

Louisiana Law Review

Volume 3 | Number 2

January 1941

Parol Evidence to Vary a Recital of Consideration

Alvin B. Rubin

Repository Citation

Alvin B. Rubin, *Parol Evidence to Vary a Recital of Consideration*, 3 La. L. Rev. (1941)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol3/iss2/5>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

LOUISIANA LAW REVIEW

PUBLISHED QUARTERLY, IN NOVEMBER, JANUARY, MARCH AND MAY
LOUISIANA STATE UNIVERSITY LAW SCHOOL

UNIVERSITY, LOUISIANA

Subscription per year \$4.00 (Foreign \$4.50)

Single copy \$1.00

VOL. III

JANUARY, 1941

No. 1

STUDENT BOARD

KENNETH J. BAILEY, *Editor-in-Chief*
JOHN M. SHUEY, *Comment Editor*
MILTON M. HARRISON, *Case Note Editor*
WILLIAM M. SHAW, *Case Note Editor*

ALVIN B. RUBIN, *Index Editor* HOWARD W. WRIGHT, JR., *Index Editor*
AUBREY BACON JOHN W. LANDRY RUSSELL B. LONG
JOSEPH T. BOSTON GILBERT D. LITTON EARL A. MORGAN
WILLIAM R. COENEN HARVEY H. POSNER

FACULTY ADVISORY BOARD

WEX S. MALONE, *Faculty Editor*
ROBERT LEE TULLIS JOSEPH DAINOW
PAUL M. HEBERT JEFFERSON B. FORDHAM
IRA S. FLORY HENRY G. McMAHON
DALE E. BENNETT J. DENSON SMITH
PIERRE CRABITÈS CLYDE W. THURMON
HARRIET S. DAGGETT

BEVERLY E. DENBO, *Secretary*

Publication in the REVIEW does not imply agreement with the views expressed in any of the contributions.

Unless otherwise indicated, the authors of COMMENTS and NOTES are students of Louisiana State University Law School.

Comments

PAROL EVIDENCE TO VARY A RECITAL OF CONSIDERATION

While the Louisiana Civil Code makes a lawful cause or consideration a condition to the legal validity of a contract, it also imposes limitations upon the admissibility of certain types of evidence offered for the purpose of disproving statements made in written contracts. A possible conflict between the requirement of consideration and the rules of evidence is thus created. The question arises: May parol evidence be introduced in an action between the parties to a written contract to disprove a specific recital of consideration paid?

In considering the problem, it will be assumed that no fraud, violence, or error is involved. The rights of third parties to disprove the declarations of contracts to which they are not privy will not be discussed. An examination will first be made of the various types of evidence which may be offered for the suggested purpose. The discussion will include the French rules on the admissibility of parol evidence and a comparison of the Louisiana and French codal provisions in order to determine the applicability in Louisiana of the conclusions reached by the French commentators and courts. It will conclude with a review of the Louisiana cases.

THE TYPES OF EVIDENCE

A contract may be proved either by the writings drawn up to record it or by oral testimony. The chapter of the Louisiana Civil Code dealing with the proof of obligations enumerates four classes of evidence: literal proof, testimonial proof, presumptions, and judicial confessions. For this discussion, the latter may be said to include interrogatories on facts and articles.¹ The French Civil Code, in addition to the foregoing provisions, includes a section on proof by means of judicial oaths and an article establishing a hybrid means of proof constituting a combination of the principles of literal and testimonial proof. This is known as the commencement of proof in writing.²

Literal proof consists in written instruments signed by the parties and witnesses thereto.³ Such instruments may be passed in the presence of a notary and two witnesses (authentic acts)⁴ or privately signed by the parties (acts under private signature). When an act under private signature is offered as proof against a party thereto, and he acknowledges its execution,⁵ or is legally held to have done so by failing to object to its introduction⁶ or because it has been proved his act,⁷ it is then equal in probative value to the authentic act. All literal proof is superior to, that is, of greater evidentiary weight than testimonial evidence.⁸

1. Arts. 347, 348, 355, La. Code of Practice of 1870.

2. Art. 1347, French Civil Code.

3. 5 Toullier, *Le Droit Civil Français* (Dernière ed. 1833) 1, n° 1. See also 12 Aubry et Rau, *Cours de Droit Civil Français* (5 ed. 1922) 184, § 756.

4. Art. 1317, French Civil Code; Art. 2234, La. Civil Code of 1870.

5. Art. 1322, French Civil Code; Art. 2242, La. Civil Code of 1870.

6. 12 Aubry et Rau, *op. cit. supra* note 3, at 219, § 756; 13 Duranton, *Cours de Droit Français* (3 ed. 1834) 124, n° 122; 4 Toullier, *op. cit. supra* note 3, at 369, n° 813.

7. 12 Aubry et Rau, *loc. cit. supra* note 6; 8 Huc, *Commentaire Théorique et Pratique du Code Civil* (1895) 292, n° 236; 4 Toullier, *loc. cit. supra* note 6.

8. 12 Aubry et Rau, *op. cit. supra* note 3, at 331-332, § 763; 7 Planiol et

Both authentic acts and those under private signature make "full proof" of anything stated in them that relates directly to the object for which the instrument is drawn, without need of evidentiary corroboration.⁹ And since both types of instruments have the same probative value, the same kind of evidence is required to contradict them.¹⁰

Testimonial evidence may not be introduced against or beyond the contents of a written instrument,¹¹ but such evidence may be introduced if there exists a commencement of proof in writing.¹² This requires a written instrument emanating from the party against whom proof is to be made, rendering probable the existence of the fact which is to be proved.¹³ When such a writing has been produced, testimonial evidence may be admitted.

Except for a passing reference in Article 2238, the Louisiana Civil Code omits the French article establishing the exception based on a commencement of proof in writing.¹⁴ While it may be doubted whether the redactors of our Code intended to include this exception, it shall be assumed that it is recognized in Louisiana. Otherwise no writing would be admissible to vary a written contract unless it met the requirements of literal proof or

Ripert, *Traité Pratique de Droit Civil Français* (1931) 853, n° 1515; 2 Planiol, *Traité Élémentaire de Droit Civil* (11 ed. 1939) 15, n° 40; 1 Pothier, *Obligations* (Transl. by Evans, 3rd. Am. ed. 1853) 542, n° 758.

9. Art. 1319, French Civil Code; Art. 2236, La. Civil Code of 1870.

10. Thus simple written proof may be introduced against the authentic act as well as the act under private signature. 12 Aubry et Rau, *op. cit. supra* note 3, at 249, § 756*bis*; 1 Demogue, *Traité des Obligations En Général* (1923) 272, n° 169. However, there are certain cases where from the very nature of the authentic act, its probative value is greater than that of the private act. In the first place, there is no need to show acknowledgment or prove the authentic act. 1 Pothier, *op. cit. supra* note 8, at 543, n° 763. When the authentic act states facts within the personal knowledge of the officer who executes it, such as the date of execution or the fact that one party paid a certain sum to the other in the officer's presence, these may not be contradicted by any means other than an impeachment of the instrument through a special and difficult procedure, the *inscription de faux*. However, while the very fact itself may not be contradicted, it may be explained by other admissible evidence. Thus a party may show that while he actually received the money stated in the officer's presence, he had previously given the money which changed hands to the other party to be used for that purpose. For a discussion of these differences and the similarity in all other respects of authentic acts and acts under private signature, see 12 Aubry et Rau, *op. cit. supra* note 3, at 171 et seq., § 755; 29 Demolombe, *Cours de Code Napoléon*, 6 *Traité des Contrats* (1876) 249, n° 279; 13 Duranton, *op. cit. supra* note 6, at 74, nos 86-88; 5 Marcadé, *Explication Théorique et Pratique du Code Civil* (7 ed. 1873) 23, Art. 1319.

