

SAUZIER
ON
EVIDENCE

Introduction
to the
Law of Evidence
in
Seychelles
(Second Edition)

by
André Sauzier

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First Edition

March 1983

Second Edition

October 2011

(updated by AH Angelo with Veronika Klauser)

Printed by
City Print, Wellington, New Zealand

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Dedication

To all my friends of the legal profession of Seychelles who gave me encouragement and support to prepare and deliver these lectures.

ANDRÉ SAUZIER

Foreword

I am honoured and humbled to dedicate this Foreword to such a distinguished jurist as Judge André Sauzier, whose experience spans from over half a century back in the early 1950s as Registrar of Deeds, Attorney-General from the mid-1950s to 1970, then a Judge of the Supreme Court 1970-1983, during that time as the Chief Justice de facto, and later as Justice of Appeal of the Court of Appeal of Seychelles 1983-1987.

What distinguishes him today is that experience, that longevity, and his love of jurisprudence.

I first appeared before him in my early start as a young lawyer in 1974. He was a welcome combination of a judge, teacher and guide.

From his first edition in 1983 to the second in 2011 is quite a span of 28 years to catch up and update on the *Introduction to the Law of Evidence in Seychelles*. That itself is an achievement almost immeasurable. He should be commended for that, particularly at a time when the Law Reports of Seychelles are not up to date.

I note Sir Michael Hogan then President of the Court of Appeal of Seychelles (former Chief Justice of Hong Kong) wrote the Foreword to first edition. What a coincidence that has destined me to write the Foreword in 2011, being a successor to him so many years later.

The place and value of evidence in the practice of law and determinations of cases is evident, pivotal and crucial. It is a must in the tools and skills of lawyers and judges.

When then you combine the richness of the experience of the author to this work, and the value of this publication, history can only recognise in him a most distinguished jurist of Seychelles.

Justice F MacGregor

10 November 2011

President of the Court of Appeal

Foreword to First Edition

The law of evidence in Seychelles, derived in part from English and in part from French sources and applied to the administration of substantive law which has its origins in both systems, must present a number of distinctive problems in addition to those common to both systems.

Knowledge of the law and these problems has not been made easier by the absence, at least until recently, of any regular system of Law Reports.

Seychelles has, however, been fortunate in having a judge with wide experience in the application of Seychelles law and the advantage of familiarity with both English and French law, who was ready to devote a substantial part of his time and leisure to the preparation of a series of lectures on the Seychelles law of Evidence.

Mr Justice Sauzier has now had these lectures collected and printed in a booklet which should be of great assistance to all who are concerned in any way with the law and its application in Seychelles.

In welcoming and commending this publication my only regret is that it was not available many years earlier.

MICHAEL HOGAN

Chapter 1

General

1 It can be said, as a general statement, that in Seychelles the law of evidence is the English law of evidence. This stems from s 12 of the Evidence Act which provides as follows –

English law of evidence to prevail except in certain cases

12 Except where it is otherwise provided by this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail.

2 The first point which arises relates to the meaning of the expression “for the time being”. Does it mean the English law of evidence as in force from time to time or as in force on the date of enactment of s 12. It is that latter meaning which must be adopted for the following reasons —

- (a) Section 12 is clearly legislation by reference. That being so the legislature must be taken to have applied the English law of evidence as it knew it, namely, as in force on 15 October 1962, the date of enactment of Ordinance 12 of 1962 (the date on which section 12 was enacted);
- (b) Section 12 cannot be construed as delegating to the United Kingdom Parliament the power of legislating for Seychelles in matters of evidence. Delegation must be effected in express terms. Moreover, when a power has been delegated, the authority which legislates must do so by virtue of such power. It is doubtful whether the British Parliament would ever be inclined to invoke such delegated power when legislating on evidence;

- (c) If s 12 were construed to mean the English law of evidence as in force from time to time this would in effect amount to an abdication, without delegation, of the power of the legislature to legislate in matters of evidence. This would be unconstitutional and as such void and of no effect. This is what the Court of Appeal for Seychelles meant in the following passage of *Kim Koon & Co Ltd v R*.¹

We have no doubt that it is not competent for the Seychelles Legislature to delegate the power to legislate, and that so far as s 12 of the Evidence Ordinance as amended may purport to apply to Seychelles future amendments of the English law of evidence, it is inoperative. In our judgment the effect of the section is to apply to Seychelles the English law of evidence as it stood on the 15th October, 1962, the date of enactment of the Seychelles Judicature Ordinance, 1962. Accordingly, the Criminal Evidence Act 1965 [Eng], does not apply in Seychelles.

¹ *Kim Koon & Co Ltd v R* (1969) SCAR 60 at 64.

3 It is suggested that this limitation of the application of the English law of evidence as at 15 October 1962 applies only to statute law and not to Common Law. Any decision of the English courts interpreting the Common Law, or interpreting a statute anterior to 15 October 1962 would be authoritative in Seychelles. It is a moot point whether the extension of the Common Law by the introduction of an entirely new concept (as opposed to the reversal of an existing concept) would not also be excluded by the limitation.

4 The next point which arises is whether English law, which in terms applies specifically to England or to the United Kingdom, applies in Seychelles. This point has never been the subject of a judicial decision. It would appear that s 12 does not allow the necessary modifications and adaptations to be made to a law of specific application to England or the United Kingdom. However, this point is arguable. That explains why the Evidence (Bankers' Books) Act (Cap 75) was enacted.

5 The following is a list of special laws relating to evidence which apply in criminal cases –

- (a) The Criminal Procedure Code (Cap 54), as amended by Act No 19 of 1975, ss 126 to 135;
- (b) The Evidence Act (Cap 74) ss 5 to 10, 11A, 11B, 15-23, 27, 28 and 31;
- (c) The Evidence (Bankers' Books) Act (Cap 75);
- (d) The Penal Code (Cap 158) ss 41, 57 and 105;
- (e) The Road Transport Act (Cap 206) ss 24 (e) and 30. Section 24 (5) should be noted specially. It is different from English law.

