of witnesses necessary to prove an allegation and the probative value to be given their testimony depending on social status. It would seem that the underpinnings of the Louisiana provisions are decidedly more French than Spanish.
82. Lawson, Anton & Brown at 151. See La. Civ. Code art. 1762 which provides that the contract between the parties should not be confounded with the writing.
83. Litvinoff § 135 at 224.
84. 4 Aubry & Rau at 93.
85. Litvinoff § 135 at 223.
Article 1797 provides that since consent is a mere operation of the mind, it can have no effect unless it is manifested in some manner so that it can be understood.8 Thus, the Code contemplates use of both the intention and its expression as a whole to construe agreements.87

When the terms of an agreement are doubtful or uncertain, article 1950 of the Civil Code provides a rule of construction for the judge:

When there is anything doubtful in agreements, we must endeavor to ascertain what was the common intention of the parties, rather than to adhere to the literal sense of the terms.

The French have also tempered the strictness of their subjective will theory by the application of article 1156, their counterpart of article 1950. The French courts, however, have subjected the ascertainment of the real intention of the parties to the ordinary rules of evidence in article 1341. Thus, by the provisions of article 1341 of the French Civil Code and its counterpart, article 2276 of the Louisiana Civil Code, parol evidence should not be admitted to prove a real intention different from that expressed in the writing. However, should the intention of the parties be so doubtful or ambiguous that the rule of construction is insufficient to ascertain intention, the judge must depart from the harshness of article 1341 or 2276.88 The role that parol evidence and rules of construction89 serve in Louisiana and France is grounded in the development of a bounded theory of proof.90 The theoretical effect is that a judge can consider a fact as established only insofar as its existence has been demonstrated by one of the statutorily prescribed methods of proof,91 a reflection of the basic tenet in civil law that writing is a more reliable form of proof than oral evidence.92

Writing Requirements

There are two kinds of writings recognized in the Louisiana Civil Code under the section “Of Literal Proof.” A written instrument may be drawn up in the presence of a notary and two witnesses (authentic act)93 or signed privately by the parties (act under private signa-

86. Id. at 228.
87. Id. at 227.
88. Id. at 224-25.
89. See also LA. CIV. CODE arts. 1945-62.
90. See text at note 23, supra.
91. Giverdon at 31.
92. Id. at 32.
93. LA. CIV. CODE art. 2234; FRENCH CIV. CODE art. 1317.
When an act under private signature is offered as proof against a party to the act and he acknowledges its execution or is legally held to have acknowledged it, the private act has the effect of an authentic act between the parties. In Louisiana, as in France, an authentic act is full proof of the agreement contained in it.

Writings may serve either an evidentiary or cautionary function. Like article 1341 of the French Civil Code, delegate to writings an evidentiary function, since a writing is not a substantive requirement for the validity of contracts formed under these articles. While article 2275 provides that every transfer of immovable property must be in writing, the article also allows admission of the confession of the vendor or vendee to a verbal sale or other disposition if actual delivery has been made. Thus, like the other provisions, this article provides a method of proving a contract rather than a rule establishing a prerequisite for its validity.

Perhaps because the frontier conditions in Louisiana in 1825 precluded an equally wide use of written evidence as was customary in France at the time, the Civil Code enacted that year did not adopt the strict French provisions regulating the proof of agreements affecting movables. As in France, article 2277 of the Civil Code of 1870 requires more proof for contracts involving a value more than five hundred dollars than those involving a lesser value. If an agreement has not been reduced to writing and its value is less than five hundred dollars, it may be proved by any competent evidence. If an agreement not reduced to writing exceeds five hundred dollars, it must be proved by one credible witness and other corroborating circumstances. Contrary to article 1341 of the French Civil Code, however, which requires a writing for any transaction the object of which exceeds the value of fifty francs, Louisiana admits parol evidence to prove all agreements involving movable property which have not been reduced to writing.

97. See text at notes 54-55, supra.
98. 4 Aubry & Rau § 306. In the Louisiana Digest of 1808 the provision of article 241, corresponding to La. Civ. Code art 2275, was more stringent and thus similar in nature to the French article. There was an absolute bar to the admission of parol evidence when the object of the contract was immovable property or a slave.
100. In France, the figure is fifty francs.
101. See 2 Colin et Capitant, Droit civil français nos. 769, 773 at 513, 514-16 (10e éd. 1948); 2 Mazeaud, Responsabilité civile délictuelle et contractuelle no. 1703 at 508 (4e éd. 1949).
102. The rule allowing parol is subject to the qualifications that all donations inter
The Parol Evidence Rule

Article 2276 of the Louisiana Civil Code is the direct descendant of the maxim lettres passent témoins. Its absolute bar against the admission of parol evidence against or beyond what is contained in a writing evidencing a transaction is taken verbatim from the French article 1341. In accordance with the French rule, the provisions of article 2276 prohibit introduction of parol evidence against any written instrument and do not apply only to parol offered against instruments required to be in writing.