11. Art. 1341, French Civil Code; Art. 2276, La. Civil Code of 1870.

12. Art. 1347, French Civil Code.

13. *Ibid.* 12 Aubry et Rau, *loc. cit. supra* note 3.

14. Art. 2238, La. Civil Code of 1870: "Enunciations foreign to the disposition, can serve only as a commencement of proof."

confessions.¹⁵ Whenever the term "written evidence" is used, therefore, it will include both literal proof and writings which serve as a commencement of proof. Testimonial, oral, or parol evidence shall refer only to proof sought to be made by means of the testimony of witnesses.

The answer to an interrogatory on facts and articles is in the nature of a judicial confession.¹⁶ Therefore it is admissible on any fact at issue,¹⁷ just as is the judicial confession.¹⁸ The verbal extra-judicial confession may be introduced only where oral evidence may be admitted¹⁹ and the written extra-judicial confession constitutes at least a commencement of proof in writing.²⁰ Generally, answers to interrogatories may be contradicted by parol evidence.²¹ But if the fact sought to be proved is one which parol evidence was originally inadmissible to establish, the denial of the fact in the answer to an interrogatory may be disputed only by those types of evidence originally admissible.²²

The presumptions irrefutably established by law in regard to the problem here under consideration are those codal rules which determine the relative probative value of written and parol evidence. The simple presumptions referred to in Article 2288 are admissible only where testimonial evidence is admissible, by the

15. In *Purdon v. Linton's Executors*, 9 La. 563 (1836), the Louisiana Supreme Court referred to an ordinary letter from one party to the other as a "counter letter," admitting it as such. The letter should have been admitted as an admission, or a commencement of proof in writing, for to be valid as a counter letter, the instrument must be signed by both parties to the contract or instrument which it contradicts. In reality, the counter letter is a contract varying what is the apparent contractual relation of the parties. Whether the later contract is a counter letter or a novation depends upon the intentions of the parties, particularly whether the original contract was designedly drawn to include false statements or to set up an apparent state of facts different from the true situation. 12 *Aubry et Rau*, op. cit. supra note 3, at 251, § 756*bis*; *Gaudemet, Théorie Générale des Obligations* (1937) 230; 2 *Planiol*, op. cit. supra note 8, at 446, n° 1186. See *Eustis v. St. Germain*, 161 So. 203 (La. App. 1935), in which a letter was classified as "written evidence" under La. Act 11 of 1926 [Dart's Stats. (1939) §§ 2024-2025].

16. Cf. Art. 349, La. Code of Practice of 1870.

17. The answers to interrogatories on facts and articles are admissible against any type of evidence including authentic acts. *Semere v. Semere*, 10 La. Ann. 704 (1855); *Newman v. Shelley*, 36 La. Ann. 100 (1884).

18. It makes full proof against the confessor and can be revoked only by alleging and proving error of fact. Art. 1356, French Civil Code; Art. 2291, La. Civil Code of 1870.

19. Art. 1355, French Civil Code; Art. 2290, La. Civil Code of 1870.

20. 2 *Colin et Capitant, Cours Élémentaire de Droit Civil Français* (8 ed. 1936) 463, n° 499.

21. Art. 354, La. Code of Practice of 1870.

22. *Bach v. Hall*, 3 La. 116 (1831); *Wright-Blodgett Co. v. Elms*, 106 La. 150, 30 So. 311 (1901); *Le Bleu v. Savoie*, 109 La. 680, 33 So. 729 (1903); *Larido v. Perkins*, 132 La. 660, 61 So. 728 (1913); *Rubenstein v. Files*, 146 La. 727, 84 So. 33 (1920); *Sherman v. Nehlig*, 154 La. 25, 97 So. 270 (1923).

very terms of this article.²³ Therefore anything that may be said with respect to the inadmissibility of oral evidence will apply with equal force to simple presumptions.

ADMISSIBILITY OF PAROL EVIDENCE IN FRANCE

The parol evidence rule in France is based on the belief that a writing is a more reliable form of proof than the testimony of witnesses.²⁴ Only a few authors mention the theory used at common law that the writing is controlling because it is presumed to be the final and complete integration of the agreement between the parties.²⁵ Rather, it is considered that since the parties have declared their agreement in writing, the admission of testimonial proof would substitute another mode of proof for that which the parties had adopted.²⁶ The agreement was reduced to writing at a time when there was comparatively little reason for falsification. If it intentionally states an untrue fact, a counter letter could have been secured to be used in any unforeseen contingency. In the absence of a counter letter, the law therefore presumes that the written act does not include any errors or omissions.²⁷ The written instrument, although fallible, is considered much more reliable than the testimony of witnesses which is attendant with dangers of careless observation, faulty memory, and dishonesty.²⁸

The French rule, therefore, is that parol evidence is not admissible, in the absence of a commencement of proof in writing, *against* or *beyond* the contents of a written instrument. The terms "against or beyond" forbid any addition to, subtraction from, contradiction or alteration of the *contents* of the writing.²⁹

23. Art. 1353, French Civil Code; Art. 2288, La. Civil Code of 1870.

24. The writing is considered only as a means of proof, not as a solemnity. 12 Aubry et Rau, *op. cit. supra* note 3, at 307, § 762, n.3. The written instrument drawn up to record a fact or contract is a more accurate method of proving that fact than the testimony of witnesses. 13 Baudry-Lacantinerie et Barde, *Traité Théorique et Pratique de Droit Civil*, 3 (II) Des Obligations (2 ed. 1905) 855, n° 2564.

25. 13 Duranton, *op. cit. supra* note 6, at 361, n° 330.

26. 6 Larombière, *Théorie et Pratique des Obligations* (Nouvelle ed. 1885) 416, Art. 1341, nos 20, 21.

27. 2 Jossierand, *Cours de Droit Civil Positif Français* (2 ed. 1933) 111, n° 208; 7 Planiol et Ripert, *op. cit. supra* note 8, at n° 1527.

28. 12 Aubry et Rau, *op. cit. supra* note 3, at 298, § 761; 14 Baudry-Lacantinerie et Barde, *op. cit. supra* note 24, at 832, n° 2517; 30 Demolombe, *op. cit. supra* note 10, at 7, n° 8; 2 Jossierand, *op. cit. supra* note 27, at 109, n° 203.

29. 12 Aubry et Rau, *op. cit. supra* note 3, at 333, § 763; 14 Baudry-Lacantinerie et Barde, *op. cit. supra* note 24, at 856, § 2566; 5 Marcadé, *op. cit. supra* note 10, at 106, 111-113, Art. 1341, nos I, III-IV; 7 Planiol et Ripert, *op. cit. supra* note 8, at 866, n° 1528.

The term "contents," however, does not include everything stated in the writing.

