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ARTICLES

GRANDEUR OR MOCKERY?*

*Alain A. Levasseur***

Although Louis Casimir Moreau Lislet's name did not reach national fame, however legitimate his own and yet humble expectations could have been, his masterpiece¹ may nevertheless

* Copyright 1997 Alain A. Levasseur. This article is the third of three installments serialized in *Loyola Law Review* from a forthcoming book on Louisiana legal history by Professor Levasseur. *The Major Periods of Louisiana Legal History* appeared in Volume 41, No. 4, and A "Civil Law" Lawyer: Louis Casimer Elisabeth Moreau Lislet appeared in Volume 42, No. 2 of the *Loyola Law Review*.

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1. Moreau Lislet's five major works can be cited as:

- a. Digest of the Civil Laws Now in Force in the Territory of Orleans (1808).
- b. Civil Code of the State of Louisiana (1825).
- c. A general Digest of the Acts of the Legislature of Louisiana passed from the year 1804 to 1827 Inclusive (1828).
- d. The Laws of Las Siete Partidas which are still in force in the State of Louisiana,

serve as a perfect substitute. The Digest, or Code of 1808, is, without any doubt, "a testimony of his vast knowledge and mastery of a science identified with the difficulty of providing for every need to come, of meeting all the expectations, of solving all the issues and of ruling on all the interests at stake."² Today, it is granted that the Digest of 1808 was the work almost exclusively of Moreau Lislet who was, with James Brown, one of the two lawyers appointed by the Legislative Assembly to draft it.³

What remains the object of some controversy today is the absolute and definitive identification of the sources of law that Moreau Lislet used in drafting the Digest of 1808. Indeed, it appears that some scholars are, in a sense, raising some questions about Moreau Lislet's intellectual honesty, his good faith, and his moral integrity.

One will remember that James Brown and Louis Moreau Lislet had been specifically instructed "to compile and prepare, jointly, a Civil Code for the use of this territory. Resolved, that the two juriconsults shall make the civil law by which this territory is now governed, the ground work of said code."⁴ The Act of March 26, 1804 had previously defined the civil law as the "civil laws" in force in the said territory.⁵ On May 22, 1806, the two houses of the newly-formed legislature of the territory defined the "civil laws" then in force in the territory as: "1. The [R]oman Civil [C]ode, as being the foundation of the spanish law, by which this country was governed before its cession to France and the United States; 2. The Spanish law."⁶

It is obvious from the above that James Brown and Moreau Lislet had been given some very precise and specific guidelines

translated from Spanish by L. Moreau Lislet and Henry Carleton (1820).

e. A translation of the Title of Promises and Obligations, Sale and Purchase and Exchange from Spanish, of Las Siete Partidas by Moreau Lislet and Henry Carleton (1818).

2. LE COURRIER DE LA LOUISIANE, Dec. 10, 1832.

3. See "The political career of James Brown," Thesis by Fox Lawrence Keith, LSU; See the 1823 report of the commissioners on the project of the Code which became the Code of 1825 (page 11 of the report).

4. SESSION LAWS OF AMERICAN STATES AND TERRITORIES, Territory of Orleans, 1804-1811; Legis: 1-1806, S.I. p. 215; LE MONITEUR, June 7, 1806 (Villars, Boulegni, Bore' Watkins, Arnaud, and Mahon appointed a committee to collaborate with James Brown and Moreau Lislet in order to prepare a Civil Code for this Territory).

5. See 9 TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS 1803-1812, at 210 (Clarence E. Carter ed., 1940) [hereinafter TERRITORIAL PAPERS].

6. NATIONAL ARCHIVES, 8 ORLEANS TERRITORIAL PAPERS, Jan. 2, 1806—Dec. 31, 1806 (1958).

which left little doubt as to the sources of law they were required to use in their preparation of the 1808 Digest. And, yet, doubts have been raised and still exist, some 190 years later, in the minds of a few. The question still lingering is the following: Did Moreau Lislet actually and faithfully follow the instructions given to him, or did he *intentionally* violate these same instructions by relying on the Napoleonic Code of 1804 and the French "Projet" of the year VIII? Did he *willfully* circumvent the instructions he had been given?

The interest manifested in the comparative study of the law of Louisiana with the legal systems that contributed to its existence reached its climax with the controversy that pitted against each other two of the most prominent scholars of Louisiana law, Professors Batiza and Pascal.⁷ This controversy, this modern and contemporary tournament of scholars, is but the finale of a century and a half of a variety of theories advanced, first, by contemporaries of Moreau Lislet and, second, by scholars of the second half of the 19th century and of the first half of the 20th. These speculations have remained speculations and the theories elaborated have remained just that, theories. Few are those who have actually attempted to find out what Moreau Lislet did do, whether he expressed his own views on the sources of law he did consult in drafting the Digest of 1808 or whether his peers and contemporaries had anything to say about these sources of the Digest. It might be helpful, if it is not also very wise, to go beyond these speculations and theories and to look as thoroughly as possible at Moreau Lislet's work and professional life to see if he, himself, did not already give us the answer we have striven to keep in hiding, sometimes under the false pretenses of scholarship.

CHAPTER I: THE TOURNAMENT OF SCHOLARS⁸

In the foreword of the first article written by Professor Batiza,⁹ Dean J.M. Sweeney stated:

7. Professor Rodolfo Batiza, now retired, was a faculty member at Tulane University Law School. Professor Robert Pascal, now retired, was a faculty member at the Law School of the Louisiana State University Paul M. Hebert Law Center.

8. Title borrowed from the article written by Dean Joseph Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972).

9. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971).

It is fair to say, I submit, that my colleague has solved the mystery, now a century and a half long, of the sources of the Digest. There are some, it must be admitted, who suspected the truth all along and to them Professor Batiza gives due credit in his article. Still, it is one thing to foresee the answer to a riddle of history, and another to dispel it by compelling evidence and proving beyond reasonable doubt the French origin of 85 percent of the articles drafted by Moreau Lislet and James Brown.¹⁰

In answer, and challenge, to this forceful and confident assertion, Professor Pascal, faithful to the same thesis he had been advocating since 1965, wrote: "the Digest of 1808, though written largely in words copied from, adapted from, or suggested by the French language texts, was intended to, and does for the most part, reflect the substance of the Spanish law in force in Louisiana in 1808."¹¹

Let us take a close look at these conflicting theories and evaluate them in the context of the law—the veil they claim to have pierced.

SECTION I: PROFESSOR BATIZA'S THEORY OF THE FRENCH ORIGIN OF THE DIGEST OF 1808

The discovery in 1958 of a copy of the Digest of 1808, presently known as "The de la Vergne Volume" after the family who possessed it, led to the formulation of a theory that the substantive law of the Digest of 1808 is apparently of Spanish origin. The basis of this theory is to be found in the handwritten "*Avant-Propos*" of that same volume. Translating from the original French language of that *Avant-Propos* or foreword, one is told "that one will find . . . next to the French text, and article by article, the citation of the principal laws of various codes from which the provisions of our local *statut* are drawn."¹²

10. Joseph Modeste Sweeney, *Foreword* to Batiza, *supra* note 9.

11. Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 604 (1972).

12. See Moreau Lislet, *Forward [Avant-Propos] to A DIGEST OF THE CIVIL LAW IN FORCE IN THE TERRITORY OF ORLEANS (1808)*, "[The de la Vergne Volume]," The Louisiana State University School of Law, The Tulane University School of Law, 1968 (a reprint of Moreau Lislet's work) (author's trans. from French). The word "*statut*" has been kept in its original French version because of its ambiguity. It could be used in a legal sense to mean "status," such as one's legal status (capacity, marriage), or in a de facto sense to mean "condition" such as in the condition, status, of a married woman. It does not mean, however, statute in the English sense of a text of law passed by some assembly.

Three examples will explain and illustrate the technique used to support this theory:

- (1) Next to Book I, Chapter II, Title VII, Section I, Article 7, one finds the following citation: L 7, t 2, Part 4. In other words: Ley 7, Titulo 2, Partida 4, the Siete Partidas.
- (2) Next to article 8 of the same Book, Title, Chapter, and Section, one can read the following citations: L 4, T 23, P 4; L 5, V 1, Liv 2, T 1, S 1. Dom p.300. In other words: Ley 4, Titulo 23, Partida 4, the Siete Partidas again; Loi 5, Volume 1, Livre 2, Titre 1, Section 1, page 300 is a reference to the French version of Domat's Civil Laws in their Natural Order.
- (3) Across from Book III, Title II, Chapter III, Section I, Article 22, one finds a citation to: Part 6, tit. 1, loi 17 . . . Fuero Real Liv. 3, tit. 5, loi 9 et tit. 12, loi 7 . . . Rec. Cast. liv. 5, tit. 6, loi 12 et tit. 8, loi 1 . . . Dom. V 1, part 2, liv 3, tit. 3, S 1 et 2 . . . Feb Cont V 1. § 5 No. 72 . . . ibid. § 7 Nos. 105, 118, et 125. Feb. Jui, vol 2, liv 2, c. 1. § 1 Nos. 2, 3¹³

If we relate the above-cited sentence from the foreword of "The de la Vergne Volume" to the three examples selected, we would probably be tempted to conclude, and logically so, that the three articles of the Digest are mostly of Spanish origin¹⁴ and, accessorially, of Roman law origin. However, Professor Batiza challenges this simple literal, textual and "superficial" conclusion:

Despite this categorical assertion and the acceptance it has received, the truth of the matter is that "The de la Vergne Volume" is not primarily a compilation of sources, but one of concordances. The numerous citations appearing on the 245 interleaves include relatively few references to actual sources and generally fail to disclose the real origins of the Code of 1808.¹⁵

13. "Rec. Cast." means *Recopilacion de Castille*; "Feb. Cont." means *Febrero Contratos*; "Feb. Jui." means *Febrero* dealing with trials (*Juicios*).

14. It will be noted that in two of the three examples selected, reference is made to Domat. The author of the *Avant-Propos* explains in the fourth section that "as it would have been too long to refer to the laws of every code of Roman Law and Spanish Law, we decided, as to the Civil Laws, to cite *Domat* because each disposition of this work gives reference to texts of Roman Law where it has its origin."

In other words, Domat is only a middleman between the Digest of 1808 and Roman Law then called "Civil Laws," and cannot be considered the actual source of certain dispositions of the Digest. If the words are borrowed from Domat, the substance is nevertheless Roman as required by the instructions given to Moreau Lislet and James Brown. It should be noted that Professor Batiza does not seem to have pointed to this relationship between the Digest, Domat and Roman Law as established in the *Avant-Propos* to the Digest.

15. Batiza, *supra* note 9, at 9.

The distinguished professor and legal scholar comes to this position after having conducted an extremely methodical, not to say meticulous, comparative study of the 2,160 articles that make up the Digest of 1808.¹⁶ All in all, we are told that Professor Batiza was "led to the identification . . . of the individual origins of 2,081 provisions."¹⁷ The results of Professor Batiza's painstaking research are as follows:

[T]he French *Projet* of the Year VIII is the source of 807 provisions; the French Civil Code of 1804 is the source of 709 provisions. Thus, the French *Projet* and Code, combined, account for 1,516 provisions, or about 70 percent of the Louisiana Code of 1808. Of the 709 provisions from the French Civil Code, however, 372, or more than 50 percent, were actually borrowed from the *Projet*. Domat contributed 175 provisions, or 8 percent, Pothier 113, or 5 percent, and eighteen can be traced either to Domat or Pothier or both.¹⁸

In the end, Professor Batiza concluded that 85 percent of the provisions of the Louisiana Civil Code of 1808 find their source in French texts, and the remaining 15 percent come from various sources such as *Las Siete Partidas* (67 provisions), *Febrero Adicionado* (52 provisions), the Institutes of Justinian (27 provisions), Blackstone (25 provisions), and Justinian's Digest (16 provisions).¹⁹

In a book with a limited publication of twelve copies only,²⁰ Professor Batiza describes the method he believes Moreau Lislet used in the drafting of the Digest of 1808:

In the preparation of the 1808 code the first step would have necessarily been the undertaking of a general survey of the area of private law to be covered on the basis of the various Spanish compilations, i.e. the *Fuero Real*, *Siete Partidas*, *Laws of Toro*, *Compilation of Castile*, and *Compilation of the Laws of the Indies*. It would have been very difficult for Moreau Lislet, who was of French ancestry and trained as a lawyer in France, not to have

16. I wish to express here my admiration and respect for my friend and colleague Rodolfo Batiza. His knowledge, scholarship and professional commitment will always be an example to be followed. May he forgive the awkwardness shown in defending a position contrary to his opinion.

17. Batiza, *supra* note 9, at 11.

18. *Id.* at 11-12.

19. *Id.* at 12 (citations omitted).

20. RODOLFO BATIZA, SOURCES WHICH HAD A SUBSTANTIAL OR PARTIAL INFLUENCE ON PROVISIONS OF THE LOUISIANA CIVIL CODE OF 1808: THE ORIGINAL TEXTS, v. 3 (1974).

taken advantage of the best model for codification then available, even at the risk of not adhering to the instructions received

Moreau Lislet adopted the structure, or organization, of the French code and *projet* as the framework for the Louisiana code. There were, however, some areas not covered, by either, e.g. slavery, master and servant . . . which the drafter included as an integral part of the Louisiana code Nearly 1700 provisions taken literally and almost literally by Moreau Lislet from French codal and doctrinal texts pervade the Louisiana code, adopted no doubt on the theory that the Roman law tradition shared by the French and the Spanish legal systems made them essentially similar.

On the other hand, there were a number of Castilian institutions, some derived from Roman law, and some from indigenous customary law, which were at variance with those of French origin, particularly in matters of illegitimacy, curatorship, succession law, and community of gains. To have ignored the Spanish law in those areas would have been in open disregard of the instructions received, but even here French texts are found throughout the code. Had the drafter, however, resorted solely to the Spanish compilations in order to accomplish his task, the final product would have been at best a 17th century compilation, rather than a 19th century code.²¹

If one is to bear a judgment purely on mathematical grounds, it is logical to formulate the following conclusion on behalf of Professor Batiza: the sources of the Louisiana Code of 1808 are fundamentally French.

SECTION II: PROFESSOR PASCAL'S THEORY OF THE SPANISH ORIGIN OF THE DIGEST OF 1808

It was only in 1965 that Professor Robert Pascal put in writing, and officially so therefore, the theory he had defended over many years in conferences and classroom lectures. His thesis was, and still is, that although written in terms literally copied, taken or adapted from provisions and texts drafted in the French language, the Digest of 1808 was actually meant to

21. *Id.*

reproduce, as it does to a large extent, the essence of the Spanish law in force in Louisiana in 1808.²² Indeed, one must not forget that Spanish and Roman laws were the law of the land in Louisiana in 1806 when Moreau Lislet and James Brown were commissioned to draft a civil code on the basis of the then applicable law.²³ That law existed neither in a codified form, nor in a format that would have made its codification an easy task. Moreover, the requirement that the drafters write the first Louisiana civil code in the French language made their task even more difficult.

It happened that French law, which was then very close to Spanish law since both legal systems shared many of the same original sources, had just been presented to the French people and the world in a form rather unique at the time: the 1804 Civil Code of the French people. The Code of 1804 offered an incomparable resource of organized and structured civil law texts to the Louisiana drafters, in addition to the fact that these texts were in the French language. Furthermore, the *Projet* of the year VIII was closer to Roman law and the Roman-Visigothic legal institutions than the Code of 1804 itself and resembled even more the Roman-Spanish legal system in force in Louisiana. This explains why the *Projet* of the year VIII was used by James Brown and Moreau Lislet in drafting the Louisiana "Code" of 1808. These two drafters, very practical and resourceful men, quite naturally either used these available French texts whenever necessary or else found inspiration and guidance in them whenever they were required to transpose in the French language the institutions and rules of Spanish or Roman substantive law.

Where, on the contrary, Spanish and Roman substantive laws could not be matched with a "tailor made" French text, the two Louisiana codifiers had to resort to other texts or to drafting the articles themselves.²⁴ Professor Pascal offers several arguments in support of his theory.

22. Robert A. Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 With Marginal Source References in Moreau Lislet's Hand*, 26 LA. L. REV. 25 (1965).

23. See Alain A. Levasseur, *The Major Periods of Louisiana Legal History*, 41 LOY. LAW REV. 585 (1996).

24. Pascal, *supra* note 11, at 603.

One will note, at the outset, that "The de la Vergne Volume" contains no express reference to either the French Civil Code of 1804 or the French *Projet* of the year VIII as potential sources for the provisions of the Digest. On the contrary, as is stated clearly by the author of the foreword—Moreau Lislet—the notes found in the volume refer to the "texts of the civil²⁵ and Spanish laws that have some relationship" with the provisions of the Digest. The justification for this "relationship," and not "actual source" in the literal sense, is simply that the law of Louisiana was Roman and Spanish in its origin.²⁶

Much more serious is Professor Pascal's charge that Professor Batiza:

failed to demonstrate that Moreau and Brown had succeeded magnificently in borrowing phraseology from French legal writings to prepare, in the French language and in civil code form, all as directed by the Territorial Assembly, a statement of law so closely based on the Spanish-Roman civil laws in force that it could be entitled a 'Digest' of those laws, and he failed to verify the validity of the Moreau notes in *The de la Vergne Volume* as references to the sources of the *substance* of the rules of the Digest.²⁷

This charge is at the center of the controversy between the two legal scholars.

Professor Pascal gave the following examples²⁸ to illustrate the basis of his position:

a. *First example:*

Digest of 1808: Book 1, Title 7, Article 20:

Lorsqu'une veuve est suspecte de se dire enceinte pour se perpétuer dans la possession des biens de son mari, par la supposition d'un prétendu héritier, l'héritier ou les héritiers présomptifs du mari pourront obtenir un ordre du juge, pour faire examiner par des matrones nommées à cet effet, si elle est enceinte ou non,

25. As stated before, the expression "civil laws" must be understood as meaning "Roman Law."

26. See Levasseur, *supra* note 23.

27. Pascal, *supra* note 11, at 608-09.

28. It will be necessary to give these examples in their French language since the controversy bears precisely on the use, or misuse, of texts in their French version.

et si elle l'est, pour la faire tenir dans un état de contrainte jusqu'à ce qu'elle soit délivrée.