6 The Civil Code of Seychelles contains several provisions relating to the exclusion of oral evidence in certain cases. These provisions are contained in arts 1341 to 1348 and art 1715. Do these provisions apply in criminal cases? The answer is no and it was given in the case of *Gardette v R*¹ by the Court of Appeal for Eastern Africa in an appeal from Seychelles. The following passage from page 191 is worth quoting —

¹ *Gardette v R* (1960) 2 SLR 179 at 191.

It is our opinion, therefore, on this part of the case, that by s 21 of the 1903 Order in Council [now section 12 of the Evidence Act (Cap 74)] the English law of evidence was to prevail in the Colony [now the Republic of Seychelles], except where special laws existed; that in criminal matters the provisions as to evidence contained in the Code Napoleon were general and not special provisions, and were superseded by English law except where, and to the extent that, a contrary indication could be gathered from legislation and, possibly, where the offence in question was one peculiar to the French Penal Code; that the repeal of the 1904 Penal Code and its replacement by the present penal and criminal procedure codes the legislature eliminated the only such contrary indication and enacted codes which were English in substance and approach. There is therefore (so far as criminal evidence is concerned) no reason or necessity to regard the law of evidence as laid down by the Code Napoleon as a special law, or as anything but a general code which has now given way before s 21 of the 1903 Order in Council [now s 12 of Cap 74]. We emphasise that we are dealing only with the law of evidence in criminal matters and not in civil; that is not within our province.

For these reasons we are of opinion that it is the English Law of evidence that applies in criminal trials in Seychelles.

7 It is to be noted that the *Gardette* case only raised the issue of the admissibility of oral evidence under the provisions of the Code Napoleon. These were held not to apply in criminal trials. Can it be said that other provisions of the Civil Code, as for example art 194 which deals with the proof of marriages, are of general application and gave way to s 21 of the 1903 Order-in-Council¹. Are they not special laws? The statement that it is the English law of evidence that applies in criminal trials in Seychelles is generally correct. It may be that in certain cases such as those falling within art 194 of the Civil Code of Seychelles, it is that Code which applies.²

¹ Now s 12 of Cap 74.

² Article 194 para 2 is a reproduction of s 24 of the Civil Status Act (Cap 34) which has been repealed in the Third Schedule of Act No 13 of 1975.

8 In civil cases the English law of evidence prevails except where special laws exist. The following articles of the Civil Code of Seychelles should be noted as special laws in civil cases: arts 194 to 200, 312, 319 to 325, 334, 340, 341, 931, 969 to 1001, 1315 to 69, 1715, 1716, 1834, 1950, 2074, 2091-1, 2127. Sometimes the form in which transaction must be drawn up goes not only to the proof but to its validity: Gifts, art 931; Wills, art 1001; Leases, art 1715; Mortgages, art 2127.

Chapter 2

Admissibility of Oral Evidence under the Civil Code of Seychelles Article 1341

1 Article 1341

Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.

The above is without prejudice to the rules prescribed in the laws relating to commerce.

2 Article 1341 contains two rules —

- (a) There must be documentary proof of any matter exceeding R 5000;
- (b) Oral evidence is not admissible against or beyond a document nor in respect of what is alleged to have been said prior to or at or since the time when the document was drawn up even if the matter relates to a sum of less than R 5000.

3 The first rule, although not stated expressly, only concerns proof and does not lay down a rule as to form. It excludes proof by oral evidence¹ of any matter exceeding R 5000 in value. It does not exclude proof by judicial admission under art 1356 or by decisive oath under art 1358.²

¹ Or by presumptions “*preuve incidiaire*”, vide art 1353.

² Vide *Encyclopédie Dalloz. Droit Civil*. Verbo “*Preuve*” (2 règles de preuve) paras 177 to 178 [*Dalloz Civil 2*].

4 Both rules bind only the parties or those claiming through them such as creditors or heirs and personal representatives. They do not bind third parties.¹

¹ *Dalloz Civil 2*, op cit, paras 178-181.

5 Neither rule is a rule of public order. As a result, the parties must themselves invoke them. The judge will not invoke them ex officio. The parties may expressly or tacitly waive their right to invoke them. The rules cannot be invoked for the first time on appeal. It is at first instance that they must be invoked.¹

¹ *Dalloz Civil 2*, op cit, paras 182-193.

6 To revert to the first rule, and the meaning which must be ascribed to “Any matter” in art 1341.

A distinction must be made between “*actes ou faits juridiques*” (juridical acts) and “*faits matériels ou faits purs et simples*” (mere acts). The first rule only applies to the proof of “*actes ou faits juridiques*”.

Juridical acts are those which consist in the manifestation of the will, having as the immediate and direct aim either to create or transfer, or to confirm or acknowledge or to modify or extinguish obligations or rights.

Mere acts are those which have a legal effect not intended by their author.¹

¹ *Dalloz Civil 2*, paras 197-201, above p8.

7 Sometimes the two are mixed up. In that case oral evidence of the “fait matériel” is admissible whereas the “fait juridique” must be proved by a document eg a person who builds on someone else’s land with permission. The fact of building without hindrance may be proved by oral evidence but the giving of permission to build must be proved by a document if oral evidence is objected to. One cannot presume permission from the fact of building without hindrance. When it is impossible to distinguish “le fait matériel” from “le fait juridique” in a situation known as “faits complexes”, then documentary proof is required.

8 Any matter the value of which does not exceed R 5000. How does one deal with the question of value?

(a) Cases which arise outside of contract

The juridical act must be considered in relation to the juridical effect that one wants to rely upon (*Dalloz Civil 2*, above p 8, para 246). For example, the juridical act consists in the payment of a sum of less than R 5000.

- (i) One wants to rely on such payment to prove that one has paid up a debt of that amount. Oral evidence is admissible.
- (ii) One wants to rely on such payment to prove that prescription of an obligation has been interrupted or that such payment constitutes the confirmation of a voidable obligation. In such a case it is the value of the obligation which is relevant and not the value of the payment. Oral evidence would not be admissible if the value of the obligation exceeded R 5000 although the payment was for a sum of less than R 5000.

(b) Contracts

The value is that of the subject-matter of the obligation which forms the basis of the claim eg the value of the property transferred or the amount which the debtor has bound himself to remit.