The authentic act makes full proof of all operative (*dispositif*) portions of the contract evidenced by it, that is, those provisions which cannot be altered or omitted without destroying or changing the contract which the parties sought to form.³⁰ The act also proves what is stated only in declaratory terms (*l'enunciatifs*) provided those terms bear a *direct* relation to the dispositive clauses. Parol evidence is inadmissible to vary these contents of a writing of which the writing makes full proof.³¹ But since the act can serve only as a commencement of proof of those statements which do not have a direct relation to the object of the instrument,³² oral testimony may be adduced to dispute those statements;³³ and the benefit of the parol evidence rule may be expressly or tacitly waived by the party against whom the testimony is adduced.³⁴ The same principles apply to an instrument under private signature acknowledged or proved to be the act of the party against whom proof is to be made.³⁵

A statement of cause may be contradicted only by evidence acceptable under the foregoing rules.³⁶ If the statement is made in the form of a receipt, it is considered as bearing a direct rela-

30. This definition of the operative portions is that given in 5 Marcadé, op. cit. supra note 10, at 30, Art. 1320, n° 1. The insertion of the dispositive portions forms the *raison d'être* of the confection of the instrument. 2 Planiol, op. cit. supra note 8, at 38, n° 94.

31. 12 Aubry et Rau, op. cit. supra note 3, at 332, § 763; 6 Larombière, op. cit. supra note 26, at 418, Art. 1341, n° 24.

32. 4 Toullier, op. cit. supra note 3, at 346, n° 774. See also 12 Locré, La Législation Civile, Commerciale et Criminelle de La France, Part II, Elemens VIII, 325, § 28; Pothier, op. cit. supra note 8, at 532, n° 738.

33. Supra note 31. See also Kerwin v. Hibernia Ins. Co., 28 La. Ann. 312 (1876); Ridgely v. Fabacher, 180 La. 171, 156 So. 212 (1934), where the purpose of the evidence was to rebut a presumption of ownership arising from an act of sale.

34. There has been some disagreement on this point among the French commentators. The early opinion was that the prohibition against oral testimony was a rule adopted in the general public interest, and therefore could not be waived. 12 Aubry et Rau, op. cit. supra note 3, at 299, § 761; 5 Marcadé, op. cit. supra note 10, at 157, Art. 1348, n° VII; 5 Toullier, op. cit. supra note 3, at 18, n°s 36-41. See also Civ. 8 janvier 1817, Sirey 1817.1.51; Civ. 6 août 1828, Sirey 1828.1.305. But the later decisions held, with the approval of more recent commentators, that the parol evidence rule may be waived. Req. 22 juillet 1873, Dalloz 1880.1.447, Sirey 1879.1.213; Req. 1 juillet 1895, Sirey 1898.1.7; Civ. 30 décembre 1903, Dalloz 1904.1.93, Sirey 1906.1.452. Bonnier, *Traité Théorique et Pratique des Preuves en Droit Civil et en Droit Criminel* (2 ed. 1852) 146, n° 135; 2 Colin et Capitant, op. cit. supra note 20, at 443, § 474; 2 Jossierand, op. cit. supra note 27, at 110, n° 203.

35. Art. 1322, French Civil Code.

36. 1 Demogue, loc. cit. supra note 10; 12 Locré, loc. cit. supra note 32.

tion to the object of the agreement.³⁷ The stated cause may be varied by oral testimony or presumption only where there exists a commencement of proof in writing.³⁸ Even a complete want of cause may not be shown by parol evidence.³⁹ The requirement of cause is thus subordinated to the rules of proof.

The parol evidence rule is not limited in operation to contracts. It encompasses all writings having a juridical effect, including receipts.⁴⁰ The French article does not forbid parol evidence against contracts, but against *actes*, written instruments. Oral testimony may not be admitted to contradict or vary a simple receipt; *a fortiori* it is inadmissible to modify the receipt contained in a written contract. Therefore oral evidence may not be used to show a consideration *different* from that expressed in the contract, although the purpose is not to invalidate the contract.⁴¹

Thus the French rule is that parol evidence is inadmissible to contradict a recital of cause in a written contract by showing either that no consideration was given or that a greater or lesser consideration than that acknowledged actually passed.⁴²

LOUISIANA CODE ARTICLES

The majority of the Louisiana Code articles relating to the problem under discussion originated in the French Civil Code. Thus, Article 1893 expressing the legal requirement of a cause for every contract is a literal reproduction of Article 1131 of the

37. 5 Larombière, *op. cit. supra* note 26, at 542, Art. 1320, n° 2; 12 Loaré, *op. cit. supra* note 32, at 318, § 8.

The receipt makes full proof of the liberation of the debtor in regard to the creditor. 32 Carpentier et Du Saint, *Répertoire Général Alphabétique du Droit Français* (1903) Quittance 35, n° 36.

38. 12 Aubry et Rau, *op. cit. supra* note 3, at 331, § 763; 7 Huc, *op. cit. supra* note 7, at 123, n° 86; 6 Larombière, *op. cit. supra* note 26, at 421, Art. 1341, n° 27; 16 Laurent, *Principes de Droit Civil Français* (2 ed. 1876) 168, n° 122; 5 Marcadé, *op. cit. supra* note 10, at 111, Art. 1341, n° IV; 2 Planiol, *op. cit. supra* note 8, at 30, 454, nos 71, 1206; 6 Planiol et Ripert, *op. cit. supra* note 8, at 364, n° 265.

39. 3 Toullier, *op. cit. supra* note 3, at 383, n° 180.

40. 14 Baudry-Lacantinerie et Barde, *op. cit. supra* note 24, at 855, n° 2563. See also 12 Aubry et Rau, *op. cit. supra* note 3, at 331, § 763; 12 Baudry-Lacantinerie et Barde, *op. cit. supra* note 24, 1 Des Obligations, at 368, n° 318; 1 Domat, *Civil Law* (Transl. by Strahan, Cushing's ed. 1853) 801, n° 2019; 2 Jossierand, *op. cit. supra* note 27, at 110, n° 204; 7 Planiol et Ripert, *op. cit. supra* note 8, at 866, n° 1528; 1 Pothier, *op. cit. supra* note 8, at 535, n° 746.

41. For illustrative examples, see 2 Jossierand, *op. cit. supra* note 27, at 111, n° 209; 6 Larombière, *op. cit. supra* note 26, at 421, Art. 1341, n° 28; 7 Planiol et Ripert, *loc. cit. supra* note 40; and note 30, *supra*.

42. 13 Duranton, *loc. cit. supra* note 25; 2 Planiol, *op. cit. supra* note 8, at 30, n° 71; Pothier, *op. cit. supra* note 8, at 544, n° 765.

French Code. Similarly, the provision of Article 2236 that the authentic act makes full proof of the agreement contained had its origin in French codal Article 1319.⁴³ Article 2238, concerning the "enunciations" and the dispositions of a contract, is identical with French Article 1320. Article 2242, stating that an instrument under private signature acknowledged or legally held to have been acknowledged as his act by the party signing it has the same effect as an authentic act, is a facsimile of French Article 1322. Article 2244 is almost an exact copy of French Article 1323 which deals with acknowledgment and judicial declaration of the verity of signatures on acts under private signature.⁴⁴ Article 1341 of the French Civil Code contains several clauses, one of which establishes the prohibition of oral proof against a written instrument. This clause is but slightly altered in our Article 2276.⁴⁵ The sec-

43. Art. 1319, French Civil Code: "*L'acte authentique fait pleine foi de la convention qu'il renferme entre les parties contractantes et leurs héritiers ou ayants cause.*" Art. 2233, La. Civil Code of 1825 (Art. 2236, La. Civil Code of 1870) is a reproduction of this sentence, adding as a subsequent clause the modification, "*sauf le cas où il est argué de faux, et où le faux est prouvé*" (Translation) "except in the case where forgery is alleged and proved," in the stead of the second paragraph of the French article, which deals with suspending execution of the act pending trial of criminal charges for forgery.