Si la veuve, sur cet examen, n'est pas jugée enceinte, l'héritier ou les héritiers présomptifs de son mari, seront envoyés en possession provisoire de sa succession, en par eux donnant caution de la restituer, si la femme vient à accoucher d'un enfant viable, dans le tem[p]s compétent fixé par la loi, depuis la mort de son mari.²⁹

Professor Batiza could not find, in either the *Projet* of the year VIII or in the French Code of 1804, or in Domat, or in Pothier, any French text or provision which could be "matched" with this article 20 of the Digest. However, *Las Siete Partidas* contains such a provision that can be traced back, in fact, to the Digest of Justinian.³⁰ Shouldn't Professor Batiza have stopped at this point, since Moreau Lislet had indicated in the Louisiana Digest of 1808 that the source of that article 20 was, indeed, in *Las Siete Partidas* and in *Febrero Juicios*? Ignoring this reference given by Moreau Lislet, Professor Batiza was to add that it was by "chance" that he discovered the "source" of that article in the commentaries of the English jurist Blackstone, since the English version of article 20 of the Digest borrows from Blackstone's English text. Professor Batiza even asked the following questions:

[W]as article 20 a contribution of James Brown in his capacity as a common-law lawyer? Was Moreau Lislet sufficiently familiar with both the common law and Blackstone so as to make contributions from Brown unnecessary? Would a civilian like Moreau Lislet, however knowledgeable of the common law, be likely to prefer a common law commentator over civilian sources? Actually,

29. LA. DIGEST OF 1808, art. 20. The following is the author's translation of article 20:

When a widow is suspected to feign herself with a child, in order to maintain herself in the possession of the estate of her husband, by the supposition of a pretended heir, the presumptive heir or heirs of the husband may obtain from the judge, an order that she may be examined by matrons appointed for that purpose, in order to discover whether she is with a child or not, and if she is, to keep her under proper restraint until delivered.

And if the widow be, upon examination, found not pregnant, the presumptive heir or heirs of the husband shall be put into a provisional possession of the inheritance, upon their giving security to return the same, if the widow should be delivered of a child able to live, within the time prescribed by law, after the death of her husband.

Id. (author's trans.).

30. SEXTA PARTIDA, Tit. VI, Ley XVII; JUSTINIAN'S DIGEST, 25, 4, 10.

there is evidence to the effect that the first two questions were answered by Moreau Lislet himself, the former in the negative, and the latter in the affirmative.³¹

Why create difficulties where there are none, asks Professor Pascal?³² This scholar suggested, then, that the drafters of the Digest of 1808 simply used Blackstone's English text to reproduce a rule that is Spanish in substance. One can add some support to Professor Pascal's evaluation of Professor Batiza's statement. Indeed, in looking at Blackstone's Commentaries, one can read the following:

and, if she be (with child), to keep her under proper restraint till delivered; which is entirely conformable to the practice of the civil law: (note o); but, if the widow be, upon due examination, found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within forty weeks from the death of a husband.³³

Blackstone advises us in "note o" to consult "Ff, 25, tit. 4, per tot.," which stands for Justinian's Corpus Juris Civilis, Book 25, Title 4 "Concerning the Examination of Pregnant Women, and the Precautions to be Taken With Reference to Their Delivery." There, under a reference to Ulpianus, the following Roman law rules appear:

(2) In accordance with this rescript, a woman may be summoned before the Praetor and, having been interrogated as to whether she believes that she is pregnant, can be compelled to answer (4) . . . If, however, she should deny that she is pregnant, then, in accordance with this rescript, the Praetor must summon midwives (6) The Praetor also must select the house of the respectable matron to which the woman must go, in order that she may be examined.³⁴

A French translation, by none other than Pothier himself, of Justinian's Digest or Pandects gives the following title to Article II of Title IV of Book XXV: *Du cas où la femme se dit enceinte après la mort de son mari* (of the instance where a woman declares that she is pregnant after her husband's death).³⁵

31. Batiza, *supra* note 9, at 28.

32. Pascal, *supra* note 11, at 611.

33. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW, Book I, Chapter 16, Of Parent and Child, No. 456 (1758).

34. JUSTINIAN'S CORPUS JURIS CIVILIS, Book 25, Tit. 4.

35. R. J. POTHIER, PANDECTES DE JUSTINIEN, MISES DANS UN NOUVEL ORDRE (1821).

Thus, as Professor Pascal has argued, the text of Book 1, Title VII, article 20 of the Louisiana Digest of 1808 is very much Roman, and Spanish even more so in substance,³⁶ as Blackstone himself, the so-called source of that article, had recognized in his Commentaries. Furthermore, Blackstone added a reference to "the Gothic constitutions."

b. Second Example:

Digest of 1808: Book III, Title I, Chapter VI, Section II, Article 96:

L'héritier soit testamentaire, ou légitime, ou irrégulier, qui craint d'accepter une succession, ou d'y renoncer avant d'avoir eu le tem[p]s d'en connaitre les forces et les charges, peut n'accepter la succession que sous bénéfice d'inventaire.³⁷

Domat: Book I, Title II, Section II, art. I:

Tout héritier, soit testamentaire ou ab intestat, qui doute que l'hérédité soit avantageuse, et qui craint de s'y engager, peut auparavant demander qu'il soit fait un inventaire des biens et des titres et papiers de l'hérédité: et sans prendre le tem[p]s pour faire délibérer sa déclaration qu'il se rend héritier par bénéfice d'inventaire. Et par cette voie il ne sera tenu des dettes et des charges de l'hérédité, qu'autant que les biens pourront y suffire, sans que les siens y soient engagés.³⁸

Professor Batiza concludes from a comparison of the text written by Domat and article 96 of the Digest that the latter

36. 2 LAS SIETE PARTIDAS 1024 (L. Moreau Lislet and H. Carleton, trans. 1820).

37. LA DIGEST OF 1808, art. 96. "The testamentary, or legal, or irregular heir, who is afraid to accept or renounce a succession, before having had the necessary time to be informed of its property and charges, may accept the succession with the benefit of an inventory." *Id.* (author's trans.).

38. JEAN DOMAT, LES LOIX CIVILES DANS LEUR ORDRE NATUREL, *des hérities bénéficiaires*, Tit. II, Sect. II, art. I. (Paris 1777).

Every heir or executor, who doubts whether the succession be advantageous or not, and who is afraid to engage himself in it, may beforehand demand that an inventory be made of the effects, and of the deeds and writings belonging to the inheritance; and without taking time to deliberate, he may declare that he accepts the succession with the benefit of an inventory. And by this means he will be liable for the debts and charges of the inheritance only in so far as the goods belonging to the deceased shall be sufficient to acquit, and his own estate will not be chargeable therewith.

JEAN DOMAT, 2 THE CIVIL LAW IN ITS NATURAL ORDER § 2690 (William Strahan trans., 1853).

was substantially influenced by the former and, consequently, that article 96 has a French source. Professor Pascal replied that the rule of law found in the Digest of 1808 is also very similar to a provision of *Las Siete Partidas* to which Moreau Lislet made an explicit reference.³⁹ Besides, the reference to Domat should be interpreted as a reference to Roman law, not to French law.⁴⁰ Batiza “often ignores the fact that the rule may be Spanish-Roman as well as French if he can match the phraseology of the Digest’s French text with that of a French language text.”⁴¹ Professor Pascal concluded that “[h]ad Professor Batiza pretended to no more than a philological exercise—and made it clear he intended no more—there could have been no objection to his work, no cause for misunderstanding, and no reason for this reply.”⁴²

These are the two opposing theories in this controversy. The gap between them is deep. To a large extent, it involves a proposition of the theory that *form overrides substance*, the Batiza theory; whereas the other, the Pascal theory, argues that there is more to a text than its form and language and that *form may disguise the substance*.

SECTION III: FORM VERSUS SUBSTANCE

Our purpose here is to attempt to reach a judgment as objective as possible—a somewhat ambitious and daring task—on the theories presented in the preceding sections. To formulate this judgment, and in support of it, we shall introduce a few yet unknown historical documents that ought to help in reaching a conclusion on the foundations and the strength of these same theories. The historical documents we have uncovered have not yet been brought into this tournament of scholars despite the

39. See SEXTA PARTIDA, Tit. VI, Ley 1.

40. Either Professor Batiza overlooked the *Avant-Propos* to the Digest written by Moreau Lislet or he decided to ignore the good faith statements made therein by Moreau Lislet. One such statement is as follows (author’s trans. from French):

But considering that it would have been too long to refer to the Laws of all the Codes of Roman Law and Spanish Law, we restricted ourselves, as far as the Civil Laws are concerned, to cite Domat, because we can find in that work (Domat’s Civil Laws) on every provision it contains, the texts of the Roman Law from which they come.

Moreau Lislet, *Avant-Propos* to “The de la Vergne Volume.”

41. Pascal, *supra* note 11, at 624.

42. *Id.* at 607.

fact that they have been in existence since the early 1800s. We believe that their existence should, at least, have been suspected and that a search for their discovery ought to have been undertaken to attempt to clear the cloud still hanging over the true sources of the Louisiana Digest of 1808 and, more particularly, over Moreau Lislet's intellectual integrity which was much admired in his days.

A comment on the text of the 1814 foreword to the notes in "The de la Vergne" copy of the Digest of 1808 must be made at the outset. One will notice that the grammatical structure of the first paragraph of the foreword makes it an introductory paragraph meant to state the purpose of the book and to lay out the methodology used in its presentation. The stated purpose is "to make known those texts of the civil laws and the Spanish laws which have some *rapport* [with the Laws of this State]."⁴³ As to the presentation or format of the book, it consists of blank pages inserted between the pages of the Digest and of written notes on these inserted pages. However, with the Digest having been written and printed in two languages with the French text as the authoritative version and the English text as a mere translation,⁴⁴ it was therefore essential to be very explicit and clear with regard to the controlling French version of the text of the Digest. This is what the second paragraph of the foreword tells the reader:

To this effect, one will find next to the English text, a *general list* of all the *titles* of the Roman Laws and Spanish Laws, which are *related to the subject matters* dealt with in every chapter of the

43. The French text of the first paragraph of the *Avant-Propos* reads, in part, as follows: "*Le but de cet ouvrage est de faire connaitre. . .quels sont les textes des loix civiles et Espagnoles, qui y ont quelque rapport!*" Moreau Lislet, *Foreword [Avant-Propos]* to LA DIGEST OF 1808.

44. Evidence of this is found in a letter from Governor Claiborne to the Secretary of State:

Sir, The Secretary of the Territory, will transmit you a Copy of the 'Civil Code,' adopted at the last Session of the Legislature. You will find the English Text extremely incorrect; this is attributable to the circumstance of the Work having been written in French, and the translation prepared by persons who were not well acquainted with the English Language; so erroneus does the translation appear to be, that it will probably be necessary to declare by Law, that the French shall (solely) be considered the legal text. . . .

See *supra* note 5, at 802-03.

Digest, and next to the French text, and article by article, the citation of the *principal laws of diverse codes, from which the dispositions of our local status have been extracted.*⁴⁵

Hence, this created a system of general references to *titles* of laws *only* opposite the English text of the provisions of the Digest and, opposite the French text of the same provisions of the Digest, an inventory of citations to *the principal laws* selected from the *titles* appearing next to the English text. This distribution of the references between the French text, on the one hand, and the English text, on the other hand, appeared quite logical at the time since:

The French, like the Spanish, are the languages of our law and of our doctrine. The English is nearly useless to us as *lingua juris*, since we are regulated by no code exclusively written in English, and we need not consult nor cite authors who have written in that language, except it be for mere parade or through pedantry
⁴⁶

As to the references that will be made to Domat, the author of the foreword adds a clear explanation; he tells us that Domat is cited "because one finds in every disposition of that book [the Civil Laws] the texts of the Roman Law from which they have been taken."⁴⁷ Thus, Domat was not cited because he wrote *in French on French law* but rather because his work entitled "The Civil Laws in Their Natural Order" contains the essence of the Roman law that the drafters of the Digest of 1808 were required to use as the basis and source of their assignment.

If we accept this formal and rational presentation of the Digest, is it still possible to conclude that the use of the French language was actually more than the mere use of a formal language of the law, its vehicle in a sense, and that it was, in reality and truth, the language of the *substance of the law*, making

45. Moreau Lislet, *Avant-Propos* to LA DIGEST OF 1808 (emphasis added).

46. Editorial, LA COURIER, June 1, 1821.

47. Moreau Lislet, *Avant-Propos* to LA DIGEST OF 1808. This text stresses the technique used by Brown and Moreau Lislet in drafting the Digest. The true and primary, but remote, source of some provisions of the Digest of 1808 is Roman Law, whereas the mediate or formal source of that same law is Domat's written work on Roman Law, his treatise on *Les Loix Civiles dans leur Ordre Naturel*—or "the Civil Laws"—as used by Moreau Lislet.

French substantive law the law of Louisiana in 1808?⁴⁸ According to Professor Batiza, it is quite possible. In his response to Professor Pascal's reply, he wrote: "[I]t is clear that Moreau Lislet took considerable liberties with the instructions since the civil law of the Territory that was to be codified was almost entirely Spanish, and the Code of 1808 shows an overwhelming French influence."⁴⁹ Professor Batiza went on to add:

To make "substance" the sole criterion for the identification of sources when the actual sources can be established beyond doubt on the basis of both language and substance is nonsensical. On the basis of substance alone, either Portuguese or Italian rules, or those from any other "Roman-oriented" system, could be advanced as sources of the Code of 1808 as readily as the Spanish rules.⁵⁰

Is it really so "nonsensical?" One may wonder why Professor Batiza did not add an adjective before the word "sources" as it is first used in the above quote, whereas the adjective "actual" appears in front of "sources" when that word is used the second time. Would that missing adjective have been "fictitious" or "artificial" to be contrasted with "actual?" Where would the proper adjectives, at least in this context, of "immediate" as opposed to "mediate" sources have been used? "Immediate," in the sense of "direct, without intervention, actual," would have been applied to those sources of Roman and Spanish law that have a direct "rapport, relation" with Louisiana law, as the Avant-Propos to the Digest of 1808 states.

On the other hand, the adjective "mediate" would have been used with the word "sources" to describe those sources that stand "in between, in the middle"—the French sources of law as Professor Batiza would probably argue. But, then, why not use a "mediate" source of law, such as the French legal language, to convey the substance of the "immediate" source of law, Roman or Spanish, if there is compatibility, as there must be, between these two kinds of sources? Is it not possible, then, to consider that French was used by Moreau Lislet as the vehicular *legal language* of the *law* as he was required to do? Let us call here

48. See in particular, Zygmunt Ziembinski, *Le langage du droit et le langage juridique. Les critères de leur discernement*, 19 ARCHIVES DE PHILOSOPHIE DU DROIT 25 (1974).

49. Rodolfo Batiza, *Sources of the Civil Code of 1808: Facts and Speculations: A Rejoinder*, 46 TUL. L. REV. 628, 649 (1972) (citation omitted).

50. *Id.* at 645.

on the testimony of the "legal spirit or frame of mind" of Moreau Lislet's time and cite one of his contemporaries:

We would have chosen official representatives who would have set as a *sine qua non* condition that in order to be a judge, one must know French, as the Territory's language, and Spanish as the language of our governing laws. For it is in the order of things that the parts be conform[ed] to the whole rather than the whole to the parts.⁵¹

The language of the governing law, then, was undeniably Spanish; Moreau Lislet himself stated it in terms that leave no doubt whatsoever, even to a reasonable reader of our era. In an announcement seeking individual subscriptions for the purchase of his translation in French of the *Siete Partidas*, Moreau Lislet wrote the following:

*Personne n'ignore combien l'étude des lois espagnoles est précieuse pour la décision des causes qui sont portées devant les tribunaux de cet état puisque l'autorité de ces lois y subsiste en matière civile, dans tout ce qui n'est pas incompatible avec notre Constitution. On sait que le Code Civil qui a été rédigé pour cet Etat ne contient en quelque sorte que les principes primitifs abstraits de ce droit dont on voit les développements, les exemples, les conséquences et les limitations dans les lois du pays qui lui ont servi de source. C'est dans cette source qu'il faut aller puiser pour avoir une véritable connaissance de notre jurisprudence actuelle.*⁵²

51. Editorial, LE COURRIER DE LA LOUISIANE, July 25, 1821 (author's trans.).

52. LE COURRIER DE LA LOUISIANE, Oct. 15, 1813.

The following English text appeared in the same newspaper on the 23rd and 28th of April 1813:

No man is ignorant of the absolute necessity of a study of the Spanish laws, for the decision of causes which are brought before the tribunals of this state where the authority of these laws subsists in civil cases, in all that is not incompatible, with our constitutions or has not been altered or abrogated by our several legislatures. It is well known that the Civil Code which has been digested for this state contains in some measure, only the primitive and abstract principles of that law, the developments, examples, consequences and limitations of which are to be perceived in the ancient laws of the country, which formed its basis. It is then to that source we must recur to obtain a true knowledge of our actual jurisprudence.

LE COURRIER DE LA LOUISIANE, Apr. 23 and 28, 1813.