Both the French and Louisiana Code articles provide further that parol evidence is not admissible in regard to what is alleged to have been said before, at the time of, or since the making of the writing. The prohibition against evidence as to what is alleged to have been said before or at the time of the making of the writing is redundant because it excludes parol evidence in the same circumstances as does the prohibition of evidence against or beyond the writing. However, the words, “or since the making of the writing” (ou depuis les actes) introduce an additional restriction applicable to parol evidence of verbal transactions taking place subsequent to the drawing up of the writing.

Louisiana courts, recognizing the unduly harsh effects that a strict application of the codal provision would require, have often chosen to depart from civilian doctrine and have preferred to adopt the common law theory of integration of contracts to achieve more equitable judgments. Under the theory of integration, an additional


103. See La. Civ. Code art. 2276: “Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since.” See generally Comment, 35 La. L. Rev. 779 (1975).

104. French Civ. Code art. 1341 explicitly provides that even when the transaction involves less than fifty francs and a writing is not required, parol evidence is not admissible against or beyond the contents of an instrument evidencing the transaction. See note 52, supra.

105. See, e.g., article 2275 requiring dispositions of immovable property to be in writing. See generally Comment, 35 La. L. Rev. 764 (1975).

106. 12 Aubry et Rau at 331; 8 Huc, Commentaire Théorique et Pratique du Code Civil n° 287 at 363 (1895); 5 Marcadé, Explication Théorique et Pratique du Code Civil n° 11 at 105 (7e éd 1873); Œuvres at 427; 7 Planiol et Ripert, Traité Pratique de Droit Civil Français n° 1527 at 865 (1931).


term or agreement may be proven by parol if the party introducing the evidence establishes that the parties did not intend the writing to be the total agreement between them. The theory springs from the role accorded by the common law to the notary and the weight given writing as proof. The common law notary has never exercised powers of a quasi-judicial nature as has the notary at civil law. In the past, common law courts adhered to the concept of the private seal as a mode of proof and were reluctant to accept the acts of the notary as evidence. Even when a notarized document was received into evidence, it was not accorded the presumption of authenticity. Contrary to the French and Louisiana Civil Codes which provide that an authentic act is full proof of the agreement contained in it, common law contends that a writing does not prove its own completeness. Further, common law regards all writings as equal, while the civil law, when referring to a writing as proof, usually intends it to be a notarial act or an act under private signature which may have the same probative value as a notarial act. Since at common law a writing, standing alone, is not full proof of the agreement, it was functionally necessary for the common law to be more flexible in admitting oral contracts which add to the terms of a writing. Thus, at common law, parol evidence is admissible on the question of whether a writing was intended by the parties to be the final and complete integration of their agreement.

The French do not use the criterion of integration to determine whether parol evidence is admissible, but concentrate on the effect upon the writing of the parol offered. Pothier and Domat indicate that parol evidence is inadmissible when the oral agreement contradicts a term of the writing, since it is against the act, and when the oral agreement expands the writing, since it is beyond the act. However, the occurrence of an act which does not vary a term of the writing, such as extinction of the obligation by payment, remission or compensation, constitutes a new and distinct fact which is not beyond the act and may be established by parol evidence. While the effect at common and civil law may be the same, in the civil law,

111. LA. Civ. Code art. 2236.
112. 3 Corbin, Corbin on Contracts § 573 at 360 (1952).
114. Oeuvres at 428.
115. Domat n° 2025 at 803.
116. Oeuvres at 428; 2 Planiol no. 1139; Sicard no. 329.
parol evidence is admitted to establish a new fact, and not because the oral transaction is to be integrated with the written instrument. Thus, a literal interpretation of article 2276 requires a writing when the parties desire to negate or enlarge a prior written agreement and permits parol only to establish a new fact which does not vary a written term.

Such a strict application of article 2276, however, does not recognize the reality of modern business transactions. Often it is impossible or impractical to recite in writing every agreement made subsequent to the original writing which established the contract between the parties. Moreover, the French courts do not apply the counterpart of article 2276 in commercial transactions, article 109 of the French Code of Commerce granting the judge discretion to admit parol evidence to prove the existence of a subsequent oral agreement and even to vary or controvert the contents of a written instrument in the commercial sphere. Since it would seem unrealistic to apply article 2276 in matters that its French counterpart, article 1341, did not contemplate, legislative consideration should be given to adjusting Louisiana's approach to the admission of parol evidence, at least in commercial transactions. Admission of parol evidence proving subsequent oral agreements that do not vary the written terms of the agreement should also be legislatively sanctioned in Louisiana. However, if the parties vary written agreements orally, they should be bound by a strict civilian application of article 2276, lest writings be relegated to simply another form of testimony to be weighed in the determination of the parties' intent.