44. Art. 1323, French Civil Code: "*Celui auquel on oppose un acte sous seing privé, est obligé d'avouer ou de désavouer formellement son écriture ou sa signature.*"

"*Ses héritiers ou ayants cause peuvent se contenter de déclarer qu'ils ne connaissent point l'écriture ou la signature de leur auteur.*"

(Translation) "The person against whom an act under private signature is produced, is obliged formally to avow or disavow his handwriting or his signature.

"The heirs or assigns may simply declare that they know not the handwriting or the signature of the person whom they represent."

The only difference is that Art. 2244, La. Civil Code of 1870, omits the italicized words of the first paragraph.

45. Since Article 2275, the preceding article, deals with contracts relative to immovables, it has been stated that Article 2276 is inapplicable to contracts dealing with movables. *Clamagaran v. Sacerdotte*, 8 Mart. (N.S.) 533 (La. 1830). There are statements also that Article 2276 is primarily applicable to contracts relating to immovables and may not apply in the case of other contracts. *Groner v. Cavender*, 133 So. 825, 827 (La. App. 1931). Cf. *Suthon v. Cambon Bros.*, 159 La. 134, 105 So. 252 (1925).

However, as is pointed out *supra*, p. 431, the purpose of the prohibition of oral testimony against a written instrument is not to prevent proof of title to realty by parol, but to prevent impeachment of a superior means of proof by an inferior.

In the Code of 1808, it is true, the prohibition against parol evidence apparently related only to contracts dealing with immovables.

"Every covenant tending to dispose by a gratuitous or incumbered title of any immovable property or slaves in this territory, must be reduced to writing and in case the existing [*sic*] of such covenant be disputed, no parol evidence shall be admitted to prove it." La. Civil Code of 1808, 3.4.241, p. 310. But the *Projet* of 1825 divided the two ideas and its proposed statement makes clear the intention to extend the rule over all written agreements.

("No parol evidence shall be admitted to contradict a written agreement

tion on presumptions, Articles 2284 through 2288, is copied verbatim from Articles 1349 through 1353 of the French Code. The section dealing with confessions, Articles 2289 through 2291, is taken directly from the French Code.⁴⁶

Three articles relevant to the problem here under consideration remain to be considered. These are Articles 1900, 2234, and 2237. Article 2234 in defining the authentic act, qualifies the definition in the French Code by the phrase "as it relates to contracts."⁴⁷ Insofar as the document against or beyond which parol evidence is to be introduced is a subsisting and valid contract, this addition to the French text should not change the prohibition against parol evidence. The same rule should apply even if the contract has been resolved, and the effort is to prove that an amount different from that stated in the contract has been paid. The act, although the contract it evidences is resolved, is still valid evidence of the facts stated in it, such as the recital of consideration;⁴⁸ and the acknowledgment of consideration still subsists as a receipt, making proof of the payment. Therefore, Article 2234 does not appear to change the French doctrine.

Article 1900 first appeared in the Code of 1825. It declares that, although the cause expressed in the contract be nonexistent, the contract is yet valid if a true and sufficient consideration be shown.⁴⁹ It has been said that the purpose of the adoption of this

[French text: "*acte*"], or to explain it, where there is no ambiguity in its statements." *Projet of the Civil Code of 1825*, p. 289.) The text finally adopted was taken almost verbatim from that provision of the French Civil Code (Art. 1341) upon which the prohibition of parol testimony against *any written instrument* is based. This seems a clear manifestation of an intention to adopt the French rule of parol evidence. Accordingly, Article 2276 has been correctly held applicable to all written contracts. *Knox v. Liddell*, 5 Rob. 111 (La. 1843); *Cary v. Richardson*, 35 La. Ann. 505 (1883). See *Trager v. The Louisiana Equitable Life Ins. Co.*, 31 La. Ann. 235, 242 (1879); *McCollister Bros. v. Labarre*, 7 La. App. 350, 354 (1928); *Salley v. Louviere*, 183 La. 92, 99, 162 So. 811, 813 (1935).

46. Although there is no section corresponding to that in the French Civil Code on oaths, the omission has no effect on the problem under consideration for the oath is a means of finally determining cases, not a type of evidence.

47. Art. 1317, French Civil Code: "*L'acte authentique est celui qui a été reçu par officiers publics. . .*"

Art. 2234, La. Civil Code of 1870 contains this definition, adding the italicized words: "The authentic act, *as relates to contracts*, is that which has been executed before a notary public. . ."

48. After resolution, the price to be restored will be fixed in accordance with the stipulations of the contract, which implies that the contract has not completely vanished. 6 *Planiol et Ripert*, op. cit. supra note 3, at 600, n° 433. See also 4 *Aubry et Rau*, op. cit. supra note 3, at 133, § 302.

49. Art. 1900, La. Civil Code of 1870: "If the cause expressed in the consideration should be one that does not exist, yet the contract cannot be invalidated, if the party can show the existence of a true and sufficient

article was "to admit oral evidence of a different cause or consideration than that expressed in the act."⁵⁰

An examination of the early French authorities leads to a different conclusion. While oral testimony is recognized as admissible to show the true cause of a contract for the purpose of sustaining it, this is permissible *only* where the falsity of the recital of consideration has been demonstrated by evidence ordinarily admissible against written contracts.⁵¹ The early French authorities announce the same principle as that contained in Article 1900.⁵² Yet the courts and commentators agree that the path is not cleared for oral proof of true consideration until the receipt contained in the contract is disproved by other legally admissible evidence.⁵³ Thus, the principle of Article 1900 as it appears in French jurisprudence is that after the cause stated in a contract has been disproved by legally admissible evidence, the creditor may then show the existence of a legally sufficient cause. For this purpose he may use any type of evidence.⁵⁴ A similar view has been expressed in Louisiana.⁵⁵ Very likely Article 1900 is derived from French sources. Even if it were not, the conclusion reached through the application of the same principle in French jurisprudence is entitled to weight.

The exception *de non numerata pecunia*, abolished by Article

consideration." The word "consideration" in the first clause of the article is a mistranslation of the French text in the Code of 1825 and should be read "contract."

50. Chief Justice O'Niell's dissent in *Robinson v. Britton*, 69 So. 282, 284 (La. 1915).

51. See page 432, *supra*.

52. 3 Toullier, *op. cit. supra* note 3, at 382, n° 176. See also 12 Baudry-Lacantinerie et Barde, *Traité Théorique et Pratique de Droit Civil*, 1 Des Obligations (3 ed. 1906) 341, n° 308, 371, n° 319; 2 Demogue, *op. cit. supra* note 10, at 786, n° 869; 10 Duranton, *op. cit. supra* note 6, at 360, n° 351; 4 Marcadé, *op. cit. supra* note 10, at 398, Art. 1132; 6 Planiol et Ripert, *op. cit. supra* note 8, at 364, n° 265.

53. *Supra* notes 36, 38.

54. Cass. 5 décembre 1900, Sirey 1901.1.229. 2 Planiol, *op. cit. supra* note 8, at 454, n° 1206.

55. "Articles 1893, 1896, and 1900 have no application to the case of a contract . . . in which a valid, definite, existing consideration given and received is clearly expressed save that in such case the real contract, if there be one, other than that expressed in the act, may be developed by a counter letter or by interrogatories. . . ." *Robinson v. Britton*, 137 La. 863, 867, 69 So. 282, 283 (1915).