Moreau Lislet added the following:

The work intended to be offered to the public, will be preceded by a preliminary introduction, which will give an idea of the law system observed in Spain and her colonies, of the several codes published at different times, and which are still in force there, and finally of the authority enjoyed by the Roman and church laws, wherever the Royal laws are silent or deficient. At the head of each title, the translation of which will be given, will be placed a list of the several titles of the

The following four examples will show that in those legal matters that had to be specifically governed by Spanish law or Roman law because of their differences with French law, Moreau Lislet used French as the required legal language in order to transcribe these Spanish or Roman rules of law. It is, therefore, in the Spanish or Roman laws that the *immediate* or *primary* or *actual* sources of the articles of the Digest drafted in French are to be found.⁵³

a. First Example: Matrimonial Law

The first example is taken from the law of matrimonial regimes or marriage contracts and, in particular, the contract of partnership or community of acquests or gains—*De la Société, ou Communauté d'Acquêts ou de Gains*.⁵⁴

Article 64:

institutes of the pandects, of the code & the novels of Justinian, of the different Spanish codes, & of the canonical law, as well as the several works treating of the same matter such as Domat's civil laws, Pothier's writings, Febrero's library, and the Curia philipica. In fine at the end of each law will be placed a note showing all such laws of the civil code of this state, and of the recopilation de castilla, which contain provisions on the same subject, in such manner that it will be easy to verify what alterations the ancient law contained in the seven Partidas, may have experienced in modern or actual legislation. . . . The said translation has been made by Mr. Moreau Lislet, counsellor at law of this city, who had made it only for his private use, but has been encouraged by his friends and colleagues to render it public. . . . Mr. Moreau Lislet hopes to be seconded in his undertaking by Mr. Mazureau, another jurisconsult of this city, well versed in the Spanish language, and known by his talents in jurisprudence. . . .

LE COURRIER DE LA LOUISIANE, Apr. 23, 1813.

Can't we gather from these excerpts that Mazureau could easily have denounced Moreau Lislet if Moreau Lislet had betrayed the specific instructions he had received to draft a Code or Digest in 1808 according to Roman and Spanish sources? One will notice also that in this same advertisement, Moreau Lislet uses the same language he used in the Avant-Propos to the Digest as regards *the Roman and Spanish laws which deal with the same subject matter*.

53. One wonders how Professor Batiza could make the following statements: *The fact that the substance of the rule expressed may conform to the Spanish-Roman law in force in 1808 is entirely irrelevant*, merely proving what the writer had already pointed out himself: "There are considerable similarities between some French and Spanish legal principles owing to the common heritage of Roman law and even some Germanic customs." *Every "literal" ("verbatim") source is necessarily "substantive."*

Batiza, *supra* note 49, at 639 (emphasis added).

54. LA DIGEST OF 1808, Book 3, Tit. 5, Chap. 2, Sect. 4, arts. 63 to 85.

This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment; of the produce of the reciprocal labor and industry of both husband and wife; and of the estates which they may acquire during the marriage either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase was made is alone attended to and not the person who made the purchase.⁵⁵

All the references given across from this text in "The de la Vergne Volume" are to Spanish texts because the substance of the law of this article is undeniably Spanish. On the other hand, Planiol, writing about French law, stated that in the organization of the community from the sixteenth to the eighteenth centuries in France, "the most general practice was to include in the community: 1) all movables of the spouses; and 2) the immovables acquired, that is to say the immovables acquired by onerous title during the marriage."⁵⁶ In contrast, article 64 of the Digest of 1808 does not include in the community the movables of the spouses, which is perfectly consistent with Spanish law.⁵⁷

Article 65:

In the same manner the debts contracted during the marriage enter into the said partnership or community of gains; and must be acquitted out of the common funds, whilst the debts of both husband and wife anterior to the marriage, must be acquitted out of their own personal and individual effects.⁵⁸

The references given by Moreau Lislet across from article 65 are all to Spanish texts because Spanish law provided that debts incurred by the spouses before the marriage had to be paid out of the separate property of each of them, whereas under the Custom of Paris these debts would become the debts of the community.⁵⁹

55. LA DIGEST OF 1808, art. 64.

56. PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 83 (3d ed. 1948) (citing *Coutume de Paris*, art. 220) (author's trans.).

57. See Nina Nichols Pugh, *The Spanish Community of Gains in 1803: Sociedad de Ganaciales*, 30 LA. L. REV. 1 (1969).

58. LA DIGEST OF 1808, art. 65.

59. FUERO REAL, Ley 14, Libro III, Tit.20; COUTUME DE PARIS art. 211; POTHIER.

Article 66:

The husband is the head and master of the partnership or community of gains; he administers said effects; disposes of the revenues which they produce, and may sell and even give away the same without the consent and permission of his wife, because she has no sort of right in them until her husband be dead.⁶⁰

This provision reproduces exactly the substance of its immediate and actual source, which can be identified as the following:

*Quando el marido enagena constante matrimonio algunos de los gananciales, o todos, lo que puede hacer sin consentimiento ni licencia de su muger no siendo castrenses ni casi castrenses, valdra la enagenación, porque la muger no tienne uso ni dominio en los gananciales hasta que el marido muere*⁶¹

If Moreau Lislet had looked in Pothier's works for the source of article 66, as suggested by Professor Batiza,⁶² it likely would only have been for the purpose of selecting a few French words considering that the substance of this provision of the Digest is much more a transposition of its Spanish source than it is of the French text by Pothier.

b. Second Example: Law of Persons

The second example is taken from the law of persons and in particular Book I, Title VII of the Digest: Of Father and Child. Chapter I is entitled "Of Children in General" and is made up of six articles. Professor Batiza undertook to establish that to draft

TRAITÉ DE LA COMMUNAUTÉ, Part.I, Chap.II, Sect.1, n. 26. See, as an illustration, the "Marriage contract between Jean Henry Lastrapes and Geneviève Boisdore, Opelousas: 1799, June 1." Written in French (the vehicular language at the time), it refers to the "laws and Custom of Spain" (the substantive law) in these words:

Les dits deux conjoints ont déclaré qu'ils ne se sont point obligés à payer les dettes l'un de l'autre créées avant leur mariage, qu'au contraire, leur volonté fut et est qu'elles le fussent par celui ou celle qui les avaient faites et de son propre bien sans que celui de l'autre ni sa personne y fut tenue en aucune manière. Les sus dits conjoints ont entendu et entendent et veulent que la communauté de biens soit régie selon les loix, us et coutumes d'Espagne, quand bien même cette colonie viendrait à changer de domination. . . .

Id.

60. LA DIGEST OF 1808, art. 66.

61. 1 FEB. ADIC. Part I, Cap. II (234) (Madrid 1806). "The husband, as head of the community, is deemed sole master over the community property, as long as it lasts, and he can dispose freely of the same, without the consent of his wife." 1 FEB. ADIC. Part I, Cap. II (234) (author's trans.).

62. Batiza, *supra* note 9, app. at 106.

these articles, Moreau Lislet was largely or partially influenced by at least four French sources: the Code of 1804, the *Projet* of the Year VIII, Domat, and Pothier. Another source cited is the commentaries of the English scholar, Blackstone. If the French sources did have an influence on Moreau Lislet, one will easily realize that they played a role only in providing a selection of French words—and here again the range of French words to chose from is necessarily limited considering the technicality of the subject matter—because the essence or substance of these articles is undeniably found in Ley 1, tit. 13 and Ley 1, tit. 15 of the Fourth Part of *Las Siete Partidas*.⁶³

63. LA DIGEST OF 1808, Book I, Title VII, Chapter I:
Of Children in General:

Art.1. Children are either legitimate or illegitimate.

Art.2. Legitimate children are those who are born during the marriage.

Art.3. Illegitimate children are those who are born out of marriage.

Art.4. There are two sorts of illegitimate children; to wit:—

Those who are born from two persons, who at the moment when said children were conceived, might have been duly married together; and those who are born from persons to whose marriage there existed at the time, some legal impediment. Adulterous and incestuous bastards belong to this last class.

Art.5. Adulterous bastards are those who are born from an unlawful connection between two persons who at the time when the child was conceived, were either of them or both connected by marriage with some other person.

Art.6. Incestuous bastards are those who are born from the illegal connection of two persons who are relations within the degrees prohibited by law.

The following is one of the relevant provisions from *Las Siete Partidas*:

Quarta Partida, Titulo XIII, Ley I:

Legitimo fijo tanto quiere decir como el que es fecho segunt ley, et aquellos deben seer llamados legitimos que nascen de padre et de madre que son casados (1) verdaderamente, segunt manda santa elesia. Et aun si acaesciese que entre algunos de los que se casasen manifestamente en faz de la elesia hobiese atal embargo por quel casamiento se debiese partir, los fijos que feciesen ante que sopiesen que habie entre ellos atal embargo, serien legitimos (2). Et esto serie tambien si amos non sopiesen que hi habie tal embargo, como si non lo sopiese mas del uno dellos (3); ca el non saber deste solo, face los fijos legitimos: mas si despues que sopiesen ciertamente (4) que habie entro ellos atal embargo, feciesen fijos, todos quantos fijos despues hobiesen (5), non serien legitimos. Pero si algunos entre quien hobiese atal embargo non lo sabiendo amos o el uno dellos, si fuesen acusados ante alguno de los jueces de santa elesia, et ante que el embargo fuese probado (6) nin la sentencia dada, quantos fijos fecieren entre tanto que estodieren en esta duda, todos seran legitimos. Otrrosi son legitimos (7) los fijos que home ha de la muger que tiene por barragana (8), si despues deso se casa con ella (9); ca maguer estos fijos atales non son legitimos quando nascen, tan grant fuerza ha el matrimonio que luego que el padre et la madre son casados, se facen por ende los fijos legitimos. Eso mesmo serie si alguno hobiese fijo de su sierva et depues deso se casase con elle; ca tan grant fuerza ha el matrimonio que luego que es fecho, es la madre por ende libre et los fijos legitimos(10).

LAS SIETE PARTIDAS.

The other relevant provision from *Las Siete Partidas* comes from Title XV of the

In Chapter 3 of the same Title VII of the Digest are found the following three provisions that again reveal the influence of the Spanish law:

Article 24. Illegitimate children who have been acknowledged by their father are called natural children, and those whose father is unknown are contra-distinguished by the appellation of bastards.

Article 25. The acknowledgment of an illegitimate child, shall be made by a declaration executed by a notary public in presence of two witnesses, whenever it shall not have been made in the registering of the birth or baptism of such child.

Article 28. Illegitimate children though duly acknowledged, cannot claim the rights of legitimate children. The rights of natural children are regulated under the title of successions.⁶⁴

Particular attention must be paid to the definition and concept of a natural child found in Digest article 24. This definition is none other than the one found in *Las Siete Partidas*: "Are natural and illegitimate as they were called by our forefathers, the children born out of wedlock, such as the concubine's children. Are called bastards those born from adultery, incest or from a

same part:

Quarta Partida, Titulo XV, Ley 1:

Naturales et non legitimos llamaron los sabios antiguos á los fijos que non nascen de casamiento segunt ley, asi como los que facen en las barraganas (1), et los fornecinos que nascen de adulterio (2), o son fechos en parienta (3) o en mugeres de orden (4), et estos non son llamados naturales porque son fechos contra ley et contra razon natural. Otros fijos hi ha que son llamados en latin manzeres (5), et tomaron este nombre de dos partes de latin mania et scelus, que quiere tanto decir como pecado infernal; ca los que son llamados manzeres nascen de las mugeres que estan en la puteria et dánse á todos quantos á ellas vienen: et por ende non puecen saber cuyos fijos son los que nascen dellas. Et homes hi ha que dicen que manzer tanto quiere decir como manceillento, porque fue engendrado malamiente et nasce de vil logar. Otro manera hi ha de fijos que son llamados en latin spurii (6), que quiere tanto decir como los que nascen de las mugeres que tienen algunos por barraganas de fuera de sus casas, et son ellas atales (7) que se dan á otros homes sin aquellos que las tienen por amigas, et por ende non saben quien es su padre del que nasce de tal muger. Otra manera hi ha de fijos que son llamados notos (8), et estos son los que nascen de adulterio: et son llamados notos, porque semeja que son fijos conocidos del marido que la tiene en casa, et non lo son.

LAS SIETE PARTIDAS.

Professor Batiza cites article 331 of the French Civil Code as the source of the above-referenced article 4 of the Digest and does not even mention Law 1, Title XV of *La Quatra Partida*, to which, in our opinion, article 4 of the Digest is closer, not only as to its form, but also as to its substance.

64. LA DIGEST OF 1808, arts. 24, 25, 28. Professor Batiza cites as the sources of these articles the following provisions of the French Civil Code of 1804: French Civil Code Article 334 as the source of Digest Article 25 and French Civil Code Article 338 as the source of Digest article 28. Batiza, *supra* note 9, at 53.

mother belonging to a religious order."⁶⁵ This definition is much more restrictive than the definition found in French law that included under the notion of natural filiation not only the simple natural filiation—equivalent to the concept of *Las Siete Partidas*—but also incestuous and adulterous natural children.⁶⁶

c. Third and Fourth Examples: Blondeau on the Digest.

The third and fourth examples are taken verbatim from a commentary on the Louisiana Civil Code of 1825 written that same year by a French professor, Blondeau.⁶⁷

In articles 357 to 366, on the curatorship of minors, the Code of 1825 reinstated verbatim articles 78 to 86 of Book I, Title VIII, Chapter II of the Digest of 1808. It is possible, therefore, to transpose the comments made by Blondeau on the articles of the Code of 1825 into the framework of the Digest of 1808 from which these same articles were copied.

In his general introduction to "The New Civil Code of the State of Louisiana,"⁶⁸ Blondeau expresses his disappointment with the form and structure of that Code, much of its style, and the length of many of the articles.⁶⁹ In addressing some of the substantive issues addressed in the Louisiana Code, Blondeau made the following comments regarding curatorship of minors:

By adopting the distinction so wisely established by Roman Law between persons under the age of puberty and adults (i.e. minors

65. LAS SIETE PARTIDAS, Quatra Partida, Tit. XV, Law I (author's trans.).

The source of article 24 would be, according to Batiza, the *Compilation de Castilla*, Lib. V, Tit. VIII, Ley IX. Professor Batiza was unable to cite a French source for this article—although the French Civil Code is cited as the source of the preceding or following articles—because, in our opinion, the substance of this article corresponds to Spanish Law and not to French law. Besides, in "The de la Vergne Volume" of the Digest of 1808—containing Moreau Lislet's handwritten notes and references—there is a footnote facing the title of Chapter III, which reads "Of Illegitimate Children." This footnote at the bottom of the page, in Moreau Lislet's handwriting, gives several references to either Latin or Spanish texts.

66. PLANIOL, *supra* note 56, at 454.

67. BLONDEAU, SUR LE NOUVEAU CODE CIVIL DE L'ETAT DE LA LOUISIANE 62 *et seq.* (Thémis ou Bibliothèque de Jurisconsulte 1826).

68. *Id.*

69. According to Professor Batiza, this was a strange and surprising comment coming from a French law professor on a Code "supposedly" French in style, wording and substance. Did Blondeau fail to "recognize" the French Code of 1804 or the French *Projet* of the Year VIII?

above the age of puberty), which distinction consists in submitting the former to the authority of a tutor who can altogether devise and carry out all the juridical acts required to protect the interest of his ward, whereas only one curator is given to the adult to approve, if necessary, the acts for which the adult has the initiative, the new Code has not however fully determined, as the Roman legislator had done, the condition of either those persons who are under the age of puberty or of those who are adults. Instead of one curator, as we have already said, adults will now be given two: one in charge of the assets or estate (*ad bona*), to assist the minor in the ordinary acts of his life, and a curator *ad litem* who has no other function than to assist the minor in the courts of justice and to substitute himself to the curator *ad bona* when the acts or interests of the latter can be in conflict with those of the minor. As in Roman Law, the curators (except for what will be said concerning the curator *ad litem*) are appointed only at the minor's request; but the Louisiana Code orders the judge to appoint the person designated by the minor, if that person is not prohibited from exercising the functions of tutor or curator. The curator *ad litem* is general or special; it is only a special curator that a judge can appoint against the will of the minor, which occurs in the event the latter goes to court before having requested a curator or having lost the one appointed, and he does not want to propose one.⁷⁰

Hence, according to this prominent scholar and a contemporary of Moreau Lislet, the law of curatorship in the Louisiana Civil Code of 1825 and, therefore, in the Digest of 1808, would have its origin or immediate source in Roman Law.⁷¹ On his part, Moreau Lislet gives references to different laws from "*Partida* 6," laws or "*leyes*" that express the substance of the articles of the Digest. Professor Batiza acknowledges the influence of both Roman and Spanish law, but classifies these "sources" under the category of "other sources" after citing as the primary source either Domat or Pothier.⁷² This example helps to point

70. BLONDEAU, *supra* note 67, at 194-95 (author's trans.).

71. In light of the time and the circumstances in which Blondeau was writing, it would be very difficult to suspect him of any bias in this controversy on the "actual sources" of the Digest of 1808. His impartial analysis of some provisions of the Code of 1825 gives all the more value to the theory of the Roman and Spanish sources of the Louisiana Digest of 1808.

72. It is interesting to note here that in his article on the sources of the Digest of 1808, Professor Batiza lists Pothier and Domat, and only in the third place *La Sexta Partida*, as sources of the articles of the Digest on curatorship. Batiza, *supra* note 9, at 58-59. In our opinion, the reference to Pothier is not justified, especially as regards

out that there is something superficial in Professor Batiza's methodology and his classification of the "actual" sources of the Digest of 1808.