The amount of the claim itself is not relevant. That amount may even exceed R 5000 eg when a lottery ticket has been purchased in common by two persons and the ticket wins a prize of more than R 5000. A claim for his share of the prize by one of the persons against the other may be supported by oral evidence as it is the value of the ticket which is relevant and not the value of the prize.¹

¹ *Dalloz Civil 2*, paras 247-252, above p8.

9 The time relevant for determining the value of the juridical act or the value of the subject-matter of the obligation is the time when the parties reached agreement.¹ When the value is not expressed, it is for the trial judge to determine it in case of conflict between the parties.²

¹ *Dalloz Civil 2*, para 253, above p8.

² *Dalloz Civil 2*, para 254, above p8.

10 Articles 1342 to 1346 support the general principles laid down in paras 6 and 7 above. They apply in claims of money arising from money lending. It is difficult to envisage the practical application of art 1346; It is obsolete and should have been repealed.

11 The second rule contained in art 1341 is that oral evidence (and proof by presumptions) is not admissible against and beyond a document nor in respect of what is alleged to have been said prior to or at or since the time when the document was drawn up.

12 That rule applies irrespective of the value of the matter ie the transaction, which the document witnesses. The rule aims at preventing the proof by oral evidence (or by presumptions) of —

- (a) Mistakes or omissions made in the document at the time when it was drawn up; or
- (b) Modifications which occurred in the agreement of the parties (judicial act) after the document was drawn up.

Such proof however may be made by another document or by a judicial admission or by the decisive oath. The prohibition contained in art 1341 does not extend to these modes of proof.

13 The rule only applies when the document is on the face of it clear and unambiguous. If however the document is couched in terms which are obscure, ambiguous or imprecise then oral evidence and presumptions are admissible to make clear the intention of the parties.

L'article 1341 du code civil restreint la recevabilité des modes de preuve lorsqu'on veut modifier ou compléter l'expression de la volonté des parties. En revanche, ce texte ne prohibe pas le recours à des témoignages ou à des présomptions pour interpréter les clauses obscures ou pour apprécier la portée et l'étendue des mentions imprécises d'un écrit.¹

¹ *Dalloz Civil 2*, para 293, above p8; the case of *Wilmot & Ors v/s W & C French (Seychelles)* (1972) SLR 144 is a case in point.

14 Extrinsic evidence may be admitted to prove fraud or error which vitiates the consent of a contracting party without the second rule in art 1341 being flouted.¹

In the case of fraud, the mere allegation of fraud is not sufficient. There must be a precise allegation of an act which constitutes fraud before the door to extrinsic evidence is opened.

In case of error the document must on the face of it be ambiguous or imprecise before extrinsic evidence is admissible; if the document is clear and precise then it would be necessary to have another writing providing initial proof under art 1347 before oral evidence is admitted to prove error.

¹ *Dalloz Civil 2*, paras 302-312, above p8.

15 Article 1321 deals exhaustively with the question of simulation by means of back-letters and their force and effect. The ostensible transaction simulated in the overt document signed by the parties may be altered by the back-letter (contre-lettre) in accordance with the terms of art 1321.

16 The document to which art 1341 refers is a document drawn up by a notary or a document under private signature and therefore the second rule applies only to such documents. However, in the case of a document under private signature, the provisions of art 1324 and art 1326 para 1 must be satisfied before the second rule applies.¹

¹ *Dalloz Civil 2*, para 316, above p8.

17 What is a document under private signature? It is a document signed by the parties. It cannot include a document marked by a party who is unable to write his name. The rule under s 22(1) of the Interpretation and General Provisions Act (Cap 103) does not apply to the Civil Code of Seychelles (see ss 5 and 9 of the Civil Code of Seychelles Act).¹

¹ Vide *Encyclopédie Dalloz. Droit Civil*. Verbo “Preuve” (1 modes de preuve) para 198 [*Dalloz Civil I*].

Chapter 3

Exceptions to the Rules Contained in Article 1341 of the Civil Code of Seychelles

1 Article 1341 contains a proviso which runs thus –

The above is without prejudice to the rules prescribed in the laws relating to commerce.

2 What are the rules prescribed in the law relating to commerce?

These are to be found in the Commercial Code of Seychelles and more particularly in art 109, paras 1 and 2, art 12, art 48 para 2 (1st) and art 50.

By virtue of art 109 of the Commercial Code proof by oral evidence (“by the evidence of witnesses”) is admissible in commercial matters at the discretion of the court. Article 1351 of the Civil Code of Seychelles extends this rule to proof by presumptions.

3 Generally speaking, it can be said that in commercial matters there is complete freedom in modes of proof. What is meant by commercial matters? Two situations may be envisaged—

- (a) A transaction between two merchants;
- (b) A commercial transaction between two non-merchants or between a merchant and a non-merchant.

The same rule would apply in a transaction which is not necessarily a commercial transaction between a merchant and a non-merchant, as against the merchant.

Merchants are those who fall within the definition of art 1 of the Commercial Code of Seychelles. It is to be noted that under that article a body corporate is deemed to be engaged in commerce even if its object is non-commercial. In other words all companies are deemed to be merchants even if they are not engaged in trade. This extends to all bodies corporate whether they are companies or not.¹

¹ Vide *Encyclopédie Dalloz, Droit Commercial*. Verbo “Preuve” para 18 [*Dalloz Commercial*].

4 Before going on to the next exception it is worth noting that one of the consequences of the principle of the freedom of modes of proof in commercial matters is that a commercial transaction may be proved by oral evidence or presumptions as against third parties in spite of the fact that art 1328 of the Civil Code is not satisfied.¹

¹ *Dalloz Commercial*, op cit, paras 11 to 13.

5 Article 1347 provides that the rules (both rules) in art 1341 do not apply if there is a writing providing initial proof.

A writing providing initial proof is writing —

(a) Which emanates from the person against whom the claim is made or from a person whom he represents and

(b) Which renders the facts alleged likely.