Brown v. Brown, 30 La. Ann. 966, 969 (1878): "Where a contract, therefore, is attacked on the ground that the expressed consideration does not exist, or that there was no consideration for it, the party may show other consideration than that expressed in the contract."

But the true and sufficient consideration which can be shown means such consideration as was contemplated at the time of execution of the act but which was misdescribed therein. *Chaffe v. Scheen*, 34 La. Ann. 684 (1882); *Chaffe v. Ludeling*, 34 La. Ann. 962, 964 (1882).

2237, originated in Roman law.⁵⁶ The exception shifted the burden of proving a payment acknowledged by one party to his opponent whose rights depended on payment.⁵⁷ By it the party who had acknowledged receipt of the payment alleged that the money was not actually counted out (*non numerata*) to him, that is, that it was not paid.⁵⁸ The exception is said to have been abolished in France because the Civil Code failed to mention it.⁵⁹ Under French law the non-receipt of an acknowledged payment must be *proved* by the party who alleges it and oral testimony is inadmissible if it is a case of proving against a writing.⁶⁰ By expressly abolishing the exception, Article 2237 does no more than overrule the early Louisiana cases which had admitted it.⁶¹ Since the exception dealt only with the burden of proof, its proscription should not have affected the parol evidence doctrine in any way.

IS THE FRENCH DOCTRINE APPLICABLE IN LOUISIANA?

In view of the demonstrated similarity between the French and Louisiana provisions on the problem under discussion, the French principle that parol evidence is inadmissible to vary in any way the recital of consideration in a written contract, should obtain in Louisiana. The Louisiana cases should now be examined with this in mind.

THE LOUISIANA JURISPRUDENCE

Taken as a group, the Louisiana decisions support the rule that parol evidence is inadmissible either to vary the amount of

56. The exception dealt with obligations contracted by simple agreement, without the tie of the technical and formal *stipulatio*. Although agreements contracted without the *stipulatio* were legally enforceable, the exception was one of the limitations on the rights of a creditor who sought to enforce an obligation as consideration for which he had paid a sum of money. 4 Toullier, op. cit. supra note 3, at 272, n° 636.

57. 13 Scott, *The Civil Law, A Translation of Justinian's Code* (1932) 70, bk. IV, tit. XXX, § 3.

58. Bonnier, op. cit. supra note 34, at 36, n° 43; 6 Planiol et Ripert, op. cit. supra note 8, at 342, n° 250. The exception is said to have been founded on the ancient belief that a negative proposition was not susceptible of proof. Bonnier, supra; 4 Toullier, loc. cit. supra note 56.

The exception was also recognized at Spanish law. *Las Siete Partidas* (Scott, 1931) Part. V, tit. I, Law IX. The notarial forms contained in Part. III, tit. XVIII, Laws LVI, LX, LXI, LXIV, LXV, and LXX all contain a recitation that the consideration was paid in the sight of the notary to prevent the exception from being invoked.

59. Bonnier, loc. cit. supra note 58; 4 Toullier, loc. cit. supra note 56.

60. 4 Toullier, loc. cit. supra note 58.

61. *Berthole v. Mace*, 5 Mart. (O.S.) 576 (La. 1818); 10 Mart. (N.S.) 256 (La. 1823). See the dissenting opinion in *Robinson v. Britton*, 69 So. 282, 284 (La. 1915).

the consideration or to disprove a payment acknowledged in a written contract.

Thus, where the purpose is to invalidate a contract, oral testimony is inadmissible to show that the contract was "simulated,"⁶² or that, although the parties seriously intended to contract, no consideration was ever received.⁶³ Such testimony is likewise

62. "It is horn-book law in our jurisprudence that the verity and reality of authentic sales can be assailed by the parties thereto only . . . by means of a counter letter . . . [or] by the answers of the other party to interrogatories on facts and articles." *Godwin v. Neustadt*, 42 La. Ann. 735, 738, 7 So. 744, 745 (1890). Note the cases cited therein.

The same rule has been applied indiscriminately to sales recorded by authentic acts or acts under private signature. *Michoud v. Lacroix*, 8 Mart. (N.S.) 445 (La. 1830); *Purdon v. Linton's Executors*, 9 La. 563 (1836); *Wolf v. Wolf*, 12 La. Ann. 529 (1857); *Hébert v. Légé*, 29 La. Ann. 511 (1877); *Cary v. Richardson*, 35 La. Ann. 505 (1883); *Johnson v. Flanner*, 42 La. Ann. 522, 7 So. 455 (1890); *W. B. Thompson & Co. v. Herring*, 45 La. Ann. 991, 13 So. 308 (1893); *Maskrey v. Johnson*, 122 La. 791, 48 So. 266 (1909); *Sherman v. Nehlig*, 154 La. 25, 97 So. 270 (1923); *Locascio v. First State Bank & Trust Co. of Hammond*, 168 La. 723, 123 So. 304 (1929); *Brinker v. Feist*, 14 La. App. 301, 129 So. 416 (1930); *Schrock v. Bolding*, 171 La. 929, 132 So. 504 (1931).

Art. 2239, La. Civil Code of 1870, as amended by La. Act 5 of 1884, permits forced heirs of a party to the simulation to attack it by parol evidence and to annul such contracts in their entirety. Prior to the amendment, they were restricted in their right of action to their legitimate. *Spencer v. Lewis*, 39 La. Ann. 316, 1 So. 671 (1887); *Westmore v. Harz*, 111 La. 305, 35 So. 573 (1905); *Sere v. Darby*, 118 La. 619, 43 So. 255 (1907). If, however, the heirs are party to the simulation, the general rule applies and parol evidence is inadmissible. *Barnes v. Barnes*, 155 La. 981, 99 So. 719 (1924); *Glover v. Abney*, 160 La. 175, 106 So. 735 (1926).

The Louisiana courts apparently use the term "simulation" to apply only to a feigned sale. The French commentators use the term in a broader sense to apply to any contract which conceals the true facts and is modified by another contract, the counter letter, revealing the real situation. The contract may be completely simulated, or the nature of the instrument disguised, the parties concealed, or a fact misstated. 2 *Josserand*, op. cit. supra note 27, at 165, nos 320, 321; 2 *Planiol*, op. cit. supra note 8, at 446, nos 1186-1187. Parol evidence is inadmissible to show any type of simulation unless the contract be designed to evade a mandatory prohibition of the law, to accomplish a fraud of the law. 12 *Aubry et Rau*, op. cit. supra note 3, at 375, § 765; and authorities cited supra notes 37 and 38.

63. *Baker v. Voorhies*, 6 Mart. (N.S.) 312 (La. 1827); *Cook v. Parkarson*, 16 La. 129 (1840); *Heath v. Locke*, 18 La. 68 (1841); *Succession of Thomas*, 12 Rob. 215 (La. 1845); *Trager v. Louisiana Equitable Life Ins. Co.*, 31 La. Ann. 235 (1879); *Vial v. Moll*, 37 La. Ann. 203 (1885); *Henderson v. Guerin*, 10 Or. App. 243 (La. App. 1913). Apparently contra are *Falcon v. Boucher-ville*, 1 Rob. 338 (La. 1842); *Kugler v. Taylor*, 19 La. Ann. 100 (1867).