This criticism is even more relevant and justified in the second example borrowed from Blondeau. This example deals with the law of emancipation:

Emancipation in the new Code can be compared to what Roman Law calls *venia aetatis*, rather than to our French notion of emancipation. Indeed, the emancipated minor does not have a defender anymore, except to receive an accounting from his tutor or curator, or to go to court, although this last restriction does not exist when emancipation results from marriage; he (the emancipated minor) is able to receive, without authorization, not only his wages but also all other amounts due to him; finally he can lawfully bind himself for an amount equal to one year of his revenues. This emancipated minor is not bound to return anything, on account of the juridical acts he entered into as stated above, either on the ground of lesion or on the ground of lack of use.⁷³

The articles of the Code of 1825 that were the objects of Blondeau's comments were articles 367 to 381, found in Book I, Title VIII, Chapter 3. They corresponded to articles 87 to 98, Book I, Title VIII, Chapter 3 of the Digest of 1808. Whereas Blondeau traced the origin of these articles on emancipation to their Roman law sources, Professor Batiza would consider these sources to be French. According to Professor Batiza, five out of the eleven articles of the Digest had their source—verbatim or almost verbatim—in the *Projet* of the Year VIII and the Code of 1804; two had their source in the Code of 1804 and one had its source in Pothier.⁷⁴

Professor Batiza does not cite any Roman law source, nor any Spanish law source for that matter, in reference to Blondeau's statement that "[e]mancipation in the new [Louisiana] Code can be compared to what Roman law calls *venia*

"mandate." In addition, between 1971 and 1974, Batiza corrected mistakes he had made in a number of his classifications and findings. For instance, in 1971, Batiza had listed Pothier as having had a substantial influence on Article 84 of the Digest. *Id.* at 59. In 1974, this influence is no longer cited and no reference is made to Pothier. On the contrary, we find a reference to *Febrero Adicionado* as having had a partial influence. *Id.* In other words, between 1971 and 1974, the sources have changed!!

73. BLONDEAU, *supra* note 67, at 195 (author's trans.).

74. Batiza, *supra* note 9, at 59. Professor Batiza did not tie the eleventh article to a particular source.

aetatis, rather than to [the] French notion of emancipation." In the volume of the Digest of 1808 that contains Moreau Lislet's handwritten notes and references, one can find a note "(a)" following the title "Of Emancipation" that reads: "For authorities on emancipation see at the bottom of page 51." At the bottom of page 51, the following references are found:⁷⁵

Adoptions and Emancipations *teatro* vol. 2, p.354 Dig. Li.1, t.7. *De Adoptionibus et emancipationibus et aliis modis*

<i>quibus potestas solvitur . . .</i>	46 laws
— <i>inst. Liv. 11 t. 11 idem</i>	12 laws
— <i>cod. Liv. 8 t. 48 idem</i>	11 laws
— <i>Partida 4 t. 18 de hos hijos profijados</i>	10 . . .

These handwritten notes confirm Blondeau's analysis of the concept of emancipation in the Louisiana Code of 1825, even if the text of the code articles was written in the French language. After having undertaken a research of sources of the substantive law of the Code of 1825, Blondeau, a contemporary of Moreau Lislet, would not suspect Moreau Lislet of any wrongdoing even though he could have been tempted to say so because, as a French jurist, he would have been naturally inclined to credit as much of the Louisiana civil code as possible to the *Code Napoléon*.

These examples—as well as others that could be given—are enough to illustrate, once again, the technique used by Moreau Lislet. Because Spanish law had been declared applicable in the Louisiana Territory, this law had to be regarded as the actual and immediate source of the dispositions of the Digest; whereas, the French texts that were used by necessity should be considered only as the vehicle—as the "formal" and "literal" source—of these dispositions.

When one tries to put oneself in Moreau Lislet's place as he was carrying out his mission, one can only conclude that he had no alternative but to obey the instructions he had received. James Brown, who knew Spanish, was working with Moreau Lislet; although Brown may not have worked as hard on the Digest of 1808 as Moreau Lislet, Brown, as far as we know, has

75. These references do not appear as such in "The de la Vergne Volume." Almost all of them, however, can be found in the introduction to Title XVIII of the Fourth Part of the translation of *Las Siete Partidas* by Moreau Lislet and Henry Carleton.

never been accused of surreptitiously importing French law into the Digest of 1808 or even of allowing Moreau Lislet to do so. In addition, when Moreau Lislet was appointed in 1806 to the committee of two to draft the Digest, he undoubtedly must have been conscious that one day, as a lawyer at least, he would have to handle legal issues and cases based on that very same Digest and that the solutions for these issues and cases would necessarily have to be found in the provisions on which he was working. Could he, then, have decided all alone that he could pull a veil over the eyes of an “uneducated” legal community of the time by seizing the opportunity to draft a code based on French law and not on the “Laws in force in the territory”?

It is hard to believe that Moreau Lislet—a man of integrity, dedication, and high moral values, as demonstrated in his personal life and legal profession—would not have been aware that neither the courts, nor his fellow members of the bar, Mazureau and Livingston in particular, would have been inclined to listen to his arguments or attach any credit to his word if he had failed them or if he had cheated on them. Had Moreau Lislet violated the trust placed in him in 1806, he would have quite obviously banned himself. And why would he have undertaken, on his own, the translation of *Las Siete Partidas* in French, first, and in English, subsequently, if there was to be no connection, no “rapport,” between the Digest of 1808 and the Spanish law?

It is hard to accept even the slightest suggestion that a man with such an excellent reputation and exemplary life could have committed this “fraud.” His contemporaries, whether trained in the law or not, did not think so; legal scholars, who, in the nineteenth and twentieth centuries, were to evaluate his contribution to the science of codified law, did not think so either.

CHAPTER II: 19TH AND 20TH CENTURY VARIATIONS ON THE SAME THEME

We have attempted to gather here many of the opinions and evaluations expressed either by contemporaries of Moreau Lislet or by scholars who, at a later time, became interested in his work and who, in their writings, addressed, either directly or indirectly, the crucial issue of the actual or presumed sources of the Digest of 1808. These opinions will be presented as they were expressed originally by their authors. We will abstain from

bearing any judgment or making any commentary that would inevitably lead to a search and an evaluation of the subjective reasons that may have inspired an author in expressing a "partisan," or personal, opinion. Such is not the scope of this study at this time. Therefore, we will transcribe these opinions as faithfully and honestly as can be done to illustrate that the current controversy on the actual sources of the Digest of 1808 is as old as the Digest itself. The reader will be the ultimate judge, convinced one way or the other by the evidence brought forth.

**SECTION I: MOREAU LISLET AND THE SPANISH SOURCES
OF THE DIGEST OF 1808: 19TH CENTURY SPANISH
VARIATIONS⁷⁶**

The supplement to issue 2077 of the *Louisiana Courier* on Monday, January 8, 1821 includes a very instructive report of a session of the House of Representatives held on January 3, 1821. The following excerpt has been selected for its relevance:

The report of the committee to whom had been referred the letter of the translators of the Partidas, was then taken up and read in the following words:

Your committee to whom had been referred the joint letters of Messrs. Moreau Lislet and H. Carlton, translators of such part of the Partidas as are considered to have the force of law in this state, by virtue of an article passed for that purpose, approved on the 3d [of] March 1819, beg leave to report, that in the opinion of your committee the said translators have discharged the duties imposed by said act with zeal and ability,

Your committee are of opinion that the labors of the translators in this invaluable work have been greater than they at first imagined; that the original Partidas is composed in about [3,000] folio pages, and written in an antiquated dialect, alike unconnected with the living and dead languages, . . . ; that they have bestowed more labour than was necessary to comply with the provisions of the act, inasmuch as each title of the work is preceded by a list of the titles of the Roman and Spanish laws, and of the civil code of this state, relative to the subject of which it treats, thereby adding to the utility of the work, and rendering it more

76. These opinions are presented in chronological order.

complete and satisfactory, and which must have required uncommon research in traversing the immense codes of Roman jurisprudence and perusing the less expanded but more complete abstract provisions of our civil code.⁷⁷

In the *Louisiana Courier* on Wednesday, May 16, 1821, the author of an editorial, signed "A LOUISIANIAN," had this to say about a recent decision of the Louisiana Supreme Court:

The Supreme Court of this State, has recently pronounced a decision, by which all those who are incapable of passing an examination in the English language, are excluded from the profession of the law. The style of this Anglo-Gallican Legislative regulation, and the violation of the rules of grammar and sound reasoning which characterise it, sufficiently designate the author. None but a man desirous of effacing all trace of his own origin, could have entertained the idea of a regulation so outrageous to the ancient population of Louisiana

. . .

But what excuse can they pretend to allege, when entertaining the most exaggerated idea of their own powers, they arrogate to themselves an authority purely legislative? In this regulation they declare that the English language is the *legal language* of the state of Louisiana. Have they duly reflected on the consequences of so palpable an error? When the law says *white*, the Supreme Court may decide that it says *black*, but their power extends no further; and it is vain that they undertake to change the immutable nature of things. The *political language* of Louisiana is unquestionably the English language, but its *legal language*, that is, the language in which the legislative will is expressed, is in the first place the Spanish, and secondly the French, in which the intelligible part of the civil code is written, and it is the knowledge of these two languages which the legislature, and not the supreme court (who are not authorised) might reasonably require in a lawyer.⁷⁸

77. LA. COURIER, Jan. 8, 1821.

78. LA. COURIER, May 16, 1821. We call the attention of the reader to that section of this editorial where the writer states that the *Spanish language is the language "in which the legislative will is expressed"* whereas the *French language is the language "in which the intelligible part of the civil code is written."* *Id.* (emphasis added). A definite distinction was made, then, between the language of the intent of the legislator, the Spanish language as the language of the substantive law, and the language of the formal or outward expression of that intent, the French language. This distinction made in 1821 is, we believe, reminiscent of the theory espoused by Professor Pascal.

The controversy went on for several months in 1821, as illustrated by the following excerpts:

Who can predict where the torrent may stop [sic]! Who can vouch that the usages and habits of the ancient population shall not be forever eradicated? . . . It is only from the Representatives of the people, that we ought to expect a remedy to so great an evil. Let us therefore hope, that the next legislature will put an end to those odious machinations, and will allow both populations peaceably to enjoy advantages which a paternal government grants to all its children.

What? Shall we not be allowed to raise our voice against the most tyrannical and arbitrary acts, without finding in the way, men so unreasonable as to charge us with throwing the brands of discord into society! What! to say that the Supreme Court have [sic] transgressed their powers, and to call the attention of the Legislature upon a measure, which, if it is not modified, must overthrow the existing order of things, and disturb the peace and good harmony which ought to exist among the two populations, it is to conspire against the state? [I]t is to wring the alarm bell, it is to call a civil war, it is to give the signal of hostilities between the Americans and the French? What a curious reasoning indeed! and what an excess of good faith.⁷⁹

Another excerpt provides:

The writer in the Advertiser, to whom we answered in our last, about the remarks to which the *celebrated regulation* of the Supreme Court has given rise, is truly tenacious in *his* opinion. He wants, at all events to [show] that we were wrong, . . . ; but he is endeavoring to make it appear that we have committed an outrage against the *whole of America* by reproaching (as he pretends) to the judges of the Supreme Court, some time their *low origin* and some time *the land that gave them birth*.⁸⁰

Later that year in June, the following appeared in the *Louisiana Courier*:

Vexatus toties, nunquamne reponam?

Let us start from a principle which is the basis of the eternal justice of a democratic republic. Our mandataries are nothing but the organs of the law. Whenever they speak by themselves they

79. LA COURIER, May 21, 1821.

80. LA COURIER, May 23, 1821.

cease to be anything; for, although we must respect the authorities [sic], we owe obedience to law alone:

In the first instance, I think that the supreme court in making that regulation have [sic] usurped the powers of the legislature [I]f an attorney who is unacquainted with the English language (which in this state is nothing but the instrument of conversation) cannot give advice to his fellow citizens, how can a judge who is unacquainted with the French, the Spanish and the Latin languages which are the Languages of our jurisprudence, be able to decide in the controversies arising among his fellow citizens? How will he be able to understand the argument, the law, and the doctrine, which must be cited in those languages? It is true, a few of the laws of the *Partidas* have been translated into English—but is ever a translation as good as the original? And does that small number of translations of our laws, suffice to give a thorough knowledge of our jurisprudence? Neither the French laws, which come next to the Spanish, nor the works of the Spanish and French law writers are translated. There is no translation of the Roman civil laws nor of its commentators. I now ask, how could a judge who is ignorant of those languages, understand the spirit of our fundamental laws? . . . The French, like the Spanish, are the languages of our law and of our doctrine. The English is nearly useless to us as *lingua juris*, since we are regulated by no code exclusively written in English, and we need not consult nor cite the authors who have written in that language, except it be for mere parade or through pedantry, since we find in abundance all the laws we stand in need of, in the three codes which are in force among us, as well as in the learned authors who have written in those three languages, whereby we are dispensed to have recourse to the monster called the common law, and to its able commentators.⁸¹

On July 25, 1821, the *Louisiana Courier* published a very elaborate and somewhat scholarly piece entitled “PROMISSA ADIMPLEBO.” It read, in part, as follows:

To judge one suit by another would be the height of absurdity and ignorance. *Illud in primis observare debet Judex, ne aliter judicat quam legibus, constitutionibus aut Moribus.* (de. offic. jud. inst.). By so doing we should become a kind of casuists in law, even more contemptible than the casuists in morals. I know that such is the manner of judging according to the common law, and that the common law is followed in other states of the Union; let

81. LA. COURIER, June 1, 1821.

it be followed elsewhere as much as they please, but it shall never be our law here, and we shall always repeat to our judges what was said to Pilate nineteen centuries ago: "*Nos legem habemus & secundum legem nostram judicare debes.*"

There is a fact unfortunately too true, it is that the trash known by the name of *Martin's Reports*, has infected our bar to such a point, that all our young lawyers and even some of our old practitioners, have their heads full of nothing else but those little tales of suits, equally insipid and out of place, and that their only occupation is to find some similitude or analogy between the cases reported and those confided to their care. They cite nothing but decisions of the courts of this State or of the courts of Virginia, Pennsylvania, [etc.] which they endeavor to adapt to our practice, and which by the bye serves only to form an Harlequin's coat

I have [shown] that the legislator alone could, and ought to explain the doubts of the law. Now the question is to know, whether there is actually any doubt. I think that the Supreme Court alone find [sic] some or fancy they [sic] discover it. The Constitution (General Provisions) says positively that the judicial proceedings shall be in the language in which the constitution of the United States is written, that is to say in [E]nglish

If we could have suspected so much weakness in [our representatives], we would have chosen individuals, who identifying themselves with our true interest, would have supported it with energy, instead of betraying us, and who, instead of suffering themselves to be deprived of the use of our language, of that language in which we uttered our first accents, . . . would have declared that no man should be called to public office, unless he could speak French. They would have stipulated as a *sine qua non*, that in order to be a judge, one would be obliged to know the French language, which is the language of the country, and the Spanish which is the language of the laws by which we are governed, for it is more in order, that the parts should yield to the whole, than the whole to its parts The Spanish government did, at least, religiously respect our habits and our language; it never thought of enacting a law, nor of issuing a decree to deprive us of them.⁸²

The controversy continued into the year 1824 at a time when Moreau Lislet, Edward Livingston and Pierre Derbigny were in the process of drafting the Louisiana Civil Code of 1825.

82. LA. COURIER, July 25, 1821.

Again in January 1824, the issue of the sources of laws that were in force in Louisiana came up in an editorial in support of Edward Livingston:

About twenty years ago, Mr. Livingston came to fix his residence among us. He brought with him as a statesman and a juriconsult, profound knowledge, a mind as vast as liberal, which naturally placed him on the first rank, as he had been in his native place. Too great to be accessible to those national prejudices unworthy of a civilized man, he soon identified himself with the population of Louisiana. Too enlightened, too equitable, to favor any innovation dangerous to that population, [although] he might have found in it the means of establishing and increasing his fortune, he seemed to make an abnegation of himself, to sacrifice the fruits of long studies as a lawyer at the school of Blackstone, to become the disciple and the apostle of the civil law which constituted the basis of the laws of *Alfonso the wise*, then exclusively in force in this extensive territory

Mr. Livingston had been hardly fifteen months in New Orleans, when Congress were [sic] pleased to form Louisiana into separate territories, and to give us, as a constitution, the ordinance of 1787, which had been framed for a country almost desert to the northwest of Ohio. By that ordinance, . . . Congress gave us a Superior Court, consisting of one single judge As if to crown the work, that famous ordinance did contain a clause providing that that Superior Court should exercise a *jurisdiction of Common Laws* If that clause was put in force, every thing was at an end in our jurisprudence: our ancient laws would have disappeared, and upon their venerable ruins would have been erected a system which none of us was acquainted with, which no where exists in a body of law, and which its warmest advocates themselves do hardly know; and the codes under which the ancient inhabitants of the country had inherited the estates of their fathers, and passed all their contracts, would have been annihilated Livingston, consulting nothing but the interest of his adopted country, setting aside all views of private interest, pleaded during three days the cause of Louisiana The Superior Court declared itself in his favor, and in so doing, freed us from that inextricable labyrinth of incoherent decisions, scattered in thousands of volumes, and which people have been pleased to decorate with the pompous name of *Common law*.⁸³

83. LA COURIER, Jan. 15, 1824.

In 1837, Etienne Mazureau, Attorney General and Dean of the New Orleans Bar, extolled the virtues and merits of George Mathews who had presided over the Supreme Court of Louisiana. On that occasion, Mazureau made some remarks about the primary sources of the Digest of 1808 and the Code of 1825:

As early as 1805 the Spanish and Roman laws, written, it is true, in languages unfamiliar to several public functionaries, as well as to the greater part of the old and new inhabitants, gave umbrage to persons whose reason, being obscured by national prejudices, repulsed the idea however simple that laws, collected and put together since numerous centuries, might in the nineteenth century be suitable to the administration of civil justice amidst a free people. . . .

The attack was brisk, they made the most heroic efforts to insure victory! But Livingston spoke, at his voice the menacing and thundering work of the new Titans crumbled to its base, and the oracle which then emanated from the mouth of Hon. John B. Prevost swept away the light rubbish and dispersed it.

. . .

[P]ersons prone to doubt would probably be very much surprised when told that several of the great principles consecrated by our constitutions, had likewise been consecrated by Roman and Spanish law a few hundred years before the immortal Columbus discovered our hemisphere. Open the Roman code of Alfonso the Wise, you will find, . . . that rule, . . . "that no law may have retroactive effects."

Let us not dissimulate it, we must have master minds, jurists of vast erudition and of rare sagacity, highly enlightened, foreseeing and very wise legislators to make better digests than that of Justinian and better laws than those of Alfonso the Wise.