6 A principle of jurisprudence (which is applicable in Seychelles by virtue of s 5(2) of the Civil Code of Seychelles Act)

has extended art 1347 Civil Code of Seychelles so that the examination of the person against whom the claim is made or of his agent on unsworn personal answers is treated in the same way as a writing providing initial proof if it renders the facts alleged likely. It will be for the trial court to determine whether the answers render the facts alleged likely. This may be held to be so if—

- (a) The answers are inconsistent;
- (b) The person refuses to answer;
- (c) The answers amount to an admission or to a qualified admission of the claim.¹

¹ Vide *Takoor v Saccaram* [1965] MR 26 at 28.

7 It should be observed that a qualified admission of the claim in the pleadings (unlike unsworn personal answers) cannot be held to be a writing providing initial proof because of the rule in art 1356 that a judicial admission “may not be admitted only in part to the detriment of the person making it”.

8 The law relating to unsworn personal answers is to be found in s 4 of the Evidence Act, ss 162 to 171 Seychelles Code of Civil Procedure Act (Cap 213); and rules 78 to 82 of the Magistrates’ Court (Civil Procedure) Rules (Cap 52). Unsworn personal answers may be resorted to at any time during a trial before the close of a party’s case if objection is taken to the admissibility of oral evidence.¹

Although a plaintiff's oral evidence has not been objected to by the defendant, the defendant is not allowed to give oral evidence to prove his case if objection is taken by the plaintiff.²

¹ Sections 162-171 of the Seychelles Code of Civil Procedure, and rules 78-81 of the Magistrates' Court (Civil Procedure) Rules.

² Vide *Marie v Dingwall* CS 8111975; [1879] MR 133; *Chui Wan Cheong v Li Chew Pan* [1955] MR 393.

9 Article 1348 provides that the rules in art 1341 are inapplicable whenever it is not possible for the creditor to obtain written proof of an obligation undertaken towards him. The article then sets out the instances in which that exception will apply.

10 It should be noted that those instances are not exhaustive. They are more in the nature of examples of cases of the general principle that whenever it is not possible to secure written proof the door is open to oral evidence and proof by presumptions.

The first example given of quasi-contracts, delicts and quasi-delicts is in point of fact inaccurate as in all those cases there is no need for written proof. What is sought to be proved in those cases are mere facts and not juridical acts and the first rule in art 1341 does not apply.

11 There are two types of cases which fall within the exceptions of art 1348 namely —

- (a) Cases in which the creditor has not been able to secure written proof of the juridical act;
- (b) Cases in which the creditor has lost the written document through unforeseen and inevitable accident or through an act of God.

The 2nd and 3rd paras of art 1348 are examples of cases where there is physical impossibility to secure written proof.

12 Jurisprudence has extended the principle of impossibility to secure written proof to moral impossibility. Such moral impossibility may arise from —

(a) The relationship between the parties —

- i Family relationship eg husband and wife, parent and child, brothers and sisters;
- ii Ties of affection eg fiancés or lovers;
- iii Relationship as friends;
- iv Relationship of trust between master and servant.

(b) Usage

- i Doctors;
- ii Barristers;
- iii Domestic workers;
- iv Deposit at a theatre cloakroom or at a parking place for cars, motor cycles and bicycles.

13 When the written document has been lost through accident (unforeseen and inevitable) or through act of God all modes of proof are admissible to reconstruct the document and what it purported to contain even in cases where form is of the essence of the transaction eg where a will has been destroyed.¹

¹ *Dalloz Civil 2*, paras 455 to 472, above p8.

Chapter 4

Modes of Proof which Exist under the Civil Code for Evidence other than Oral

- A Authentic documents
- B Documents under private signature
- C Presumptions
- D Admissions
- E Oaths

A Authentic Documents

1 Article 1317 of the Civil Code provides that an authentic document is a document received by a public official entitled to draw up the same in the place in which the document is drafted and in accordance with the prescribed form.

2 Generally speaking authentic documents are those drawn up by notaries, civil status officers and land surveyors.

3 The rules relating to the drawing up of notarial deeds are contained in the Notaries Act (Cap 149). Those relating to the drawing up of civil status acts are contained in the Civil Status Act (Cap 34) and those relating to memoranda of survey in the Land Survey Act (Cap 109).

4 A document which is not authentic due to the lack of powers or capacity of the official or owing to a defect of form shall have effect as a private document if signed by the parties. (art 1318 Civil Code of Seychelles).

5 An authentic document raises a legal presumption of proof which may be rebutted by evidence to the contrary.¹

Before this provision came into force an authentic document had first to be impugned by an elaborate procedure known as *inscriptio falsi* (*inscription de faux*) laid down in arts 286, and 303 to 316 of the Code de Procédure Civil which are still in force in Seychelles (although now obsolete). That was necessary only in relation to acts or facts which were stated in the document to have happened in the public official's presence or which he himself had performed. No such procedure was required for other acts or facts.

¹ This provision is contained in the art 1319.

6 The legal presumption of proof lays the burden on the party who impugns the document to prove its falsity. At the same time the elaborate procedure of *inscriptio falsi* is done away with and no distinction is made between acts or facts which have happened in the public official's presence or which have been performed by him and those which have not.

7 An authentic document has full effect until the rebutting evidence impugning its validity has been accepted by the court.

B Documents under private signature

8 The first requisite is that the document must be signed by the party who is to be bound by it.

9 Documents under private signature which contain obligations which are not merely unilateral must be drawn up in as many originals as there are parties having a separate interest. One original is sufficient for all the persons having the same interest. Each original shall mention the number of originals in which the document was drawn up. A person who has performed

his part of the obligation cannot plead the failure to mention the number of originals in which the document was drawn up. The provisions contained in art 1325 go to the validity of the document under private signature. An invalid document however may serve as a writing providing initial proof under art 1347.

10 When the obligation consists in the payment of a sum of money or the giving of something of value, the document under private signature to be valid must conform with the following conditions —

either

- (a) It must be written in full in the hand of the person who signs it,

or

- (b) Apart from the signature, the person must add in his own hand the formula “valid for” or “approved for” followed by the amount in letters or the quantity of the thing (art 1326 para 1).

The requirement of the formula as in paragraph 1 of this article shall not apply to promissory notes which are regulated by the Bills of Exchange Act, Cap 15, or any law amending or replacing that Act (Article 1326 para 2).