In the leading case, *Robinson v. Britton*, 137 La. 863, 69 So. 282 (1915), plaintiff attempted to annul a sale of land. The court refused to allow parol evidence to show (1) the cash consideration receipt of which was acknowledged in the contract was never paid, (2) that the contract was intended to be one of exchange, and (3) that no consideration had ever been given. A vigorous dissent was written by Chief Justice O'Niell. It may be argued that the case is authority only as to written contracts of sale of land, for, in such cases, permitting annulment of the sale would be to permit transfer of title to an immovable by parol evidence.

The argument forgets, however, that oral testimony is usually admitted to change title to land whenever a contract for the sale of land is impeached

inadmissible to show that an ostensible contract was actually a disguised donation.⁶⁴ Where receipt of consideration is acknowledged, absence of cause will not result in invalidity unless proved in conformity with the evidentiary rules.⁶⁵ If no consideration⁶⁶ or only a nominal consideration⁶⁷ is expressed in the writing, oral testimony will be admitted to show that consideration was actually given. This follows the rule that the contract is not the less valid although the consideration is not expressed.⁶⁸ Furthermore, proof that the consideration presumed by law in such a case was not actually given does not violate the rule, for no cause is actually stated.⁶⁹ This may explain those cases which admitted

for fraud, error, violence, or violation of a resolatory condition. Article 2275 applies only to prevent private transfer of immovables. It does not apply to a judicial judgment of ownership. No distinction should be drawn between the case of a contract of sale of land and any other written contract. See note 45, *supra*. *Robinson v. Britton* seems to announce a correct general principle in denying the admissibility of parol testimony. *Shannon v. Shannon*, 188 La. 588, 177 So. 676 (1937); *Barre v. Hunter*, 181 So. 674 (La. App. 1938); *Johnson v. Johnson*, 191 La. 408, 185 So. 289 (1933).

64. *Lawson v. Conolly*, 51 La. Ann. 1753, 26 So. 612 (1899); *Jeansonne v. Jeansonne*, 187 La. 939, 175 So. 626 (1937); and see cases cited in note 63, *supra*.

65. ". . . as between the parties to a written act, the only admissible evidence to prove simulation is a counter letter. . . ." *Cary v. Richardson*, 35 La. Ann. 505, 509 (1883). Equally admissible is the interrogatory on facts and articles, cases cited notes 62 and 63, *supra*.

66. Parol evidence is admissible to show the true consideration for a written contract which does not recite a consideration. *Klein v. Dinkgrave*, 4 La. Ann. 540 (1849); *Read v. Hewitt*, 120 La. 288, 45 So. 143 (1907); *Crichton Co. v. Smith*, 18 La. App. 567, 137 So. 643 (1931); *Texas Co. v. Couvillon*, 160 So. 839 (La. App. 1935); *Consolidated Companies v. Angelloz*, 170 So. 556 (La. App. 1936).

67. Although there is no square decision on the issue, the court has intimated that parol evidence would be admissible to show the true consideration where a nominal consideration of one dollar is stated. See *Moore v. Pitre*, 149 La. 910, 90 So. 252 (1921); *Morris v. Monroe Sand & Gravel Co.*, 166 La. 656, 117 So. 763 (1928).

Where the contract recites a stated sum "and other valuable consideration," oral evidence may be used to show the nature of the other consideration. *Linkswiler v. Hoffman*, 109 La. 948, 34 So. 34 (1903); *Klumpp v. Howcott*, 139 La. 163, 71 So. 353 (1916); *Morris v. Monroe Sand & Gravel Co.*, *supra*. But the opponent of the contract may not show that the stated sum was not received. *Johnson v. Johnson*, 191 La. 408, 185 So. 299 (1938), discussed in *The Work of the Louisiana Supreme Court for the 1938-1939 Term* (1939) 2 LOUISIANA LAW REVIEW 31, 50, in which the problem of the present comment was raised.

68. Art. 1894, La. Civil Code of 1870. A just consideration is presumed unless the contrary be proved. *Barrow v. Cazeaux*, 5 La. 72 (1833); *Pack v. Chapman*, 16 La. Ann. 366 (1861); *Read v. Hewitt*, 120 La. 288, 45 So. 143 (1907); *Martin v. McCloskey*, 155 La. 604, 99 So. 477 (1924); *Crichton Co. v. Smith*, 18 La. App. 567, 137 So. 643 (1931). See also 4 *Aubry et Rau*, op. cit. *supra* note 3, at 557, § 345; 11 *Baudry-Lacantinerie et Barde*, op. cit. *supra* note 52, at 368, § 318; *Gaudemet*, op. cit. *supra* note 15, at 131; 2 *Josserand*, op. cit. *supra* note 27, at 70, n° 137; 2 *Planiol*, op. cit. *supra* note 8, at 399, n° 1044.

69. 4 *Aubry et Rau*, op. cit. *supra* note 3, at 558-559, § 345.

oral testimony to prove want of consideration in a promissory note,⁷⁰ prior to legislation on the subject.⁷¹

The question as to whether or not proof that a greater or lesser consideration than that acknowledged in writing may be given is one that has been several times contested. In these cases, the evidence is offered, not to invalidate the contract, but to prove the amount actually received for some other purpose. The latest case directly raising the question is *Grimm v. Pugh*,⁷² a recent court of appeal decision. In a suit to recover the sums paid for a mineral lease declared invalid because of error, the plaintiff sought to prove by parol evidence that he had paid a sum larger than that stated in the lease. Somewhat reluctantly the court held that the evidence was inadmissible, and stated the following rule:

“. . . parol testimony is not admissible to prove a greater consideration than that set out in the instrument, unless the instrument is attacked because of want of consideration or insufficiency of consideration; but parol testimony is admissible to show that the consideration set out in the deed or instrument was not wholly paid, although receipt of it is acknowledged in the contract.”⁷³

The enunciated rule proceeds from an attempt to reconcile a number of previous cases on the subject. Among them is *Dickson v. Ford*⁷⁴ involving a suit for cancellation of a mortgage which recited as consideration the indebtedness of the mortgagor. Parol evidence of the nature of the indebtedness was admitted to permit the plaintiff to prove discharge of his obligation. Grant-

70. It does not appear in any of these early cases involving promissory notes that a consideration was stated. Parol evidence was admitted to show want of consideration. *Grieve's Syndics v. Sagory*, 3 Mart. (O.S.) 599 (La. 1815); *LeBlanc v. Sanglair*, 12 Mart. (O.S.) 402 (La. 1822); *Byrd v. Craig*, 1 Mart. (N.S.) 625 (La. 1823); *Hebert v. Landry*, 3 La. 303 (1832); *Greenwell v. Roberts*, 7 La. 63 (1834); *Griffin & Dyson v. Cowan, Dykers & Co.*, 15 La. Ann. 487 (1860); *Reeve v. Doughty*, 19 La. Ann. 164 (1867); *Gillard v. Huval*, 22 La. Ann. 426 (1870); *Phillips v. W. T. Adams Mach. Co.*, 52 La. Ann. 442, 27 So. 65 (1899). It was also admitted in *Coupry's Heirs v. Dufau*, 1 Mart. (N.S.) 90 (La. 1823) (bill of exchange was involved).

71. Section 28 of the Negotiable Instruments Law providing that “absence . . . of consideration is a matter of defense as against any person not a holder in due course” (La. Act 64 of 1904, § 28 [Dart's Stats. (1939) § 817]) effects no change in the prior rule, and parol evidence is admissible to show the true consideration for a promissory note. *Sere v. Darby*, 118 La. 619, 43 So. 255 (1907); *Belknap Hardware & Mfg. Co. v. Hearn*, 179 La. 909, 155 So. 396 (1934).