. . .

Our Code of 1808, whose co-existence with the ancient laws that were not incompatible was wisely maintained, remained in vigor during almost eighteen years. If, as it must be acknowledged, imperfections were noticeable in it, jurisprudence aided by the enlightenment found in the Roman and Spanish laws had ended by embodying itself into a corps of legal doctrines which, if not perfect, (what work of the human mind can be so), was at least sufficiently complete, sufficiently comprehensible to all slightly studious minds, to satisfy in great part the exigencies of reason and justice.

. . . .

But, . . . clamors arose against this same digest, against its insufficiency, and above all, against the necessity under which we still labored of going to sources from which were taken the principles which rule our civil tribunals. They wanted a code comprehensible to all They wanted a code covering everything, foreseeing everything, providing for everything, as if such a code could ever emanate from man! A new code was made. Less incomplete and in this respect less imperfect than the first. However, it was so far from fulfilling the exigencies of justice that our tribunals were continually obliged to dig into the old compilations of Castilian and Latin laws to find rules that might be applied to cases to which the general rules in that voluminous collection could with difficulty be applied⁸⁴

In 1838, the *Revue des Deux Mondes* published, under the signature of Mignet, a very interesting biography of Edward Livingston who was said "to be known for having participated in the work of the French jurisconsults Moreau Lislet and Derbigny, who gathered in one book the old Louisiana civil laws."⁸⁵ Tracing back the first years of the territorial government of Louisiana, Mignet wrote the following:

With the territorial form of government, [Louisiana] adopted the writ of habeas corpus and the jury system, two institutions which accompany the American in any country where he settles, in order to ensure his enjoyment of liberty and justice. But this preliminary law which brought before a jury all civil and criminal facts affecting his property as well as his person, was not sufficient. It remained to decide which body of law would control those facts as well as the procedure that would be followed in a case all the way to the judgment. Was the law of Louisiana to be maintained, a mixture of Roman law, French customary law and Spanish texts? Or was English law to be introduced in Louisiana, with all the uncertainties attached to its precedents, the subtleties of its fictions and the prolixity of its expressions? This was the subject of debates before the Supreme Court. American lawyers pushed for the exclusive adoption of English law in civil and criminal matters. But, following the arguments presented by Mr.

84. Etienne Mazureau, *George Mathews—President of the Supreme Court of La.*, 4 LA. HIST. Q. 154, 172-73, 175-76, 181-82 (1921) (trans. by H. Cruzat from the French original as published in 1 WHITES' "NEW RECOPIACION" 673-701 (Philadelphia 1839)) (Panegyric Delivered Jan. 1837).

85. Mignet, *Livingston, Sa Vie et Ses Travaux*, in REVUE DES DEUX MONDES, 31, 41 (Jul.-Sept. 1838) (author's trans.).

Livingston who reminded to the new possessors of the land the dispositions of the treaty according to which Louisiana was to participate fully in all the benefits flowing from belonging to the American Union without losing its own privileges, it was decided that Louisiana would keep its civil laws⁸⁶

Charles E. Fenner, who was a Justice of the Louisiana Supreme Court and a passionate defender of the Civil Law, wrote the following in 1887:

In 1808, this commission made its report to the territorial legislature, which was adopted and is known as the [C]ode of 1808. This [C]ode preserved anterior laws in force except in so far as they were contrary to, or inconsistent with [the Code] itself.

Although the Napoleon[ic] [C]ode had been promulgated in 1804, in those days of slow and imperfect communication, no copy of it [this code] had yet reached New Orleans. The framers of the code of 1808 availed themselves, however, of the project of the work which they possessed, and embodied large portions of it in their own report⁸⁷

Moreover, Fenner stated that the period from 1803 to 1825, illustrated by the reports of Judge Martin, was the formative era of our jurisprudence.⁸⁸ In the beginning of that period, there was a juridical chaos; all things were without form and void. This condition of uncertainty was amusingly described by Mr. Ellery, the lawyer for the Plaintiff in *Beauregard vs. Piernas*.⁸⁹

The navigation among these codes and *Recopilacion* is certainly difficult and dangerous, thick set with points, and abounding in sands and shoals: the path dazzled by the deceitful lights of expositors, and pursued with unskilful pilotage; we have weathered the *Partidas* and the *Recopilacion*, we have steered clear of the laws of Madrid and Toro, but is there no risk of striking upon the *Fuero Real*, or the *Fuero Juezo*, or being lost upon the shoals of the *Ordonamiento*, even a *senatus consultus Velleianus*, or an unheeded law of Justinian might prove fatal to our voyage.⁹⁰

Charles Fenner also stated that:

86. *Id.* at 40 (author's trans.).

87. CHARLES E. FENNER, *THE GENESIS AND DESCENT OF THE SYSTEM OF CIVIL LAW PREVAILING IN LOUISIANA* 24 (New Orleans, L. Graham & Son, 1887).

88. *Id.* at 24-25.

89. 1 Mart. 281 (1st Dist. Spring Term, 1811).

90. *Id.* at 293.

Although the origin of the laws was Spanish, French was the mother tongue of the people, and Pothier, with his precise and logical method, exercised, in all probability, more ascendancy here than in France In fact, it has been held (15 L. 112, 1 A. 456, 2 A. 201), that the articles of the Civil Code, derived from the Code of 1808, are to be interpreted by reference to the Spanish laws not repealed by the Code of 1808.⁹¹

The following appeared in a series of articles on Louisiana published in 1892:

It must be remembered, however, that while the *Code Napoléon* has served as the model of our municipal law, it has not been servilely copied, and that free scope has been given to American inventiveness in adapting it to the requirements of modern times and the genius of free institutions. So, many principles of Spanish law which had proved salutary in their practical operation were retained, and many modifications were introduced suitable to the habits and wants of a progressive people in a new country

. . . .

In 1808, very shortly after the organization of the territorial courts, a code was prepared and published, but this consisted merely of an abstract of the Spanish laws then prevailing, with such modifications from the *Code Napoléon* lately introduced into the territory as seemed compatible with the existing law We see, therefore, this singular anomaly in the first series of reports, that while the organic structure and statutory provisions of the law were mainly of Spanish origin, there was a rapid transition to the French modes of criticism and interpretation, so that when the new code of 1825 gave legal authority for this transition to the French system by positive statutory enactment, the new jurisprudence founded on the *Code Napoléon* was so congenial to the spirit of the old, that it seemed rather its natural and logical evolution than the introduction of a foreign outgrowth.⁹²

Parts of the last two opinions reproduced above are somewhat in conflict with respect to the issue of the influence that the *Code Napoléon* may have had on the Digest of 1808. Yet, they concur on the same single and most important conclusion that Spanish law was actually the fundamental source of the Digest.

91. FENNER, *supra* note 87, at 23.

92. I BIOGRAPHICAL AND HISTORICAL MEMOIRS OF LOUISIANA 77-101 (Chicago, The Goodspeed Publishing Co. 1892).

It is proper now to present the opinions of those who have chosen to adopt the opposite theory, the theory that the sources of the Digest of 1808 are French—rather than Spanish—not only in form, but also in substance.

SECTION II: MOREAU LISLET AND THE FRENCH SOURCES OF THE DIGEST OF 1808:⁹³ 19TH CENTURY FRENCH VARIATIONS

Professor Batiza, following in the footsteps of a few prominent scholars who preceded him, wrote that "Moreau Lislet adopted the structure, or organization, of the French Code and *projet* as the framework for the Louisiana Code."⁹⁴ Professor Pascal is not at all critical of this broad statement as the evidence is too overwhelming to be challenged. However, these two contemporary scholars are at odds on the importance to be given to the "form" of the law over its "substance" and they reach opposite conclusions as concerns the respective sources of the former and the latter.

The following are a series of positions taken by a number of authors who have supported the theory of the French origin of the Digest of 1808. Some of these opinions, as we shall see, take the position that one can witness an influence of French sources more on the *form* of the Digest of 1808 than on the *substance* of the law therein contained; other authors accept *in toto*, without any qualification or distinction between form and substance, the French origin of the Digest of 1808.

Edward Livingston, one of the co-drafters of the Louisiana Civil Code of 1825, had an extensive correspondence with the Presidents of the United States; in one of his numerous letters to President Jefferson, he wrote: "You are aware Sir that in the year 1808 a civil code was adopted in that State [Louisiana] founded chiefly on that of Napoleon, but very hastily and therefore very imperfectly executed"⁹⁵

93. The opinions of the different authors will be presented in chronological order.

94. *Preface to BATIZA, supra* note 20.

95. *Letters of Edward Livingston to Presidents of the United States*, 19 LA. HIST. Q. 937, 956 (James A. Padgett, ed. 1936) (citing The Jefferson Papers, Library of Congress) (letter of March 9, 1825 to Thomas Jefferson). The same opinion was expressed in a report that Judge Workman addressed to the Louisiana House of Representatives: "Our civil code, erroneous as it confessedly was, has nevertheless been of great utility Those portions of it which were copied from the Napoleon code, were excellent, as far as

François Xavier Martin,⁹⁶ Justice of the Supreme Court of the Territory and author of *The History of Louisiana*, wrote this about the Digest of 1808:

The professional gentlemen, who had been appointed in 1805, to prepare a civil and criminal code, Moreau Lislet and Brown, reported "a digest of the civil laws now in force in the territory of Orleans, with alterations and amendments adapted to the present form of government." Although the Napoleon code was promulgated in 1804, no copy of it had as yet reached New Orleans: and the gentlemen availed themselves of the project of that work, the arrangement of which they adopted, and *mutatis mutandis*, literally transcribed a considerable portion of it. Their conduct was certainly praiseworthy; for, although the project is necessarily much more imperfect than the code, it was far superior to anything, that any two individuals could have produced, early enough, to answer the expectation of those who employed them Anterior laws were repealed, so far only, as they were contrary to, or irreconcilable with any of the provisions of the new In practice, the work was used, as an incomplete digest of existing statutes, which still retained their empire The Fuero Viejo, Fuero Juezo, Partidas, Recopilaciones, Leyes de las Indias, Autos Accordados and Royal schedules remained parts of the written law of the territory, when not repealed expressly or by a necessary implication To explain them, Spanish commentators were consulted and the *corpus juris civilis* and its own commentators were resorted to; and to eke out any deficiency, the lawyers who came from France or Hispaniola read Pothier, d'Aguesseau, Dumoulin, etc.⁹⁷

they went." In *SAMPSON'S DISCOURSE AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS UPON THE HISTORY OF THE LAW*, 165-166 (Gales & Seaton, 1826).

96. A contemporary of Moreau Lislet:

Judge François Xavier Martin was born at Marseilles, in France, March 17, 1762, and died December 11, 1846. He was appointed judge of the highest court of the territory March, 1810, and judge of the supreme court February 1, 1815, where he labored industriously until the organisation of the court under the constitution of 1845, having served as chief justice for many years.

1 *BIOGRAPHICAL AND HISTORICAL MEMOIRS OF LOUISIANA*, *supra* note 92, at 83. *See also*, 2 Henry A. Bullard, *A Discourse on the Life, Character, and Writings of the Hon. François Xavier Martin, LL.D.*, in *HISTORICAL COLLECTIONS OF LOUISIANA* 17-40 (New York, Wiley and Putnam 1850).

97. FRANÇOIS-XAVIER MARTIN, *THE HISTORY OF LOUISIANA, FROM THE EARLIEST PERIOD* 344 (Gresham ed., 1882). One will notice the ambiguity of the statements by Judge Martin: On the one hand, he states that the gentlemen who drafted the digest used the projet of the French code, "the arrangement of which they adopted, and *mutatis mutandis*, literally transcribed a considerable portion of it;" however, on the other hand, he

In 1829, Barbé de Marbois⁹⁸ published his "*Histoire de la Louisiane et de la cession de cette colonie par la France aux Etats-Unis de l'Amérique Septentrionale*" in which he made a brief comment about the influence of the French Civil Code on the Louisiana Code of 1825:

The laws of Spain, France and the United States have ceased in 1825 to conflict on this land where these three powers have succeeded one another; learned men have undertaken a great work to reconcile them. A Civil Code was adopted and the Code now applicable in France was used to a large extent in its drafting.⁹⁹

The most forceful and unwavering opinion on this matter may have been expressed in 1842 by Gustavus Schmidt:¹⁰⁰

The jurisprudence of Louisiana is a mixture of the Roman, French and Spanish law, tintured with no inconsiderable portion of the common law of England, as understood and expounded in the sister States of the Union,

. . .

[T]he first territorial legislature appointed, in the year 1806, Messrs. James Brown and Moreau Lislet

These gentlemen, thus appointed to prepare a digest of the laws in force in Louisiana, instead of looking to the Spanish colonial law, and consulting exclusively the *Partidas* and the *Recopilacion de las Indias*, [etc.], as they surely would have done, had the Spanish law alone been in force, transcribed literally, and incorporated into their Digest large portions of the *projet* of the

states also that "certain laws were repealed so far only as they were contrary to or irreconcilable with any of the provisions of the new." *Id.* This last statement is followed by a listing of Spanish sources of law in addition to references to Spanish commentators. On the basis of these two statements, Judge Martin could as well be placed in the category of those scholars who supported the Spanish origin of the Digest of 1808.

98. François Barbé de Marbois (1745-1837), French politician, French consul to the United States, Minister of Finances under Bonaparte and Minister of Justice in the Richelieu cabinet. 1 GRAND LAROUSSE ENCYCLOPÉDIQUE 902 (Paris, Librairie Larousse 1960).

99. FRANÇOIS BARBÉ DE MARBOIS, HISTOIRE DE LA LOUISIANE ET DE LA CESSION DE CETTE COLONIE PAR LA FRANCE AUX ETATS-UNIS DE L'AMÉRIQUE SEPTENTRIONALE 364 (Paris, 1829) (author's trans.).

100. Gustavus Schmidt was a counsellor at law and the editor of the *Louisiana Law Journal* which was "devoted exclusively to subjects connected with the science of jurisprudence, including every thing, which has a tendency to illustrate its progress; and to exhibit its present condition." 1 *To The Public*, in THE LOUISIANA LAW JOURNAL iii (Gustavus Schmidt, ed., 1841).

*Code Napoléon.*¹⁰¹

However, in a letter dated October 12, 1841, under the title "Were the Laws of France, which governed Louisiana, prior to the cession of the country to Spain, abolished by the Ordinances of O'Reilly?," another legal scholar apparently endorsed by Gustavus Schmidt had this to say:

[T]he laws of a country cannot be rooted out so entirely as to leave no vestiges of their existence, and the learned jurists who, in 1806, compiled our old Civil Code, were well apprized of it, and took care to blend, with the Spanish laws, such parts of the French laws, as were consonant with the feelings of the people, and the ancient customs of the territory.¹⁰²

A former justice of the Supreme Court, Henry A. Bullard referred to the sources of the Digest of 1808 in these terms:

Seven years before the period of which I am speaking, Louisiana was a Spanish Province; governed by a system of laws written in a language understood by only a small part of the population, and which had been forced upon the people at the point of the bayonet by O'Reilly, and which superceded the ancient French laws by which the Province had been previously governed

In 1808 was promulgated the Digest of the Civil Laws then in force in Louisiana, commonly called the Old Code. That compilation was little more than a mutilated copy of the Code Napoleon. But instead of abrogating all previous laws and creating an entire system, as had been done in France by the Code Napoleon, . . . our code was considered as a declaratory law, repealing such only as were repugnant to it, and leaving partially in force the voluminous codes of Spain.¹⁰³

Henry J. Leovy, a jurist and owner as well as publisher of *The New Orleans Delta*, wrote the following in 1851:

The first territorial legislature met in 1806, and one of its acts was the appointing of Messrs. Brown and Lislet, two members of the bar, a committee to prepare a *Digest* of the laws then in existence in the territory. Instead of complying with their orders and

101. *The Supreme Court and its Decisions*, in THE LOUISIANA LAW JOURNAL 135-36 (Gustavus Schmidt, ed., Apr. 1842).

102. See *supra* note 100, at 24-25.

103. Bullard, *supra* note 96, at 11.

digesting the laws in existence, these gentlemen made a *code* based principally on the *Code Napoléon*. This was adopted by the Legislature, and is now known as the "old Civil Code of 1808." This code did not repeal former laws; "the old Civil Code repealed such parts of the Civil law as were contrary to or incompatible with it." It did not contain many and important provisions of the Spanish law nor any rules of judicial proceedings. It was therefore decided that the Spanish laws were to be considered as untouched when the Digest or Civil Code did not reach them. The legislature, therefore, in 1819 ordered the publication of such parts of the *Partidas* as were still in force.¹⁰⁴

In 1856, Anthoine de Saint-Joseph published his second edition of *Concordance Between Foreign Civil Codes And The Code Napoléon*.¹⁰⁵ In his introduction to the Louisiana Civil Code of 1825, he wrote the following:

Louisiana is the only State in North America to have undertaken to coordinate its customs and its laws so as to make a regular Civil code. Before 1824, it was governed by Spanish laws, the Custom of Paris and by a large number of statutes of the United States.

In 1824, the Sixth Louisiana Legislature put an end to this confusion of such voluminous and contradictory laws by voting the adoption of a Civil Code comprised of 3522 articles for which ours has largely been the model.¹⁰⁶

SECTION III: 20TH CENTURY VARIATIONS ON THE SAME THEME

Among the many contemporary scholars and legal writers who have written in this century on the enigma of the actual sources of the Old Civil Code of 1808,¹⁰⁷ we will quote from only

104. Henry J. Leovy, *Louisiana and her Laws*, in *THE LOUISIANA BOOK: SELECTIONS FROM THE LITERATURE OF THE STATE* 1, 8-9 (Thomas M'Caleb, ed., R.F. Straughan 1894).