11 When a document under private signature is used to substantiate a claim, the person who is alleged to have made it and against whom it is pleaded must either acknowledge his handwriting or signature or repudiate it. The heirs or assigns of the maker of the document need not repudiate the handwriting or

signature of the maker. They may only declare that they do not recognise the handwriting or signature of the principal.¹

¹ Article 1323.

12 In the event of a repudiation or non-acknowledgement under art 1323, it is for the court to decide the issue after hearing evidence. It would appear that when a claim has been filed on the basis of the document the issue should be tried in a trial within the trial as a preliminary issue, as a document under private signature when repudiated or not acknowledged loses its probative force temporarily and cannot support the claim.¹ There lies the difference between an authentic document and a document under private signature.

¹ *Dalloz Civil 2*, paras 316-319, above p8.

13 A document under private signature has effect against third parties (date certaine) -

- (a) As from the date the document is registered; or
- (b) As from the date of death of the person who signed it; or
- (c) As from the date on which the contents were confirmed in documents drawn up by public officials, such as minutes under seal or inventories.¹

¹ Article 1328.

14 Article 1320 has limited application in practice. It relates to statements made by the parties in the document and their probative value. If the statement is directly related to the transaction then it is to be taken as binding proof against the party

(or the *ayants droits*) that made it. Otherwise it only serves as a commencement de preuve par écrit.¹

¹ *Dalloz Civil 2*, paras 397, above p8; DP 1902.1.33.

15 The effect of erasures, additions, marginal notes and interlineations in a document differs according to the nature of the document. When the document is a notarial deed additions and alterations are null unless made in compliance with ss 39 and 40 of the Notaries Act. In the case of documents under private signature, the trial judge will decide what effect to give to such additions and alterations.¹

¹ *Dalloz Civil 2*, paras 597-609, above p8.

16 Books kept by merchants

Articles 8 to 11 of the Commercial Code lay down in detail the obligation which merchants have to keep accounts, documents and correspondence relating to their business. Such commercial books therefore have some probative value especially when properly and regularly kept according to law.

Articles 12 and 13 of the Commercial Code lay down the evidential value of commercial books as between merchants when such books are regularly kept and when not properly or regularly kept.

Articles 1329 and 1330 of the Civil Code on the other hand lay down the evidential value of commercial books between the merchant who kept them and a non-merchant.¹

¹ *Dalloz Commercial*, paras 127-139, above p16.

17 Articles 1331 and 1332 of the Civil Code of Seychelles should be noted as their provisions may become relevant in particular cases. These articles are self-explanatory.

18 Article 1333 about tallies is obsolete and need not be considered.

Copies of documents: Articles 1334, 1335 and 1336 of the Civil Code

19 Article 1334 is equivalent to the best evidence rule of the English law of evidence.

In certain cases when the original is kept in the custody of a Government department or a public officer such as a notary or a land surveyor the original is not admissible. The document can only be proved by the production of a certified copy under the hand of the head of department or public officer having the custody of the document. Sections 7 and 8 of the Evidence Act (Cap 74) refer to this.

Entries in bankers' books must be proved by certified copies in accordance with ss 3, 4 and 5 of the Evidence (Bankers' Books) Act (Cap 75).

Articles 1335 and 1336 would only apply if the original document no longer exists.

C Presumptions (arts 1349 to 1353)

20 These may be classed into two categories —

- (a) Presumptions which apply by operation of law;
- (b) Presumptions which do not apply by operation of law.

21 Presumptions which apply by operation of law

These presumptions fall into two classes —

- (a) Presumptions which are irrebuttable;
- (b) Presumptions which may be rebutted by evidence to the contrary.

22 Examples of presumptions which apply by operation of law which are irrebuttable are to be found in arts 472, 911, 918, 1099, 1100, 1596 and 1597 of the Civil Code.

23 Examples of presumptions which apply by operation of law which are rebuttable by evidence to the contrary are to be found in arts 2230, 2234, 2268, 2279 of the Civil Code.

24 Article 1351 para 1 deals with the binding effect of final judgments otherwise known as *res judicata*. The conditions which must be present are 3 in number. The case of *Berthier de Sauvigny*¹ set out the principles involved very clearly. There must be threefold identity between the “objet”, “cause” and “personne”.

¹ *Berthier de Sauvigny v Courbevoie* [1955] MR 215; on *res judicata* see also *D’Offay v Louise* SCA 34/2001, LC at 332.

25 Article 1353 deals with ordinary presumptions of fact, that is, those which do not apply by operation of law. Presumptions can only be used as a mode of proof where oral evidence is admissible. Proof by presumptions is therefore excluded in all cases where oral evidence would be excluded. The corresponding French expressions for “serious, precise and consistent” are “graves, précises et concordantes”.

D Admissions (arts 1354 to 1356)

General

26 Admissions are —

(a) Judicial, or

(b) Extra-judicial.

27 An admission may be defined as follows—

An admission is a declaration, either oral or written, by which a party accepts as true and established a fact capable of having legal consequences.¹

¹ Vide *Dalloz Civil 1*, para 673, above p13: L'aveu est la déclaration par laquelle une personne reconnaît pour vrai et comme devant être tenu pour avéré à son égard, un fait de nature à produire contre elle des conséquences juridiques.

28 An admission is a unilateral declaration of a party manifesting the will of such party. There is no need for the party who benefits from the admission to accept such admission by declaring or manifesting his acceptance. There is also no need to show that the party who made the admission knew at the time that the admission could be used as proof against him or intended his declaration as an admission of the fact.¹

¹ *Dalloz Civil 1*, paras 677-687, above p13.

29 An admission to be valid as such and binding must be an admission of a fact. For example, a declaration whereby a party admits having caused an accident and agrees to compensate the

victim amount to an acknowledgement of liability based on legal principles and does not amount to a binding admission of fact.¹

However the admission by a driver that he was driving a car at a certain speed constitutes an admission of fact as to the speed.

Foreign law which is considered to be a question of fact cannot form the basis of an admission as it is not a fact personally known to the party making the declaration.²

¹ DP 1966.541.

² *Dalloz Civil 1*, para 685, above p13.