72. 197 So. 641 (La. App. 1940).

73. *Id.* at 645.

74. 38 La. Ann. 736 (1886).

ing the interpretation of the court that the word "indebtedness" does not necessarily imply only contracted debts,⁷⁵ there was no proof *against* or *beyond* the terms of the contract, for neither a greater nor a lesser nor otherwise different consideration was claimed. The character of the indebtedness was shown merely for the purpose of proving execution of the contract, a fact which may be shown by oral testimony.⁷⁶ On its facts, then, *Dickson v. Ford*⁷⁷ is support for neither side of the question here involved.

In *Queensborough Land Company v. Cazeaux*,⁷⁸ which was also considered, rescission of a contract was granted on the basis of a resolutive condition not involving the consideration. The plaintiff offered proof that he received less than the payment acknowledged in the contract. The court treated the recital of consideration as a simple receipt and summarily declared that, as such, it was open to oral explanation, for "the purpose of the offer is not to defeat the contract."⁷⁹ This case denied the rule that parol evidence is inadmissible against *any written instrument* having a juridical effect.⁸⁰ The court thereby misconstrued the rules established by the Civil Code,⁸¹ and this without any discussion of earlier jurisprudence.⁸²

75. Cf. *Brander v. Bowmar*, 16 La. 370 (1840); *Pickersgill & Co. v. Brown*, 7 La. Ann. 297 (1852).

76. Proving performance or execution of a contract clearly does not vary the contract. 12 *Aubry et Rau*, op. cit. supra note 3, at 334, § 763; 5 *Marcadé*, op. cit. supra note 10, at 113, Art. 1341; 2 *Planiol*, op. cit. supra note 8, at 428, n° 1139.

77. 38 La. Ann. 736 (1886). The court implied that it was proceeding on the principle that parol evidence is admissible, "not against or beyond what is contained in the acts . . . but . . . to ascertain the *true intent of the parties when the same is not clearly expressed or described therein.*" (Italics supplied.) (38 La. Ann. at 740.)

78. 136 La. 724, 67 So. 641 (1915).

79. 136 La. at 739, 67 So. at 646.

80. See supra p. 433.

81. See supra p. 438, n. 62.

82. Although the court differentiated the case by stating that the "purpose of the offer is not to defeat the contract," prior jurisprudence holds testimonial evidence inadmissible even where there is no attempt to invalidate the contract. Thus, in *Forest v. Shores*, 11 La. 416 (1837), parol could not be introduced to show that a balance was still due on a price acknowledged to have been received in the act of sale. In *Hill v. Hall*, 4 Rob. 416 (La. 1843), the party suing on a promissory note, receipt of which was acknowledged in a mortgage, was not permitted to show by parol that he had not received the note at that time. Cf. *Ruston Brick Works v. Heard*, 177 So. 494 (La. App. 1937), where parol was held admissible because of error of the parties. Oral evidence was held inadmissible to show that, although the note stated that it was given in payment for certain enumerated services, it was intended to cover *all* fees due the plaintiff. *Dwight v. Kemper*, 8 La. Ann. 452 (1853). Nor could parol be admitted to show a greater consideration than that stated in the act of sale as a defense to an action of rescission for lesion beyond moiety. *Girod v. Vines*, 23 La. Ann. 588 (1871). And in a case strikingly similar in principle to the *Queensborough* case, where a contract

In *Brewer v. New Orleans Land Company*⁸³ a purchaser sued to recover the purchase price following the vendor's failure to make good title. Parol evidence was offered to show that a greater sum than that stated in the contract had been paid. The evidence was excluded, the court correctly declaring Article 1900 inapplicable because, "the purpose of the article is to enable a vendee to maintain the validity of a sale when attacked on account of the consideration, by showing the true consideration." The court distinguished the *Queensborough* case on the ground that:

"In that case the court admitted parol evidence, *not to show that the amount of the consideration was different from that stated in the deed, but to prove the amount that the Queensborough Land Co. actually received from Cazeaux, and should therefore refund to him. . . . The court did not, however, hold that a different consideration in amount may be proved in such a suit by parol from that expressed or agreed to in the act of sale, which additional fact it is necessary to prove in the case at bar. . . .*" (Italics supplied.)⁸⁴

It is difficult to perceive any logical distinction between the *Brewer* and *Queensborough* cases. Both involve a simple statement of fact, an acknowledgment of receipt of a stated sum. It is a mere circumstance that in one case the sum actually paid was greater than that acknowledged, while in the other it was less. If proving that a greater sum changed hands than that stated is proving a different consideration, why would not the same effect result from proving that a lesser sum changed hands? Both cases involve attempts to recover a sum different from the one stated. An attempt to draw a distinction, as was done in *Grimm v. Pugh*, on the basis of the relative size of the sums involved cannot be justified. Later cases have been correct in following the *Brewer* case.⁸⁵

An interesting problem arises when a certain sum is stated

was rescinded for error and fraud, the recital of consideration received could not be contradicted by evidence that a consideration was paid and hence should be restored. *Formento v. Robert*, 27 La. Ann. 489 (1875). The only case which admitted parol prior to the *Queensborough* case where the attempt was not to defeat the contract was *Saramia v. Courrégé*, 13 La. Ann. 25 (1858). There the defendant was permitted to prove that the consideration paid him for a sale, referred to in the act as a stated sum of "current money," included an obligation of the plaintiff to discharge the note sued upon.

83. 154 La. 446, 97 So. 605 (1923).

84. 154 La. at 455, 97 So. at 608.

85. *Lockwood Oil Co. v. Atkins*, 158 La. 610, 104 So. 386 (1925); *Johnson v. Johnson*, 191 La. 408, 185 So. 299 (1938), cited *supra* note 67.

as consideration and there is an attempt to show, for one purpose or another, that this was merely a lump statement of the value of various acts to be performed, or sales to be made, or debts to be paid.⁸⁶ It is sometimes said that in such cases the oral testimony is admitted "to give effect to the contract . . . by supplementing necessary information which was omitted."⁸⁷ Even then the correctness of permitting the consideration to be shown different in nature from that stated may be doubted. In effect, there is a direct contradiction of the consideration stated. This is certainly proof "against" the contents of the instrument. A factor of influence in such cases is that a blanket statement of a monetary sum as consideration is usually adopted by the parties for convenience, and it seems unjust to permit one party to later use this as a screen for perpetrating an injustice on the other. Yet many injustices may be perpetrated by the parol evidence rule. The very theory of the rule is that a writing, although it may be inaccurate, is generally more dependable than the testimony of witnesses.

If parol evidence is inadmissible to vary a declaration of fact, such as the statement of the receipt of consideration, it is *a fortiori* inadmissible to disprove the *terms* of a contract, that is, to show a promise different from that stated. Thus parol is inadmissible to prove a promise by a vendee to divide profits realized on the resale of land in addition to the price stated in the act of sale transferring title to him,⁸⁸ or, generally, any promise to pay a greater consideration than that stated;⁸⁹ nor is oral evidence

86. Illustrative cases are *Forest v. Shores*, 11 La. 416 (1837); *Falcon v. Boucherville*, 1 Rob. 337 (La. 1842); *Saramia v. Courrégé*, 13 La. Ann. 25 (1853), discussed supra note 82. In *McConnell v. Harris Chevolet Co.*, 147 So. 827 (La. App. 1933), the act of sale merely recited that a stated sum had been paid; parol was admitted to show that the price paid included a payment for insurance.