105. ANTHOINE DE SAINT-JOSEPH, *CONCORDANCE ENTRE LES CODES CIVILS ÉTRANGERS ET LE CODE NAPOLÉON* (2d ed. 1856).

106. 2 ANTHOINE DE SAINT-JOSEPH, *supra* note 105, at 459 (author's trans.). Could that statement be interpreted to mean that the author acknowledges the fact that before 1824, under the era of the Digest of 1808, the law was based on the Spanish laws, the Custom of Paris, etc.?

107. See, John H. Tucker, *Bench and Bar, Source Books of Louisiana Law*, 6 *TUL. L. REV.* 280, 284 (1931). This author quotes from Saunder's second edition of the Louisiana Civil Code of 1870:

[Moreau Lislet and Brown] either did not understand that their mission was to

two of them: Judge Hood and Professor Dainow. They will be considered, then, as the advocates and representatives of the school of thought that has argued and still supports the view that the Digest of 1808 was French in its source.¹⁰⁸

compile the Spanish laws, or else they assumed that the French laws were substantially the same as the Spanish laws, or they may have believed that, in fact, no one system of laws was definitely the law of the colony, and, as they found already prepared a Code of French laws which did not seem to differ much from the laws in common use, they proceeded to make such alterations and modifications in this Code as would, in their opinion, adapt it for use in Louisiana.

Id.

See also, BEN ROBERTSON MILLER, *THE LOUISIANA JUDICIARY* (La. State University Press, 1932). In *The Item Tribune*, Sunday, May 1, 1932, one can read on page 20:

Seated in his law library at 1124 Royal Street, HENRY L. GARLAND, veteran attorney, is shown reading from an original copy of the Code Napoleon of France, which belonged to Moreau Lislet 127 years ago and which he believes was used by Lislet and James Brown in their compilation of the first Louisiana Code which was enacted into law by the legislature of 1808. Legend says that the original Code Napoleon was not used in the compilation of the Louisiana law.

THE ITEM TRIBUNE, New Orleans, May 1, 1932.

In the Times Picayune on Sunday, May 1, 1932, under the heading "Moreau Lislet had code at hand as model, old tome indicates," one can read:

It has been supposed generally, lawyers say, that when the Louisiana civil code of 1808 was compiled by Moreau Lislet with the assistance of James Brown, they had as their model not the original Code Napoleon, but only a project of that code. . . . Mr Garland's book is the first real evidence that has been produced to show that Moreau Lislet did have a copy of the code.

TIMES PICAYUNE, May 1, 1932. This statement is far from being very convincing; indeed, nothing in the article can be taken as establishing beyond any doubt that Moreau Lislet had the French code in his possession before 1808 even though he did have this code in his library at the time of his death in 1832. We have not been able to find any evidence that Moreau Lislet and James Brown had the French code in front of them when they drafted the Digest of 1808. See also Mitchell Franklin, *Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806*, 16 TUL. L. REV. 514 (1942); JOSEPH T. HATFIELD, WILLIAM CLAIBORNE: JEFFERSONIAN CENTURION IN THE AMERICAN SOUTHWEST (The USL History Series, 1976).

108. Besides Judge Hood and Professor Dainow, two legal scholars will be identified here as supporting strongly the influence of French law on the Digest of 1808. In *Tradition and Technique of Codification in the Modern World: The Louisiana Experience*, 25 LA. L. REV. 698 (1965), John H. Tucker, Jr. wrote:

The Code of 1808 was not based on Spanish law, but it was adopted with the title "A Digest of the Civil Laws." The juriconsults appointed to prepare this Digest chose as their model the *Code Napoleon* of France, although Spanish law prevailed. Later, the Supreme Court of Louisiana held that Spanish law still prevailed unless it had been repealed expressly or by necessary implication by the Digest (Code of 1808). This led to the redaction of the Code of 1825, and upon its adoption all former Spanish law was repealed.

Id. at 706.

Writing on the specific topic of the law of marriage contracts, Professor Hans W. Baade made these assertions:

This brings us to the crucial question of the intent in 1808 of the redactors and the Legislative Council of Orleans Territory. The historical context shows the chief

This doctrine, it will be noticed, narrowly qualifies the influence and authority of the French texts that are claimed to have been used as models by the drafters of the Louisiana Digest of 1808. The fluid, almost vacillating, position of this doctrine could, in the end, easily lead one to the temptation of actually including these authors among those of the opposite school, those who have argued and continue to argue today with Professor Pascal that the fundamental sources of the Digest of 1808 are to be found in the Roman law and, more particularly, in the Spanish law.

Judge Hood was very much interested in the history of Louisiana law and, in one of his numerous articles, he expressed his views as follows:

The Civil Code prepared by Brown and Moreau Lislet, however, was not based on the Spanish law, as the Legislature had directed, but was based instead on the then newly adopted French Code, the Code Napoléon. No satisfactory explanation has been offered to this date as to why this was done. *It is probable, however, that these two attorneys and the Legislature had a high regard for the codification experience in France, not only as to form but also as to content, since both the French and the Spanish systems had many common sources in Roman law; for that reason they may have used the Code Napoléon as a model without any intent to displace the Spanish law. This theory is supported by the fact that there are many differences between the Code Napoléon and the Louisiana Code of 1808, due largely to the fact that there were incorporated into the Louisiana Code a substantial number of Spanish laws, which had not been included in the French Code.*¹⁰⁹

aim was to consolidate the civil law of the territory into code form to forestall the infiltration of the common law. This objective had to be achieved speedily, in an increasingly unfavorable environment The French *Code Civil* of 1804 had to serve as the basic text and was generally acceptable to the extent it reflected or harmoniously advanced the "living law" of the Territory, the Custom of Paris. Yet this borrowing could not be publicly acknowledged. On the contrary, every effort had to be made to find support for the various provisions of the Code of 1808 in enacted Castilian law formally applicable in Spanish Louisiana after 1769, and as yet not formally repealed. It now appears that the furnishing of such a "positive law alibi" was the primary purpose of the source notes to the 1808 codification, which Moreau Lislet prepared for publication in 1814, and which were recently discovered by Professor Pascal.

Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 TUL. L. REV. 3, 83-84 (1978).

109. John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 33 TUL. L. REV. 7, 14 (1958) (emphasis added).

Judge Hood gives a very plausible explanation of the methodology used by James Brown and Louis Moreau Lislet, even though we cannot find any convincing "legal" evidence of the argument he wishes to make. All in all, for Judge Hood, the adoption of the French Code, not only as to its form but also as to its "content," is perfectly justified. Indeed, the *Code Napoléon*, or French Code, was the expression of the most recent technique of codification and its mediate sources found in Roman law were the same, to a large extent, as the sources of Spanish law. The French Code was then a perfectly appropriate go-between, given the circumstances prevailing in Louisiana. Still the existence of typically Spanish dispositions in the Code of 1808, is evidence that the drafters of the Digest obviously had no intention at all to repudiate Spanish law in its entirety and to ignore intentionally the specific instructions they had been given. It appears to us that we would not betray Judge Hood's viewpoint if we venture to argue that Judge Hood would be more a supporter of the theory "form may conceal the substance," than an advocate of the theory "form reveals the substance."

Such was also, we believe, the conclusion reached by our colleague, Joseph Dainow. In an historical introduction to his second edition of the Louisiana Civil Code, Joseph Dainow wrote the following:

One of the questions to which there has not been a conclusive answer is "Why did the 1808 code follow so closely and borrow so much from the French law, since the existing civil laws were Spanish?" There has also been the secondary question: "Which French materials were the ones actually used?" In view of the fact that there is not available, neither from the commissioners nor from anyone else, a written record of the reasons for the use of French basic materials, the answer later attributed to these questions must necessarily include a degree of conjecture.

. . .

The use of the French code as a model and as a source could not have been intended as the displacement of Spanish law by French law. Considering their close relationship as the two most prominent and well developed systems of civil law, as well as the extensive area of common sources in Roman law, and the actual similarity of the textual provisions, it was only to be expected that the Louisiana jurists would take advantage and make use of

the French unification experience instead of attempting the impossible task of making one order of their own out of the multiplicity and chaos which existed

Not to be overlooked at this point is the fact that the Louisiana Civil Code of 1808 contained a substantial amount of laws incorporated directly from Spanish sources.¹¹⁰

This opinion seems to us the wisest and the closest to the historical facts, under the condition, however, that the word "source" as used by Joseph Dainow be given the qualification retained by this author, and in our opinion, by Moreau Lislet himself. This qualification is that if the Digest of 1808 has its apparent sources in the French Code and other French texts, these sources are only *indirect* because it was not the intention of the drafters, Louis Moreau Lislet and James Brown, to substitute French law for Spanish law, the *mediate* source of the dispositions of the Digest of 1808.

CHAPTER III: THE DIGEST OF 1808 AND THE COURTS

A short presentation and some brief comments will be made here of a few cases heard by the Superior Court of the Territory of Orleans between the years 1809 and 1812. The purpose of this survey is two-fold: first, to ascertain whether the legal issues raised before the court were considered and decided according to the provisions of the Digest which had just been promulgated and, second, whether, beyond these provisions which had just become positive sources of law, the court had embarked upon an examination of the original sources of law that predated the Digest and had served as the actual sources of the applicable provisions of the Digest.

"In 1812 the Territory of Orleans adopted a constitution . . . [and] on April 8, 1812, Congress admitted it to the Union as the State of Louisiana."¹¹¹ As a consequence of these two landmark events it will be necessary to study some additional court decisions handed down between 1812 and the early 1820s to find

110. CIVIL CODE OF LOUISIANA, REVISION OF 1870 WITH AMENDMENTS TO 1960, XVIII (Joseph Dainow, ed. 2d ed., West 1961).

111. RICHARD H. KILBOURNE, JR., A HISTORY OF THE LOUISIANA CIVIL CODE, THE FORMATIVE YEARS, 1803-1839 61 (1987) (citations omitted).

out if statehood had altered, to some extent or not at all, the legal scholarship of Louisiana judges and practicing attorneys. Were they concerned with the necessity to establish a relationship between the provisions of the Digest and their actual sources? We shall see that the historical and legal analysis applied by the Louisiana courts was remarkably consistent during the years 1808 to 1823 and that the courts themselves held that the Digest of 1808 had its actual sources in Spanish and Roman law.

SECTION I: THE DIGEST OF 1808 AND THE SUPERIOR COURT OF THE TERRITORY OF ORLEANS: 1808-1812

As Richard H. Kilbourne very wisely stated, "[t]he extent to which the Territorial Superior Court followed the rules stated in the Digest cannot be determined with certainty because of the brevity of the period between the enactment of the Digest and the admission of the territory to statehood."¹¹² Nevertheless, five cases decided during this brief period of time may be singled out and used to illustrate the purpose of this study. For each case, a succinct diagram, under the form of columns listing the sources of law referred to by the parties and the court, will be made in an attempt to compare them with those sources that Professor Batiza has stated and "identified" as being the "actual" sources of the Digest. Lastly, all these sources will be compared to the sources that Moreau Lislet, himself, in his own handwriting, listed in a copy of the Digest of 1808 which came to be known as "The de la Vergne Volume."

A. *Dewees v. Morgan*, Fall Term, 1809¹¹³

The issue in this case was one of redhibition following the sale of a slave who was carrying a disease.

Sources of law cited:

<i>Plaintiff</i>	<i>Defendant</i>
Brown, attorney	Hennen, attorney
Digest p. 358 art. 80	Domat, (Justinian):1,T.2,S.7
Partida L.64,65,T.5,P.5	Partida 5, T.5,L.23

112. *Id.* at 61-62 (citation omitted).

113. 1 Mart. 1 (1st Dist. Fall Term 1809).

Pand. L.21,T.1,L.4,§6

The Court, Lewis, J.
Digest, 358, art. 71, 72, 73.

Batiza
French Projet, art. LXVI, LXVII, LXVIII
Code Napoleon, art. 1645, 1646, 1647.

Moreau Lislet's Note to the Digest of 1808
Domat, Pothier, Partida 5

One will notice the similarity of the sources of law cited by the attorneys for the parties, one such attorney being James Brown, a co-drafter of the Digest, and the sources or references cited by Moreau Lislet in his handwritten annotations to the Digest. There is, on the other hand, a definite discrepancy with the sources cited by Professor Batiza who is the only one to refer to the French *Projet* and the *Code Napoléon*. It is most relevant, and instructive at the same time, to point out here that *three contemporaries* of the Digest, all members of the legal profession at that time, agreed on finding the law applicable to the case in the same *Spanish* sources, in addition to Roman law referred to either directly or through Domat's *Treatise on the Civil Laws in their Natural Order*. None of the attorneys cited an exclusively French source of law. Professor Batiza's critical analysis, referring exclusively to French sources, was made more than a *century and a half later!* Is it not revealing that two attorneys, one of them a co-drafter of the Code of 1808, although pitted one against the other, agreed nevertheless on finding the actual sources of the law of their case in the same sources, which happen to have been cited by Moreau Lislet as having a relationship with the articles of the Digest?

B. *Caisergues v. Dujarreau*, Fall Term, 1809¹¹⁴

The issue in this case involved the amount of interest payable under the law.

Sources of law cited:

<i>Plaintiff</i>	<i>Defendant</i>
Alexander, attorney	Mazureau, attorney

114. 1 Mart. 7 (1st Dist. Fall Term 1809).

Recopilacion de las leyes	Febrero, Partida, Recopilacion de Castilla
<i>The Court, Lewis, J.</i> Laws of Spain	<i>Batiza</i> Projet year 8, Code Napoléon.

MOREAU LISLET's Notes to the DIGEST of 1808
Recopilacion, Domat, Febrero, Pothier

One should note the similarity, not to say the identity, between the *Spanish sources* cited by the two attorneys—Mazureau most specifically since he was a very prominent citizen, a *French speaking attorney*, and a leader of the Bar—and the same Spanish sources of law referred to by the court in an opinion written by an *English speaking judge*. In contrast, Professor Batiza gives only the same two French sources of law, as he did in the last case example, as the law of the case. Lastly, it is worth pointing out, again, that the sources *listed* by Moreau Lislet match those cited by the attorneys and the court. As far as the contemporaries of the Digest of 1808 are concerned, they all agree, once again.

C. *Debon v. Bache*, Fall Term, 1810¹¹⁵

In this particular case, the issue was one of an insolvent debtor who had given a preference to one of his creditors over his other creditors.

Sources of law cited:

<i>Plaintiff</i>	<i>Defendant</i>
Ellery, attorney	Alexander, attorney
Ordinance of Bilboa	Ordinance of Bilboa
	Recopilacion de las leyes de Castille, tit.5, ley 19.
	Curia Phil. lib.2, chap.9.
<i>The Court</i>	<i>Batiza</i>
Spanish authorities cited in support of plaintiff's case.	Projet art. LXI Code Napoleon, opinion. art. 1166, 1167

115. 1 Mart. 160 (1st Dist. Fall Term 1810); 1 Mart. 240 (Spring Term 1811).

Moreau Lislet
Pothier.

To the extent that the Digest of 1808 did not include an express provision that could have been relied upon by the court, Spanish law controlled as the law in force in the Territory in 1803. The court, unable to cite a specific article of the Digest, relied on Spanish law as did the two attorneys for the parties. In his annotated version of the Digest of 1808, Moreau Lislet referred to Pothier "on Obligations" to the extent that Pothier offered some comments on this very topic.

D. *Daublin v. Mayor & c. of New Orleans, Fall Term, 1810*¹¹⁶

In this case the issue involved the authority of the city to tear down a building.

Sources of law cited:

Plaintiff

Mazureau & Paillette,
attorneys.
Laws of Spain
Leyes del Ordonamiento Real
Recopilacion de Castille

The Court, Martin, J.

Pothier
Partida 3
Roman law, Dig.43, 10.

Defendant

Duncan & Moreau,
attorneys.
Partida 3, lib.23.

The Digest of 1808 was not at issue in this case and, therefore, no comparison can be made between the selection of the relevant sources of law by Professor Batiza and Moreau Lislet. We must point out, however, that three prominent jurists, Moreau Lislet, Mazureau and Judge François Xavier Martin, were involved in the above cited case and that all three of them were, undoubtedly, very familiar with the history of Louisiana and of Louisiana law in particular. In the above cited case, these same jurists did not hesitate to rely on Spanish law as the actual source of law applicable to the issue. According to them, Spanish and Roman law were the legal systems controlling in

116. 1 Mart. 185 (1st Dist. Fall Term 1810).

Louisiana before the Digest of 1808, as well as beyond that date, whenever the law lacked any specific legislation to the contrary.

E. *Hayes v. Berwick*, Spring Term, 1812¹¹⁷

In this case, the plaintiff sought to open her husband's succession due to his absence for twenty years.

Sources of law cited:

Plaintiff

Baldwin, attorney
No retroactivity of Code

Defendant

Porter, attorney.
Civil Code 16, art 9; 17,
art. 19.

The Court

Civil Code of Digest
French authors
Roman law

Batiza

French Civil Code, art. 115,
120-29
French Projet p.31, art.9

Moreau Lislet's Notes to the Digest of 1808

Pothier, successions
Partida 3 t.14 l.14.
Feb. 2, Liv.3

Professor Batiza is the only one to cite the French *Projet* and the French Civil Code as sources of the relevant articles of the Louisiana Digest of 1808. Actually, an analysis of the *actual* sources of the French *Projet* and the French Code articles cited by Professor Batiza would reveal that the *actual* source of the articles of the *Projet* and the *Code Napoléon* was the French jurist Pothier in his treatise "on successions, ch.3, S.1." This treatise is one of the three sources cited by Moreau Lislet as being a source of the corresponding articles of the Digest, the other two sources listed being Spanish. One could then make the legitimate comment that the articles of both the French *Projet* and the French Civil Code should only be considered as *indirect and formal* sources, whereas the actual substantive source of law existing behind these articles was, in fact, Pothier as cited by

117. 2 Mart. 138 (5th Dist. Spring Term 1812).

Moreau Lislet. Strangely enough, Professor Batiza fails to identify Pothier as being the source of the articles of the French *Projet* as well as of the French Civil Code articles in this particular instance.