30 An admission may be express or implied, written or oral.¹

The defendant who does not distinctly deny a material averment contained in the plaint is deemed to have admitted such averment.² This is an example of an implied admission.

¹ *Dalloz Civil 1*, paras 688-690, above p13.

² Section 75 Seychelles Code of Civil Procedure, and rule 25 of the Magistrates' Court (Civil Procedure) Rules.

31 An admission must emanate from the party against whom the admission is held or from his specially empowered agent.

A solicitor or attorney is deemed to be a specially empowered agent of the party, whereas a barrister who is not also acting as attorney is not a specially empowered agent. The barrister is the legal adviser of the party (*Dalloz Civil 1*, para 705, above p13).

An agent acting within the scope of his agency may bind his principal by an admission made of a fact within his personal knowledge. In that case there is no need for a special power.

The party making the admission must have full capacity.

For example, a minor, an interdicted person or a person to whom a guardian has been appointed would not be bound by an admission to the extent of their incapacity. This rule does not hold in the case of the acknowledgement of a natural child.¹

Although the party subject to incapacity is not bound by an admission, that party's admission of a fact is not devoid of value. It may serve as evidence of the fact to be weighed along with other evidence.

¹ *Dalloz Civil 1*, para 693, above p13.

Judicial admissions (art 1356)

32 The following conditions must be satisfied before an admission can be classed as a judicial admission:

- (a) The admission must be made in judicial proceedings before a competent judge;
- (b) The admission must be made in the very proceedings in which the admission is sought to be relied upon;
- (c) The admission must be expressed in clear terms and must arise from the pleadings of the party or from the notes of evidence taken down by the judge or the registrar.¹

¹ *Dalloz Civil 1*, paras 706-717, above p13.

33 The effect of judicial admissions - Article 1356

- (a) The admission shall be accepted against the person who makes it (l'aveu fait pleine foi contre celui qui l'a fait);
- (b) The admission may not be admitted only in part to the detriment of the person making it (l'aveu ne peut être divisé);
- (c) The admission cannot be revoked unless made as the result of an error of fact - not of an error of law.

Each of these effects must be considered in turn.

34 Once an admission has been made the court or judge must hold the admitted fact to be correct. The party who made the admission cannot contest the correctness of the admitted fact.

That does not mean that the court or judge may interpret the meaning and effect of the declaration made by the party and assess its consequences.¹

¹ *Dalloz Civil I*, para 727, above p13.

35 An admission cannot be split. It must be taken as a whole. This applies both where the admission is qualified and where it is complex. The rule does not apply when there have been distinct successive statements. In such a case an anterior admission may be severed from a later retraction or qualification.¹

¹ *Dalloz Civil I*, para 733, above p13.

36 A qualified admission arises when the party admits a fact but adds a statement which modifies the juridical effect of the admitted fact. For example, a sale is admitted but it is averred that

it was subject to a trial period. A sum of money is admitted as having been received but it is averred that it was received as a gift and not as a loan.¹

¹ *Dalloz Civil 1*, paras 735-737, above p13.

37 An admission is said to be complex where the admission is accompanied by an averment about a posterior fact which alters the juridical effect of the admitted fact. For example, it is admitted that a sum of money was received by way of a loan but it is averred that it has been paid back.¹

¹ *Dalloz Civil 1*, para 738, above p13: L'aveu est dit complexe lorsqu'il comprend deux faits distincts, l'un s'ajoutant à l'autre auquel il se rattache et le contredisant totalement ou partiellement.

38 The rule about indivisibility of a judicial admission does not apply to a statement made by a party in his personal answers. In such a case the court or judge may act on a qualified admission to decide that there is initial proof opening the door to oral evidence.¹

¹ *Vide Takoor v Saccaram* [1965] MR 26 at 28.

39 A judicial admission cannot be revoked unless it is proved that it resulted from a mistake of fact. It cannot be revoked on the ground of a mistake of law. The admission is not revocable even if the adverse party has not shown any acceptance of it. This stems from the nature of an admission which is a unilateral act of the party making the admission.¹

¹ *Dalloz Civil 1*, para 770-777, above p13.

40 A mistake of fact is one which stems from the lack of knowledge of certain existing factual circumstances or the belief that some fact or circumstance exists when it does not. It may

also stem from an erroneous description of a particular fact or circumstance.

41 A mistake of law is a mistake as to the juridical effect which results from an admission of fact.

42 An admission is binding on the assumption that the admitted fact is true and correct. If it can be proved that the admission was made in error as to the fact admitted, then it may be revoked as the assumption as to correctness does not apply any more.

Extra-judicial admissions

43 Any admission which are made outside the very proceedings in which the admission is sought to be relied upon is an extra-judicial admission.

44 Article 1355 curtails the proof of an oral admission in proceedings where the claim itself cannot be proved by oral evidence. It is to be noted that a verbal admission registered on a tape has been held to fall within art 1355.¹

¹ *Dalloz Civil I*, para 782, above p13.

45 The three rules contained in art 1356 apply strictly to judicial admissions and not to extra-judicial admissions.¹ The result is that —

- (a) The judge may assess the admission and give it the probative force he thinks should be given to it, if any;²
- (b) The extra-judicial admission may be split or considered as a whole as any other kind of evidence before the court.
- (c) The extra-judicial admission may in principle be revoked only when it is proved that a mistake of fact has been made but not on the grounds of a mistake of law.

However, that principle is not in practice strictly applied as the judge may assess the probative force of the admission and in doing so may take account of the alleged mistake of law which prompted the admission.³

¹ Vide para 32 above.

² *Dalloz Civil 1*, paras 783-785, above p13.

³ *Dalloz Civil 1*, paras 788-790, above p13.

46 It should be noted that if the revocation or retraction of an admission may be permitted, the proof of the error of fact or law may be difficult in view of the provisions of art 1341. For example, the admission is contained in a signed document. Oral evidence is not admissible to prove against or beyond the document.¹

¹ Vide *Compagnie de Beau Vallon v Compagnie du Chemin Français* [1955] MR 264.

E Oaths (arts 1357 to 1369)

47 There are two types of oaths provided for in arts 1357 to 1369 —

(a) Decisive oaths; and

(b) Oaths tendered *ex officio* by the judge.