However, some of the cases admitting parol seem justified. Thus, parol was admissible to show as against unsecured creditors, that the sum stated in a sale of land actually included secured claims. *Succession of Rhodes*, 164 La. 488, 114 So. 107 (1927). Or that a cash consideration was stated through error as to legal requirements. *Ruston Brick Works v. Heard*, 177 So. 494 (La. App. 1937). But parol was properly excluded when the contract stated a paid cash consideration and plaintiff sought to show the consideration was to be delivery of trucks. *Truett Nash Motor Co. v. Centanni*, 184 So. 362 (La. App. 1938).

87. *Barre v. Hunter*, 181 So. 674, 675 (La. App. 1938).

88. *Hart v. Clark's Executors*, 5 Mart. (O.S.) 614 (La. 1918); *Pfeiffer v. Nienaber*, 143 La. 601, 78 So. 977 (1918).

89. *Clark's Executors v. Farrar*, 3 Mart. (O.S.) 247 (La. 1814); *Harrison v. Laverty*, 8 Mart. (O.S.) 213 (La. 1820); *Goodloe v. Hart*, 2 La. 446 (1831); *Eugene Dietzgen Co. v. Kokosky*, 113 La. 449, 37 So. 24 (1904); *Hemler v. Adcock*, 166 La. 704, 117 So. 781 (1928). See *Succession of Tilghman*, 11 Rob. 124 (La. 1845). It may not be shown by parol that an additional consideration

admissible to show that the obligor agreed to accept less than the sum stated.⁹⁰

On the problem of admission of testimonial evidence to vary or contradict a simple receipt, the Louisiana cases are not in accord with the French authorities. The cases generally announce that a receipt may be contradicted, varied, or explained by parol evidence.⁹¹ These decisions appear to be incorrect, since Article 2276 deals with "acts," that is, written instruments, not merely contracts. The reasoning and theory underlying the civil law parol evidence rule is as applicable to a receipt as to a contract. Insofar as a receipt implies by its very nature whole or partial discharge of an obligation, it has juridical effect. Since it is also the intentionally selected form of evidence, to admit parol is to disregard the choice of the parties. After rescission of a contract, its recital of consideration has no more legal effect than a written receipt. Yet that recital still binds the parties. Exclusion of parol evidence in the one case should, logically, result in exclusion in the other.

In addition to the cases where fraud, error, or violence is involved, a general exception to the parol evidence rule is found in both Louisiana and French jurisprudence. Parol evidence is admissible to show that a contract was made in violation of a prohibitory rule of law, in fraud of law.⁹² Thus, parol evidence

was agreed upon and has failed in order to rescind the contract for failure of consideration. *Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co.*, 143 La. 743, 79 So. 324 (1918). Cf. *Wainwright v. Gilham*, 188 So. 434 (La. App. 1939). The admissibility of parol to prove a contemporaneous collateral agreement is discussed in a Note (1939) 1 *LOUISIANA LAW REVIEW* 460.

90. *Berthole v. Mace*, 5 Mart. (O.S.) 576 (La. 1818); *Reimers v. Hebert*, 7 La. App. 56 (1927); *Monroe Investment Co. v. Ford*, 168 La. 475, 122 So. 586 (1929).

91. *Clamagaran v. Sacerdote*, 8 Mart. (N.S.) 533 (La. 1830); *Bass v. Balph*, 5 La. Ann. 235 (1850); *Fletcher v. Fletcher*, 5 La. Ann. 406 (1850); *Tardiff v. Baudoin*, 9 La. Ann. 127 (1854); *Gray v. Lonsdale*, 10 La. Ann. 749 (1855); *Succession of Croizet*, 12 La. Ann. 401 (1857); *Bringier v. Gordon*, 14 La. Ann. 274 (1859); *Draughan v. Collins*, 21 La. Ann. 175 (1869); *Porter v. Brown and Chaler*, 21 La. Ann. 532 (1869); *Borden v. Hope*, 21 La. Ann. 581 (1869); *Wells v. Sherrill Hardwood Lumber Co.*, 151 La. 1081, 92 So. 706 (1922). See *Bérard v. Boagni*, 30 La. Ann. 1125, 1127 (1878); *Dixie Mills Supply Co. v. Town of Homer*, 6 La. App. 714 (1927); *Anders v. Lee-Rogers Chevrolet Co.*, 7 La. App. 481 (1927); *Demasi v. Whitney Trust & Savings Bank*, 176 So. 703 (La. App. 1937). But see *Chew v. Chinn*, 7 Mart. (N.S.) 532 (1829), holding parol evidence admissible to show that the "payment" mentioned in a receipt was a promissory note, on the ground that such testimony does not really contradict the receipt or impair its legal effect, and *Glennon v. Vatter*, 109 La. 942, 33 So. 930 (1903), holding, *semble*, that a receipt in the form of an authentic act is conclusive, although the case was finally decided on the basis of prescription.

92. *Fireman's Ins. Co. of New Orleans v. Cross*, 4 Rob. 508 (La. 1843);

is admissible to show that an ostensible *dation en paiement* was in reality a donation of all the donor's property in contravention of Article 1497.⁹³ It is not clear what legal principles are prohibitory within the meaning of this rule. The strength of the policy the courts feel to be embodied in the article or statute under consideration is probably the major factor, with some regard placed on the wording of the legislation.⁹⁴

In conclusion, it may be said that except for occasional aberrations the Louisiana decisions have correctly applied the Code articles, although the *Queensborough* case has never been overruled and the receipt cases remain anomalous. The general rule established by the decisions is that parol evidence is inadmissible to vary in any way the recital in a written contract that a stated sum has been received as consideration. The wisdom of such a rule may be questioned. It may be objected that it should not be possible to evade the legal requirement of consideration by a mere recital, and further that the probative value of a written instrument should not be so great. Notwithstanding the fact that common law jurisdictions in general follow different principles,⁹⁵ our Code has adopted the French rule. If a change is to come, it should come only by way of legislative amendment of the Civil Code.

ALVIN B. RUBIN

THE PROBLEM OF A SERIES OF MORTGAGE NOTES

A very usual form of borrowing is the giving of a series of notes secured by a special mortgage. While such a series may often be held in its entirety by a single creditor, yet since the notes are negotiable, transfers may be readily effected by which each note becomes the property of a different owner. It is surprising, then, that the respective rights of each of the holders of such

Equitable Securities Co. v. Talbert, 49 La. Ann. 1393, 22 So. 762 (1897); *Kelley v. Kelley*, 131 La. 1024, 60 So. 671 (1913); *Becker v. Hampton*, 137 La. 323, 68 So. 626 (1915). See Arts. 11, 12, La. Civil Code of 1870. For the French rule in accord, 12 Aubry et Rau, op. cit. supra note 3, at 375-376, § 765; 2 Jossierand, op. cit. supra note 27, at 115, n° 216; 6 Planiol et Ripert, op. cit. supra note 8, at 476, n° 348.

93. *Kelley v. Kelley*, 131 La. 1024, 60 So. 671 (1913).

94. See the French commentators and the Louisiana cases on forced heirship cited supra note 62.

95. Because of the differences in theory and application of the civil and common law rules of parol evidence, and because of lack of space, common law rules on the problem were not discussed.