SECTION II: THE SOURCES OF THE DIGEST OF 1808 AND THE SUPREME COURT OF THE STATE OF LOUISIANA FROM 1812-1823

In 1812 the Territory of Orleans adopted a constitution that embodied the essential institutions of Jeffersonian democracy The indigenous laws of the area had survived the territorial period more or less untouched, and the Digest of 1808 had no doubt helped to substantiate and preserve the influence of the civil law in Louisiana's legal system Once Louisiana became a state it was free to develop its legal system in any way it saw fit; so statehood opened up vast possibilities for enrichment of the legal system . . . ; the post-1812 decisions of the new Louisiana Supreme Court demonstrate that the authoritativeness of the Digest tended to diminish in the decade after statehood.¹¹⁸

Although an examination of the years between 1812 and 1825 indeed reveals that the Digest of 1808 had lost some of its authority as a result of a concurrence of events that led to its subsequent replacement by the Louisiana Civil Code of 1825,¹¹⁹ the Digest nevertheless remained the primary legislative source of law to be relied upon by the Louisiana Supreme Court in solving legal issues raised within the purview of the articles of the Digest. Therefore, the questions concerning the actual sources of this Digest should have remained the same after the Territory of Orleans became a state of the Union and until the Digest gave way to the Civil Code of 1825.¹²⁰ From 1812 onward, the court manifested a tendency to make an even greater use of the Spanish sources of law as the Digest's role and purpose of providing an inventory of formal and positive written rules of law became more and more restricted. The court also showed a propensity to look beyond the French text of the provisions of the Digest.

118. KILBOURNE, *supra* note 111, at 61-62.

119. *Id.* at 62-63.

120. La. Act of Apr. 12, 1824 (promulgating the Civil Code of 1825).

A survey of a few important and illustrative cases handed down by the Louisiana Supreme Court after 1812 will demonstrate this trend and, at the same time, buttress the theory that Spanish and Roman law were the substantive law of the land from 1806 to 1808 during the crucial formation years of Louisiana law. The Louisiana Supreme Court exhibited a definite inclination to place the same Digest of 1808 in the wider realm of Spanish law by resorting to additional Spanish, rather than French, sources of law considered not in conflict with the provisions of the Digest.

A. *Le Breton v. Nouchet*, June Term, 1813¹²¹

The point of law raised in this case concerned the validity of a contract of marriage. The issue was whether the applicable law was that of the domicile, *lex fori*, or that of the place, *lex loci*, of the celebration of the marriage. Although not referred to by the court, at issue was the application of article 10 of the preliminary title of the Digest. The most interesting aspect of this case is that it brought the two most prominent lawyers of the time against each other, Edward Livingston and Louis Moreau Lislet, who were to join forces later to draft the Civil Code of 1825.

Sources of law cited:

Plaintiff

Moreau Lislet, attorney
Partida 4, tit. 11, 1.24
Gregorio Lopez

Wife

Livingston, attorney.
4 Part. tit. 11, 1.24
Commentary by Gregorio Lopae
Las Leyes de Toro, 626, n.75.

The Court

Law of nations
L.24, T.11, P.4
L.15, T.14, P.3.

Batiza

French Projet, art. VI.

Moreau Lislet's Notes to the Digest of 1808

L.15, t.14, part.3
L.24, t.11, part.4. No 289.
Ch.1.V.1 p.243. Feb.Cont.

121. 3 Mart. 60 (East. Dist. June Term 1813).

Professor Batiza, in citing the French *Projet* as the source of article 10, stands alone against the two legal giants who "lived" the law of their days and who both relied on the *Siete Partidas* to further explain the legal meaning and scope of the application of article 10. Also important is that Moreau Lislet is "vindicated" by the supreme court decision since the court sided with him in turning to Spanish law, and not to the French *Projet*, as the source of Digest article 10. The Louisiana Supreme Court stated:

[I]t is necessary to enquire . . . whether the special provision of the Spanish statute, which directs, that the customs of the place where a marriage has been contracted, shall govern the effects of such marriage, is applicable to the present case There is, indeed, such a provision in the 24th law of the 11th title of the 4th partida; but the Court is of opinion, that it is not applicable to this case. That provision is evidently intended to have effect only within the dominions of Spain Were it not so, it would be at war with the 15th law of the 14th title of the 3d partida, which expressly forbids the Spanish tribunals to recognise any authority in the foreign laws cited before them, except as to controversies arising between foreigners upon contracts by them made abroad.¹²²

In the end, Moreau Lislet won this case against Livingston.

B. *Pizerot v. Meuillon's Heirs*, June Term, 1813¹²³

Several issues bearing on Spanish law were raised in this case. Two were particularly interesting. One concerned "the necessity of compliance with the solemnities required for a renunciation of a testamentary bequest, and the other concern[ed] whether[,] upon the death of a spouse[,] the community of acquets and gains formerly existing between the spouses might continue between the surviving spouse and the heirs of the deceased."¹²⁴

Sources of law cited:

Plaintiffs

Livingston, attorney

Defendants

Mazureau, attorney

122. *Id.* at 71-72.

123. 3 Mart. 97 (East. Dist. June Term 1813).

124. KILBOURNE, *supra* note 111, at 66-67.

Numerous Spanish sources
of law cites:
ex: Febrero, Matienzo
Velasco, Azevedo, Partidas,
Nueva Recopilacion, . . .
Also Pothier, Custom of Orleans

Numerous Spanish sources
of law cited:
Rodriguez, Partidas,
Febrero de Juicios,
Also: Domat

The Court

Laws of the Partidas, Fuero
Real, Azevedo, Febrero, Laws
de Toro . . .

On these two issues, the court gave no reference to articles in the Digest. It dealt exclusively with "other" sources of law, Spanish sources in particular. For example, the court stated:

We can never believe that it was the intention of the monarchs of Spain to require all that strictness in the execution of acts in their distant colonies This doctrine of the continuation of the community is founded in the *fuero real* of the kingdom of Spain. We think it would be easy to show, from the authority of Febrero, Azevedo and others, that it is necessary to prove the *fuero real* to be in use and force in the place where the continuation of the community is contended for.¹²⁵

Since the court "overlooked" the provisions of the Digest on these issues and went "behind" the Digest to focus on its Spanish sources, we cannot evaluate Professor Batiza's listing of the sources of the Digest. Suffice it to say that, with respect to the two most important issues raised concerning the solemnities required for a renunciation of a testamentary bequest and the continuation of the community of acquets and gains upon the death of a spouse, the court considered that the controlling law was Spanish law. The court did so rule even though the Digest included many specific provisions, in French, directly applicable to partnerships (p.389-401), marriage contracts (p.323-345), and successions (p.145-209), for example.

C. *Sennet v. Sennet's Legatees*, August Term, 1814¹²⁶

In this case, the court was asked to rule whether a deceased could bequeath all his property to his natural children although

125. *Pizerot*, 3 Mart. at 115, 120.

126. 3 Mart. 411 (West. Dist. Aug. Term 1814).

he had three legitimate brothers and a niece living at the time of his death.

Sources of law cited:

Plaintiff

Porter, attorney
Digest or Civil Code, p.212,
art.21; p.208, art.4; p.210,
art. 14.

Defendant

Brent, attorney
Same references as plaintiff &
Code, p.154, art.43; Spanish law.

The Court

Civil Code, p.210, book 3,
tit. 2, chap. 2, art. 14.

Batiza

Digest, art. 21 = French Projet, p.286, chap.2, art.14; XVI, and Code Nap. art.916; Digest, art. 14 = French Projet, p.138, art. LV; Code Nap. art. 757; Partida 6, T.XIII, L.IX; Digest, art.4 = French Projet, p.285, art.XV; Code Nap. art.902.

Moreau Listlet's Notes to the Digest of 1808

Digest (of Justinian), art.14, p.210 = Part. 6, tit.13,1.8; Rec. Cast. Liv.5, tit.8, L.8; Feb. Cont. vol.1 ch.1 §7; Feb. Jui. v.2 liv.2 ch.1 §3 . . . Digest (of Justinian), art.21, p.212 = Part.6, tit.7, L.1 & 2; tit.8, L.2; Fuero Real Liv.3, tit.6, L.1; Feb.Cont. v.1, C.1 §7, §14.

It is tempting to state here that the two attorneys in the case, having been trained in the common law, restricted themselves to the language of the Digest and reasoned exclusively on the basis of its French text. One may also venture to say that these attorneys probably had little or no knowledge of the Spanish language. Except to a very limited extent on the part of the defendant's lawyer, the two attorneys, following the traditional common law reasoning of focusing on the text of a statute, did not go beyond the Digest to look at the sources of the law with which they were dealing. These sources, once again, were very much Spanish as explained by Moreau Lislet in his handwritten notes in "The de la Vergne Volume."

D. *Cottin v. Cottin*, July Term, 1817¹²⁷

The issue presented to the court in this important case was whether a child who lived a few hours and died could nevertheless inherit. The court stated that:

[A]ccording to the Roman law, and to the laws of many modern nations, this child would be deemed capable of inheriting. In Spain, however, the laws of which were, and have continued to be ours, where not repealed, there exists a particular disposition, by which it is further required, that the child, in order to be considered as naturally born, and not abortive, should live twenty-four hours.¹²⁸

Sources of law cited:

The Court, Derbigny, J.
Civ. Code 8, art. 6, Sect. I
Law 2, tit. 8, book 5 of
Recopilacion de Castilla

Batiza
Domat, 1, Liv. Prél. Tit. II,

Moreau Lisset's Notes to the Digest of 1808
L.2, t.8, Liv.5 Rec. Cast.
L.5, S.1, T.2, Liv. Prél. V.1 p.10 Domat
No. 112 ch.1 v.1 p.112. 103 Feb. Cont.

The importance of this case lies in the fact that the court brushed aside a literal reading of the provisions of the Digest or Civil Code of 1808 to find the roots of Louisiana law in the legal system that was then in existence. Consider the following statement by the court:

It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.

Is the definition given of abortive children in the code, incompatible with the disposition of the law 2, tit. 8, book 5, of the Recopilacion de Castilla, which declares that those will be deemed abortive who shall not live twenty-four hours? We think not. The

127. 5 Mart. 93 (East. Dist. July Term 1817).

128. *Id.* at 93-94.

definition given in the code, must hold as good in Spain as any where else, for it is dictated by nature itself; So our civil code provides that, in order to inherit, the child must be born capable of living (viable;) and the Recopilacion de Castilla, requires a legal presumption, that he was capable of living—that he shall have lived twenty-four hours.¹²⁹

This was significant because:

Edward Livingston, in an unsuccessful motion for rehearing of the *Cottin* case, argued that the Digest established a rule sufficiently different from the Spanish rule there at issue as to make it "mathematically demonstratable" that the court could not give effect to the Spanish rule if the Digest were followed. Thus Livingston argued for a more liberal construction of the Digest's articles under which they, and not the prior Spanish rules, would be given the benefit of the doubt when the crucial question of conflict *vel non* was raised. Had Livingston's view prevailed, the history of the Digest in the interim between the two codifications would have been very different, and probably the *magnum opus* of 1825 would have been unnecessary Justice Derbigny's description of the Digest of 1808 as merely a compilation of the laws previously in force thus seems unfortunate in retrospect, even though that pronouncement was justified by the terms of the Digest enactment itself.¹³⁰

E. *Bruneau v. Bruneau's Heirs*, January Term, 1821.¹³¹

In this opinion by Judge François Xavier Martin, the court was asked whether a plaintiff-widow could claim half the property acquired during her marriage to the deceased and an additional sum of money which she had brought into the marriage.

Sources of law cited:

<i>The Court</i>	<i>Batiza</i>
Civ. Code, 337, art.64 and	Art.64 influenced by
67. Recop. de Cast. 5, 9,	Pothier, Fuero Real and
2. 1 Febrero, Contratos,	Recop. de Cast. Art. 67
1, 2, n.9.	influenced by Recop. de Cast.
<i>Moreau Lislet's Notes to the Digest of 1808</i>	
Art. 64 = Fuero Real; Rec.Cast.; Feb.Cont.; Feb. Jui . . .	
Art. 67 = Rec. Cast.; Feb.Cont.; Feb. Jui	

129. *Id.* at 94-95.

130. KILBOURNE, *supra* note 111, at 65 (citations omitted).

131. 9 Mart. 217 (East. Dist. Jan. Term 1821).

One will have noticed that, this time, Professor Batiza recognized that the two relevant articles of the Civil Code, although written in French, had been influenced by Spanish law; it could not be otherwise in this particular case since the law of marriage contracts in the Digest was definitely Spanish. Judge Martin was to add the following illuminating statement:

As the marriage took place while this country was under the dominion of Spain, the laws of that kingdom afford us the only legitimate rule of decision . . . unless it should appear what are the goods, and their value, which each party brings in marriage, or which had been given to him separately, or which he has inherited during the marriage, all are presumed common. 1 Febrero, Contratos, 1,2, n.9. This part of the Spanish law has been transcribed in one of our statutes. Civ. Code, 137, art. 64 and 67.¹³²

F. *Dufour v. Camfranc*, June Term, 1822¹³³

The main issue in this case was whether immovable property sold at a sheriff's sale could pass to the buyer by mere adjudication, or whether an act was also essential to the transfer.

Moreau Lislet, attorney

Civ. Code, 344, art.2

Id. 346, art. 4

Id. 490, art. 1, 2 and 3.

Partida 5, 52.

Partida 3, tit.30, 1, 4 & 5.

Domat, liv.3, tit.7, sec.4,

n. 13

Part. 3, tit.28, 1.39; *id.*

1.40.

Livingston, attorney

D. 41, 4, 6, in notis, n.42.

D. 41, 4, 2, sec.15.

Carlivallio, tit. 3,

Des. 2,4,7,

Batiza

Tercera Partida, Tit. XVIII

Ley XVI.

French Projet of the year VIII

Prothier, Domat and French

Civil Code

The Court, Porter, J.

Civil Code (Digest) several articles; prior Louisiana cases citing Spanish Law; Domat, liv. 3, tit.7, sec.3, art. 5; Pothier, *Traité de prescription*; Digest, lib.41, ti.4, 1.11; Digest, lib. 50, tit. 16, 1.109.

Two of the most prominent attorneys and legal scholars of the time—Moreau Lislet and Livingston—were again facing

132. *Id.* at 218-19.

133. 11 Mart. 675 (East. Dist. June Term 1822).

each other in this case. Shortly thereafter, they were to work side by side to draft the Louisiana Civil Code of 1825. Both of the attorneys, as well as the court, referred to the traditional sources of law in use at the time, to wit: Spanish sources and Roman sources. One would think that if French sources of law had been "copied" and transplanted into the Digest of 1808, as Professor Batiza argues, these attorneys would most likely have mentioned them and used them. If Moreau Lislet had extensively "borrowed" from French sources from 1806 through 1808 and not disclosed that evil and unethical fact at all, it is very likely that Edward Livingston would have brought it up long before this particular case.

Moreau Lislet made a very revealing statement in his argument: "In translating this law [of the Siete Partidas, 3, 28, 40], an error has been committed, *and though part of the blame may attach to me*, still it is true that there is a mistake, and it is *my duty to show it*."¹³⁴ One can only speculate, then, that had Moreau Lislet copied the French *Projet* and the French Code, he would have admitted it long ago to avoid the risk of later being humiliated by such a revelation. It would have been very easy for any other attorney or legal scholar, such as Edward Livingston, Etienne Mazureau or François Xavier Martin, to break through that "secret" activity had Moreau Lislet had anything to hide when he embarked with James Brown on the drafting of the Digest. If an error in *translation*—a minor "sin" in relation to "plagiarism"—could so easily have been discovered, wouldn't it have been even much easier to establish that Moreau Lislet had "betrayed and miscarried" the instructions he had been given to make use of Spanish law and Roman law in drafting the Digest of 1808? One should note that in the above case Professor Batiza was, once again, the only one to claim that French sources of law, particularly the French *Projet* and the French Code, were the actual sources of the articles of the Digest applicable here.

CONCLUSION

It is apparent that the above cases of both the Territorial Court and the Louisiana Supreme Court establish, for their

134. *Id.* at 705 (emphasis added).

part, that the Digest of 1808 had its sources in the Spanish law and the Roman law because these were the "laws in force in the Territory of Orleans" in May 1806 and as incorporated, thereafter, in the Digest. In his conclusion to a comprehensive and scholarly evaluation of Louisiana court decisions during these years, Richard H. Kilbourne firmly argued that:

[t]he redactors' approach, moreover, merely reflected the predominant view among the members of the bench and bar of the period, The early decisions of the Louisiana Supreme Court demonstrate that, at least after Louisiana became a state, the court found it congenial to approach the Digest as a kind of "Restatement of the Civil Law" that still drew its sustenance from the uncodified law of the region For the Anglo-American lawyers and judges who came to predominate in Louisiana after 1812, law, whether civil or common, was revealed in courtrooms, not in the halls of the legislature. The use that those men made of Spanish legal sources, moreover, coincided with contemporary views about the effects of the 1803 cession, and the survival of Spanish institutions after that cession. Their reliance on Spanish law to substantiate the Digest's provisions, even where those provisions had been taken verbatim from the Code Napoléon or were contrary to the old law, was credible insofar as the civil law at that moment in history was not identified with any single state but was instead deemed the *jus commune* of all of the civilian world [T]rade [with Cuba, Mexico, and the rest of the Spanish Caribbean] frequently brought Spanish law into the courtroom, so that the bench and bar of early Louisiana remained familiar with many of its institutions long after the cession had severed Louisiana from Spain itself.¹³⁵

We can only join Richard Kilbourne in another of his conclusions:

that, whatever sources the redactors of the 1808 Digest employed in their labors, the legislature's enactment of the Digest made those laws Louisiana's laws. Thus they tended to be construed within the context most familiar or available to the Louisiana attorneys and judges who applied them, which, during the period in question, were the Anglo-American and Spanish "common laws." It is thus not surprising that the supreme court largely ignored French sources in interpreting the Digest, despite the fact that much of its language was taken from the *Code Napoleon* and its *Projet*. Moreover, the change in sovereignties had already given

135. KILBOURNE, *supra* note 111, at 75-77 (citation omitted).

local practitioners one new legal system to work with, and they must therefore have been the more unwilling to embrace a second. In any event, there is no indication that either the redactors of the Digest or the Territorial Legislature ever intended to adopt the French legal system. In sum, the supreme court's continuing reliance upon Spanish commentators and compilations during the Digest period did not undermine the integrity of the traditional legal principles epitomized in that enactment.¹³⁶

EPILOGUE: MOREAU LISLET ON MOREAU LISLET

It is time, we believe, to bring to an end the constructive, but divisive, tournament of scholars triggered thirty years ago with the publication of "The de la Vergne Volume." We hope to provide here, in this conclusion, an acceptable resolution to the sometimes acrimonious debate that has lasted for that many years over the single issue of the identification of the actual sources of the Louisiana Digest of 1808. Whereas the three parts of the work completed here were written on the basis of materials and sources provided by "third parties," namely, historians, legal scholars, politicians, public officials, lawyers, journalists and many others, this conclusion will give the most directly concerned party—Moreau Lislet—a final opportunity to present his own personal views and to answer the fundamental question raised in the introduction to this work: did Moreau Lislet betray the trust placed in him by the people of Louisiana in not following the specific instructions of the Louisiana legislature of 1806?