These two types of oaths must be viewed in the context of the system of trial in civil cases which is based on the English law of evidence.

Decisive Oaths (arts 1358 to 1365)

48 The aim of the decisive oath is —

(a) To secure the proof of a fact; and

(b) To put an end to the litigation (hence “decisive”).

49 The procedure of the decisive oath usually arises in the following type of case. The plaintiff alleges a fact on which he bases his claim and is denied by the defendant. The plaintiff lacks proof of the fact. He therefore requests the defendant to swear that the alleged fact is unfounded. In doing so the plaintiff throws himself on the conscience of the defendant trusting that he will not perjure himself.

- 50 The defendant has then three options available-
- (a) He takes the oath and thereby wins the case; or
 - (b) He declines to take the oath, the case then is decided in favour of the plaintiff; or
 - (c) He passes the oath on to the plaintiff. This third option is not open to the defendant if the fact is personal to him only and not to the plaintiff.¹

¹ Article 1362.

51 If the plaintiff to whom the oath has been passed on takes the oath, he wins the case. If he declines to take the oath the case is decided in favour of the defendant.

52 The oath may be tendered only by one party to legal proceedings to the other. A person who is not a party to the proceedings may not tender the oath and may not take the oath.

A party must have full legal capacity to be able to tender the oath.

A party's representative must be specially authorized before he may tender the oath. That is so in the case of attorneys acting for their client.

Tendering the oath, being in the nature of a compromise, persons under disability must satisfy all the conditions required in the case of a compromise before they may tender the oath. For example, in the case of guardians they must be authorised to do so by the court as is required under art 457(1) of the Civil Code in the case of a compromise.

53 The fact over which the oath is tendered must satisfy two conditions —

- (a) It must be personal to the party to whom the oath is tendered, not merely within his own personal knowledge;
- (b) It must be relevant and conclusive.

54 According to the general provisions of art 1358 an oath may be tendered in respect of any kind of litigation. However the Civil Code provides for special cases in which the oath may be tendered. These special cases are —

- (a) Article 1715 - In the case of an oral lease which has not yet started to run and which is denied;
- (b) Article 1716 - Where the amount of the rent payable in the case of a verbal lease is contested;
- (c) Article 2275 - Where prescription is pleaded in the case of a debt, to prove that the debt has not yet been paid. (Query the validity of that article in its present form).¹

¹ *Vide Dalloz Commercial*, paras 102-105, above p16.

The oath may be tendered at any stage of the proceedings. The formula of the oath is proposed by the party who tenders the oath. If there is any dispute as to the form the oath should take, the judge will settle the matter.

55 The party who has tendered or passed on the oath cannot withdraw it after the other party has declared himself ready to take it.¹

¹ Article 1364.

56 Once the oath has been taken by a party the other party cannot prove its falsity.¹ This does not prevent a prosecution for perjury being taken against the party who has falsely sworn to a fact.

¹ Article 1363.

57 The party who takes the oath must have full legal capacity.

The representative of a party cannot take the oath on behalf of the party. That rule does not apply in the case of a party having corporate existence or in cases falling within art 2275 second sentence. For a party having corporate existence it is the legal representative for the time being who may take the oath.¹

¹ *Dalloz Civil I*, para 850, above p13; D.1973.256.

58 Once the oath has been taken the litigation is at an end. The judge has power to assess its weight or effect. The fact which is contested has either been proved or disproved as the case may be. There is also no appeal as to the fact. However an appeal lies on the question of the procedure followed to tender the oath and that may invalidate the effect of the oath.

59 Article 1365 sets out the persons in whose favour or against whom the decisive oath operates.

Oaths tendered ex officio by the Judge (arts 1366 to 1369)

60 Although provision exists for the tendering of these oaths, the system of trial in civil cases (which depends upon the *viva voce* evidence of witnesses parties being taken under oath) renders those provisions unnecessary. These powers are seldom used. In Mauritius only three cases are reported in which the ex officio oaths are mentioned. Two cases went on appeal and they were referred back to the trial court for the oath to be tendered to one of the parties so that the case could be decided finally. The cases are reported in 1862 MR 101 and 1866 MR 84. The other was also an appeal, 1931 MR 144, in which it was found that the magistrate had been right to receive evidence of an account by a merchant against a non-merchant when the correctness of the account had been sworn to, arts 1329 and 1367 Civil Code having been correctly applied.

61 It is not necessary that the fact upon which the oath is tendered should be personal to the party to whom it is tendered. However, it must be within his knowledge.

62 The oath tendered ex officio does not render the fact sworn to binding on the court. The judge has the right to assess its value and either accept or reject it as any other evidence.

63 It would appear that the powers given to the trial court under arts 1366 to 1369 run counter to the principle in English law that in civil cases the trial court cannot compel a party to give evidence.

Chapter 5

Conclusion

The original goal of this text was to provide a clear and accessible statement of the general laws of evidence of Seychelles. It has served that purpose well. That the changes brought to this edition are minor, in relation to matters of substance, is testament to the fact that the current law of evidence of Seychelles has its base in well-accepted clear decisions of the highest courts of Seychelles. This is complemented by the Legislature, by constitutional status deemed to know the existing law, which for its part has not seen fit to amend the law radically even though the English law on which the Seychelles law is based has changed over the years. There is therefore stability in the field of the law of evidence.

Two important factors of relevance are suggested for the future of the Seychelles law of evidence. The first is that any change to the substantive base of the law of Seychelles should be made judiciously, with circumspection. It is not in the interests of the rule of law that settled principle should be disturbed without serious reason. Any substantial change from the known best lies with the Legislature. The second is that because Seychelles is one of the few Commonwealth common law countries not to have its law of evidence codified and in statutory form and because the local law has been stable for many years, now may be the appropriate time for the Legislature to take advantage of the situation and to legislate the known and accepted principles, reforming as necessary to meet unmet needs. This would be a clear patriation of the law of evidence, and be consistent with the status and development of its law by the independent state of Seychelles.