The major exception to the French parol evidence rule, the commencement of written proof, was recognized by the Louisiana Digest of 1808 to prove agreements relating to movables, but the article was suppressed and was not carried into the Civil Codes of 1825 and 1870. However, a remnant of the exception is found in the last sentence of article 2238 relating to recitals in an act unrelated to the principal matter, to wit: "Enunciations foreign to the disposition can only serve as a commencement of proof." It is unclear whether the redactors of the Civil Code intended article 2238 to be the only...
application of the doctrine of commencement of written proof; however, since the Civil Code does not generally require the transfer of moveables to be in writing and because the public records doctrine governs the transfer of immovable property, the practical significance of the doctrine is greatly diminished.

Much confusion about the admissibility of parol evidence has been caused by article 1900. Article 1900 provides that if the cause expressed in the contract is nonexistent, the contract may not be invalidated if the existence of a true and sufficient cause can be shown. Some Louisiana jurists have contended that the purpose of this article was to provide an exception to the general prohibition of parol evidence to show a different cause than that expressed in the act. Although article 1900 has no direct counterpart in the French Civil Code, it does have its origins in French jurisprudence and has been the subject of examination by the commentators. The rule of article 1900, as interpreted by the French, is that parol evidence is admissible to show the true cause of the contract in order to sustain it, only after the falsity of the cause recited has been proved by evidence ordinarily admissible against written instruments. Thus, in the absence of fraud or mutual error, the person attacking the contract should be required to show the absence of cause in the act by evidence other than parol.

Articles 2276 and 2236, read together, establish that parol evidence is admissible to establish fraud, duress or mutual error. Since the subjective will of the parties is not expressed in a writing executed under conditions of fraud, duress or mutual error, and, in fact, consent is vitiated, parol evidence is admissible, not to prove the contents of the writing, but to determine the reality of the contract. Thus, Civil Code articles 1848 and 2288 expressly authorize all means of proof to establish fraud. While Louisiana did not enact the French exception admitting parol when it is impossible to produce a writing on account of mutual error and duress, the jurisprudence admits parol in these instances on the basis that the writing was not

123. 3 Toullier, Le Droit Civil Francais nos. 175-77 at 381-82 (derniere ed. 1833) [hereinafter cited as 3 Toullier].
124. 12 Baudry-Lacantenerie et Barde, Traite Theorique et Pratique de Droit Civil, 1 Des Obligations n° 308 at 341 (3e ed. 1906) [hereinafter cited as Des Obligations]; 3 Toullier at 382. See generally Comment, 3 La. L. Rev. 427 (1941).
127. See text at note 68, supra.
effective between the parties.  

Article 2279 of the Louisiana Civil Code did carry over the French exception of impossibility of producing literal proof when the writing has been lost or destroyed by accident or force. Parol evidence may be offered to establish the contents of the lost act, but the testimony or corroborating circumstances must render the loss probable.

A final situation in which parol evidence is admissible is provided by article 2239, allowing forced heirs to annul a simulation of those from whom they inherit. As between the parties to a simulation, French authorities assert that the fact of simulation may only be established by a counter-letter, which can have no effect against creditors or bona fide purchasers. Thus, while a creditor of an apparent vendor may introduce parol evidence and the counter-letter to establish that the transaction was a simulation to defraud him of attachable assets, the creditor of the apparent vendee will prime him since the counter-letter cannot prejudice his rights. Civilian doctrine in this instance restricts the subjective will theory to protect the interests of third parties by permitting them to rely on the apparent declared intent of the contracting parties.

Conclusion

Louisiana’s law of proof derives from a civilian tradition which recognizes the superiority of written proof. Rigid application of article 2276 which precludes parol evidence against or beyond a written act may produce harsh effects and the courts will be tempted to stray from civilian doctrine and incorporate common law notions. In France, the judge serves in a distinctly inferior position vis-à-vis the dictates of the Code Civil and must operate within the framework of a bounded theory of proof; in Louisiana, as a practical matter, the role of the judge is not nearly as limited. Louisiana, as a mixed jurisdiction, should recognize statutorily the impracticality of modeling its judicial roles from those of the French and legislatively grant

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130. 12 Aubry et Rau at 184; 2 Baudry-Lacantinerie, Précis de droit civil nos. 295-96 at 299 (12e éd. 1902); 4 Demolombe, Traité des contrats nos. 303-49 at 270-98 (1878); 4 Des Obligations at 111-38.
131. 2 Planiol no. 1199.
132. Litvinoff § 135 at 226.
its judges broader discretion to evaluate the probative weight to be given parol evidence in certain defined instances. At a minimum, Louisiana should recognize the French exception allowing admission of parol evidence in commercial matters as the judge sees fit, in order to reflect changing commercial practices yet remain consistent with civilian theory.

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