Selected Cases on Evidence 1983 – 2010

[LC refers to *Leading Cases of Seychelles 1988-2010*;

p/pp refers to the relevant pages in this book]

A Court of Appeal

- 1 ***Banque Francaise Commerciale v Fayon*** [1983-1987] 1 SCAR 66
 - admission of liability based on a mistake of fact; admission of no effect; pp 30-34
- 2 ***Didon v Leveille*** [1983-1987] 1 SCAR 164
 - proof of handwriting; pp 22-25
- 3 ***Port Louis v Central Stores Development*** [1983-1987] 1 SCAR 165
 - contest of signature or handwriting of a document under private signature; pp 22-25
 - oral evidence and presumptions; pp 26-27
- 4 ***Renaud v Dogley*** [1983-1987] 1 SCAR 202
 - admission of oral evidence; pp 30-34
- 5 ***Tirant v Kreckman*** [1983-1987] 1 SCAR 287
 - copy of holograph will admissible after loss of original proved; p 26
- 6 ***Chez Deenu v Loizeau*** SCA 17/1987, 22 July 1988; LC 2
 - decisive oath; pp 35-38
- 7 ***Appasamy v Appasamy*** SCA 9/1988 , 4 October 1989; LC 11
 - the contents of a holographic will can be proved by secondary evidence in cases where the document cannot be found after due search; p 26

- 8 ***Botel v Ruddenklau*** SCA 8/1992, 31 March 1993; LC 27
 - article 1341 Civil Code of Seychelles; pp 7-13
 - back-letters; p 12
 - writing providing initial proof; p 16
 - unsworn personal answers; p 17
- 9 ***Larue v Husser*** SCA 23/1994, 16 June 1995; LC 73
 - judicial admission; pp 30-33
- 10 ***Ruddenklau v Botel*** SCA 4/1995, 1 March 1996; LC 105
 - back-letter agreements are void unless they are in writing; p 12
- 11 ***Hoareau v Hoareau*** SCA 30/1996, 3 April 1997; LC 112
 - written evidence for simulated sale proof
 - back-letter cannot be proved by oral testimony; p 12
- 12 ***Savy v Krishnamart*** SCA 19/1999, 14 April 2000; LC 173
 - in the absence of other laws, the English law of evidence and procedure applies (Evidence Act s 12); pp 1 and 5
- 13 ***Adonis v Marie*** SCA 39/1999, 3 November 2000; LC 180
 - back-letters: an agreement not in writing is not able to be registered as formally required under art 1321(2) Civil Code of Seychelles; p 12
- 14 ***Gayon v Collie*** SCA 8/2001, 16 November 2004; LC 251
 - bringing oral evidence requires initial proof in writing; p 16
- 15 ***Seychelles Construction v Braun*** SCA 9/2004, 20 May 2005; LC 264
 - Court has discretion to admit hearsay evidence in conjunction with other credible evidence
 - documentary evidence admissible
 - invoice as evidence; pp 22-25

- 16 **Michaud v Ciunfrini** SCA 26/2005, 24 August 2007; LC 302
- article 1341 Civil Code of Seychelles provides that oral evidence is not permissible to prove an obligation. exceptions can be found in arts 1347 to 1348 Civil Code of Seychelles; pp 16-18
 - moral impossibility because of the special relationship of the parties; p 19
 - party objects oral evidence; pp 17-18
 - handwriting; pp 12, 22-25
- 17 **D'Offay v Louise** SCA 34/2007, 14 August 2009; LC 332
- it is in the public interest that there is finality in litigation
 - *res judicata* applies not only to the points which the court was required to pronounce a judgment, but to every point which properly belongs to the litigation and which a party who is exercising reasonable diligence might have brought forward at the time of the case
 - due to the principles of *res judicata* and finality of judgment, a decision of the Court of Appeal cannot be stayed or challenged in proceedings in a lower court; p 27
- 18 **Anscombe v Indian Ocean Tuna** SCA 40/2009, 13 August 2010; LC 352
- A person who seeks to admit oral evidence to prove a contract above R 5000 should apply to the court under the Personal Answers Procedure; this application should be made before the date of hearing; p 8

B Supreme Court

- 1 ***Herbert v Hossel*** [1984] SLR 127
 - the court has a discretion to permit evidence by affidavit; however, this has not as much weight as evidence by oath (s 167 (now s 168) Seychelles Code of Civil Procedure)
- 2 ***Central Stores v Adelina*** [1984] SLR 147
 - private signature, handwriting arts 1324, 1326 Civil Code of Seychelles; pp 12, 22-25
- 3 ***State Assurance v Petrousse*** [1987] SLR 104
 - any matter the value of which is over R 5000 requires a voluntary document drawn up by a notary or under private signature; this rule is inapplicable where the document has been lost as a result of an accident which was inevitable and unforeseen or which was a consequence of an act of God
 - merchants are required to keep books or accounts; pp 25-26
- 4 ***Appasamy v Appasamy*** [1988] SLR 132
 - a holographic will is a document under private signature; pp 12, 22-25
- 5 ***MacGaw v Jean*** [1990] SLR 149
 - authentic document; p 21
 - oral evidence shall not be admissible to vary the terms of a deed except where -
 - i the deed contained terms or clauses ambiguous or imprecise
 - ii there was writing providing initial proof
 - iii the parties have expressly or tacitly waived the prohibition
 - iv the person affected was a third party

- 6 ***Dominion Traders v Govinden (2)*** [1990] SLR 266
 - books kept by merchants within the meaning of the Commercial Code are admissible in evidence between them in respect of commercial transactions; pp 25-26
- 7 ***Vidot v Padayachy*** [1990] SLR 279
 - oral contract over R 5000; admissibility of oral evidence
 - impossibility to obtain written proof because of the special relationship between plaintiff and defendant; oral evidence admissible; p 18
- 8 ***Esparon v Esparon*** [1991] SLR 59
 - documentary proof
 - moral impossibility under art 1348 Civil Code of Seychelles; p 18
- 9 ***Francoise v Herminie*** [1992] SLR 111
 - the court has a wide discretion to decide what constitutes moral impossibility under art 1348 Civil Code of Seychelles based on the facts of each case; p 18
- 10 ***Soffa v Melanie*** [1994] SLR 152
 - public document, secondary evidence
 - admissibility of copies where there was some internal reference in an original; p 26