It is fitting to give to the party "charged," Moreau Lislet in this unique trial, the last word before the jury of History. Ideally, those who have debated and argued over the theme of the research undertaken in this work should have resisted the dangerous temptation of elaborating unsubstantiated "speculations" fueled by their personal feelings or biased intellectual bents. Although, as we found out, the obstacles to the research in this field were numerous and the hurdles vexing at times, nevertheless, one should have attempted and made every effort possible to ascertain what Louis Casimir Elisabeth Moreau Lislet had actually done before accepting these speculations as reality. All

136. *Id.* at 94.

of Moreau Lislet's contemporaries, associates, peers and friends always referred to him as a modest, honest, virtuous, ethical, true-hearted, just and trustworthy man. These impressive human qualities remained a constant for us, like a haunting theme or refrain, and were so much at odds with the charge leveled against him that the personality of Moreau Lislet became the original main focus of our research. Once we determined to our satisfaction that Moreau Lislet was truly who "they" said "he" was, it did not surprise us to find the "man" behind his work and, most specifically, the "honest man" behind the Digest of 1808.

So let us allow Moreau Lislet to come to the bar to present to us, in his own words, the arguments to counter the charge made against him. Such is the purpose of the two consultations and the one opinion presented here as a formal conclusion to this research and as the "last word of the defense." These documents are presented, first, in their original French version and, second, in an English translation. My personal contribution, as co-counsel for the defendant and as author of the translations, will consist only in adding a few footnotes to the texts written by Moreau Lislet so as to re-emphasize my own conclusions supported by the research reported in the three parts¹³⁷ of this article: Moreau Lislet was truly an *honest* man.

No. 3008

29 avril 1825

Déclaration et Opinion

par

Messrs. L. Moreau

Lislet et Pierre

Derbigny, avocats

à la requête

de

Mr. Jn.Bte. LaBranche

en sa qualité.

137. See Alain A. Levasseur, *The Major Periods of Louisiana Legal History*, 41 *LOU. L. REV.* 585 (1996) (Part I); Alain A. Levasseur, A "Civil Law" Lawyer: Louis Casimir Elisabeth Moreau Lislet, 42 *LOU. L. REV.* 203 (1996) (Part II).

En la ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, le vingt neuf avril mil huit cent vingt cinq, et dans la quarante neuvième année de l'Indépendance des Etats-Unis d'Amérique.

Pardevant Hugues Lavergne, notaire public dûment commis-sionné dans et pour la ville et paroisse de la Nouvelle Orléans, y résidant, et en présence des témoins ci-après nommés et soussignés.

Est personnellement comparu Mr. Jean-Baptiste LaBranche habitant sucrier demeurant dans la paroisse St Charles, de présent en cette ville, et agissant au nom et comme fondé de pouvoir ad hoc de Mr. A.G.M.Suriray De la Rue, Gardemagasin des Tabacs en feuilles à Bordeaux, dans le Royaume de France, ainsi qu'il résulte d'une lettre en date de Bordeaux, le premier août mil huit cent vingt quatre, adressée par le dit sieur De la Rue au dit sieur LaBranche qui l'a représentée au notaire soussigné qui la lui a rendue après en avoir pris lecture, ce qu'il certifie;

Lequel dit sieur comparant, en sa qualité, a déclaré que le dit sieur son constituant ayant un procès en France, relativement au partage d'une succession, dont la base principale repose sur un contrat de mariage passé à la Louisiane, en dix-sept cent soixante et quatorze, qui ne stipule point de société d'acquets entre les époux, il a été chargé par le dit sieur son constituant de prendre l'attestation en bonne forme, de deux avocats éclairés, de la Nouvelle Orléans, sur la question de savoir, "si dans les partages de successions qui s'effectuent maintenant à la Louisiane, la société d'acquets ou la communauté entre mari et femme, est reconnue ou non exister de plein droit quoiqu'il n'y en ait point de stipulation expresse de la part des époux, dans les contrats de mariage, qui ont été passés à l'époque où la Louisiane était une colonie espagnole;" et qu'en conséquence il a requis le notaire soussigné de prendre la déclaration de Messrs. Louis Moreau Lislet et Pierre Derbigny, anciens avocats en exercice près des Tribunaux de l'Etat de la Louisiane et demeurant à la Nouvelle-Orléans; —à quoi obtempérant:

Sont personnellement comparus Messrs. Louis Moreau Lislet et Pierre Derbigny, avocats, chargés par la Législature de l'Etat de la Louisiane, de la rédaction du code civil dudit Etat;

Lesquels, répondant à la question mentionnée dans le préambule de cet acte, ont dit et déclaré qu'ils ont parfaite connaissance et ont fait une étude particulière des lois qui ont régné à la Louisiane, depuis l'époque de son établissement comme Colonie Française et sous les divers changemens de gouvernemens qu'elle a

éprouvés jusqu'à ce jour; —Qu'avant la cession de la Louisiane par la France à l'Espagne, elle était gouvernée comme toutes les autres colonies françaises par la coutume de Paris; —Qu'en l'année dix sept cent soixante neuf, lors de la prise de possession de la Louisiane, par le Comte O'Reilly revêtu des pleins pouvoirs de sa Majesté Catholique, les lois françaises furent abolies et qu'on y substitua les lois espagnoles telles qu'elles s'observent en Espagne et dans les colonies du nouveau monde; —Que d'après ces lois qui sont encore en force aujourd'hui à la Louisiane, il existe de plein droit, par le seul fait de la célébration du mariage, une communauté ou société d'acquets ou de gains entre mari et femme, dans laquelle entrent tous les conquets meubles et immeubles faits durant le mariage et les fruits des biens propres des deux époux. Recopilacion de Castille, livre cinq, titre neuf, lois une, deux et quatre Febrero adicionado, édition de Madrid de mil huit cent dix-huit, première partie, chapitre deux, paragraphe unique numéro un, pages deux cent trente-cinq et deux cent trente-six—et seconde partie livre un, chapitre quatre, paragraphe un, numéro un à six, pages deux cent douze à deux cent quatorze; —Digeste des lois de l'Etat de la Louisiane, articles soixante-trois, soixante-quatre, soixante-cinq, page trois cent trente-six; Que d'après les dispositions de ces lois, la coutume constante qui a été suivie sous leur empire, et les décisions des tribunaux de la Louisiane, les avocats ci-dessus nommés déclarent qu'ils n'ont point de doute, que dans tout partage de succession qui s'effectuerait aujourd'hui à la Louisiane, et dont la base serait un contrat de mariage passé à l'époque où la Louisiane était une colonie Espagnole et dans lequel il n'y aurait point de stipulation expresse établissant une communauté ou société d'acquets ou de gains, cette communauté ou société d'acquets ou de gains serait censée exister de plein droit et par le seul effet de la loi, et que la même chose aurait lieu quand même il n'y aurait pas eu de contrat, si le mariage avait été célébré sous l'empire des lois Espagnoles.

Et les dits sieurs comparans ont ajouté de plus que pendant tout le tems que la Louisiane est restée sous la domination Espagnole, il était assez rare que les époux fissent un contrat de mariage, ce qui n'empêchait pas que la communauté n'eut lieu de plein droit.

Fait et passé en l'Etude, les jours, mois et an que Dessus, en présence des sieurs Jean-Baptiste Desdunes fils et Charles Janin, témoins requis Domiciliés qui ont signé avec tous les comparans et le notaire, après lecture faite.

*Signatures de Moreau Lislet, P.Derbigny, Jn. Bte. [Jean Baptiste] Labranche, Charles Janin, J.B. Desdunes et H. Lavergne.*¹³⁸

The following is the author's translation of this consultation:

No. 3008

April 29, 1825

Declaration and Opinion

By

Messrs. L. Moreau Lislet and Pierre

Derbigny, Counselors at Law,

At the request of

Mr. J.B. LaBranche,

in his capacity.

In the city of New Orleans, State of Louisiana, the twenty ninth of April one thousand eight hundred and twenty five, and the forty ninth year of the Independence of the United States of America.

Before Hugues Lavergne, notary public duly commissioned in and for the city and parish of New Orleans, there residing, and in the presence of the named and undersigned witnesses.

Has appeared in person Mr. Jean-Baptiste LaBranche, resident and sugar manufacturer residing in St. Charles Parish, presently in this city, and acting in the name and as agent ad hoc for Mr. A.G.M. Suriray de la Rue, Warehouse of Tobacco Leaves in Bordeaux, Kingdom of France, as is established by a letter dated in Bordeaux on the first of August one thousand eight hundred and twenty four, addressed by the said Mr. de la Rue to the said Mr. LaBranche who presented that letter to the undersigned notary who, after he took cognizance of it returned the same to him [LaBranche], which he certifies;

The said appearing Gentleman, in his capacity, has declared that the said Gentleman his principal was involved in a trial in France, in a matter of partition of a succession raising a main

138. Consultation (Apr. 29, 1825) No. 3008 (Notarial Archives, New Orleans, Louisiana) (Lavergne, notary). Original text in the French language as reported above.

issue based upon a marriage contract entered into in Louisiana, in seventeen hundred and seventy four, which stipulates no community of acquets between the spouses; he was instructed by his said principal to obtain the proper affidavits from two learned New Orleans counsellors at law on the question, "whether in the partitions of successions being opened now in Louisiana, the partnership of acquets or the community between husband and wife is considered to exist or not as of right, although there has been no express stipulation to that effect made by the spouses in the marriage contracts which were entered into at the time when Louisiana was a Spanish colony;" in consequence of which, he did request that the undersigned notary record the statement of Messrs. Louis Moreau Lislet and Pierre Derbigny, two former counsellors at law who practiced before the Courts of the State of Louisiana and who are residents of New Orleans; —in compliance with the above:

Have personally appeared Messrs. Louis Moreau Lislet and Pierre Derbigny, counsellors at law, mandated by the Louisiana Legislature to draft the civil code of the said State;

Who, in answer to the question set forth in the preamble of this act, have stated and declared that they have a perfect knowledge of and have made a specific study of the laws that have been in force in Louisiana, since the time of its settlement as a French colony and all through the various changes in government that have taken place until this day; —That before Louisiana was transferred by France to Spain, it [Louisiana] was governed, as were all other French colonies, by the Custom of Paris; That in the year seventeen hundred and sixty nine, when Count O'Reilly, vested with full powers by His Catholic Majesty, took possession of Louisiana, *the French laws were repealed and were replaced by the Spanish laws* as they are in force in Spain and in the colonies of the New World; —That *according to these laws which are still in force in Louisiana to-day*,¹³⁹ there exists as a matter of right, by the sole fact of the

139. The emphasis is ours. It is meant to call the reader's attention to Part I of this work as it concerns the history of the Louisiana legal system. See Alain A. Levasseur, *The Major Periods of Louisiana Legal History*, 41 LOY. L. REV. 585 (1996). In this consultation we have two French-speaking attorneys, trained in the French legal tradition in France and living witnesses, since 1804, of that period in time when the Louisiana legal system was being shaped, molded and couched in a Digest and subsequently in a Code, informing us in no uncertain terms that Spanish law was still the law of Louisiana in 1825 when this consultation was given. This historical state of things could only

celebration of a marriage, a community or partnership of acquets or gains between husband and wife, in which are included all movable and immovable property acquired during the marriage and the fruits of the personal property of the spouses. *Recopilacion de Castilla*, Book V, Title IX, Laws 1, 2 and 4.—*Febrero Adicionado*, Madrid Edition of one thousand eight hundred and eighteen, Part I, Chapter II, Paragraph 1, pages two hundred and thirty five and two hundred and thirty six, and Part II, Book 1, Chapter IV, Paragraph 1, n^o1 to 6, pages two hundred and twelve to two hundred and fourteen. *Digest of the laws of the State of Louisiana*, articles sixty three, sixty four, sixty five, page three hundred and thirty six;¹⁴⁰ —That, according to the dispositions of these laws, the constant custom followed under the control of these laws, the decisions handed down by the courts of Louisiana, the above named two counselors at law have declared that they have no doubt, that in every partition of a succession that would take place today in Louisiana, and the basis of which would be a marriage contract entered into when Louisiana was a Spanish colony, and in which

lead Moreau Lislet and Derbigny to write, in the next sentences to come, that the legal issue they were addressing here had to be considered in light of the *Recopilacion de Castilla* and *Febrero Adicionado* as these sources of law were transcribed in the Digest of the laws of the State of Louisiana. We believe that we can read in these statements the specific indication of the methodology and writing technique used by Moreau Lislet and James Brown in their writing of the Digest.

140. In his article entitled *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, Professor Batiza "finds" the sources of articles 63, 64 and 65, cited by Moreau Lislet in this consultation, in no other than "Pothier, Communauté; Coutume de Paris;" the Professor also adds, by necessity, the "Fuero Real, Partida I, Compilation of Castille, Febrero Adic." Batiza, *supra* note 9, at 105-06 (app. C). Professor Batiza notes that these articles of the Digest were *substantially influenced* by these sources. *Id.* One could ask to which sources he was referring and whether the influence of these sources was on the substance of the articles or on their terminology or wording. Is it not possible to find here an illustration of the technique resorted to by Moreau Lislet, to wit: use French words and, thus, French texts where Spanish law or Roman law and French law reflected the same substantive law, or where *French texts could be used to reflect Spanish law and substantially influence the wording of the provisions of the Digest?* Professor Batiza himself stated that:

[because the Code of 1808 was originally drafted in French and then translated into English and because identity or substantial identity of wording is necessary to classify a source as "verbatim" or "almost verbatim," only the French and Louisiana sources can be either "verbatim" or "almost verbatim." All other sources, whether in Spanish or Latin, had to come under either of the two remaining categories, "substantially" or "partially" influenced, since only *their concepts and not their language were adopted*.

Id. at 13-14 (emphasis added) (citation omitted).

contract of marriage there would be no express stipulation creating a community or partnership of acquets or gains, the said community or partnership of acquets or gains would be deemed to exist as of right and by the mere effect of the said law, and that the same would occur in the event there would have been no marriage contract, if the marriage had been performed under the control of Spanish laws.

And the said appearing two Gentlemen have added that as long as Louisiana was under Spanish domination, it was rather exceptional for spouses to enter into a contract of marriage, which would not prevent the community from existing as of right.

Done and signed in this office, on the day, month and year stated above, in the presence of MM. Jean-Baptiste Desdunes, Jr. and Charles Janin, witnesses summoned to that effect, who have signed with all the parties appearing and the notary, after the act had been read.

Signatures of: —Moreau Lislet, —Pierre Derbigny, — LaBranche, —Janin, —Desdunes, — Lavergne.¹⁴¹

The second consultation was as follows:

Consultation, 18 décembre 1818

Consultation—

Pierre s'est marié en premières noces et a eu sept enfans de ce premier mariage. La première femme lui avait apporté environ 74000 piastres avec lesquelles Pierre avait acheté une habitation et une centaine de nègres. Après la mort de sa première femme, Pierre est passé à de secondes noces ayant sept enfans du premier lit existans. Depuis son second mariage deux de ces mêmes enfans sont morts sans postérité et Pierre s'étant vu dans la nécessité de faire cession de biens à ses créanciers a fait liquider les droits qui revenaient à ses enfans du premier lit et il s'est trouvé qu'en comprenant les parts des deux enfans décédés, ces droits s'élevaient à une somme de 52500 piastres aux environs, c'est-à-dire 7500 pour chaque enfant. Les syndics des créanciers de Pierre ayant mis ses biens en vente, trois des enfans de Pierre ont acheté son habitation et quelques uns des esclaves y attachés et le surplus a été vendu à des étrangers, les sindics n'ont pas encore fait de répartition et ont demandé s'il[s] peuvent répartir les 15000 piastres qui revenaient

141. Author's translation.

aux deux enfants décédés de Pierre comme un bien qui était acquis à Pierre, en toute propriété, comme héritier naturel de ces deux mêmes enfans.

L'avocat soussigné pense que si Pierre ne fut point passé à de secondes noces il n'y aurait pas de doute qu'ayant hérité de ses deux enfans du premier lit, qui étaient décédés, ses droits sur leur succession ne fussent passés à ses créanciers, en vertu de la cession de biens qu'il leur avait faite de manière que les syndics pourraient pleinement en disposer. En effet la loi porte en général, que les pères et mères succèdent à leurs enfans décédés sans postérité à l'exclusion des autres ascendans ainsi que des collatéraux:

Code Civil Art= 30 page 150-

Loi 1.- 1-5, - tit 8 de la récopilation de Castille.

Mais Pierre est passé à de secondes noces et c'est depuis ces secondes noces, que deux de ses enfans du premier lit sont décédés, il en résulte qu'il ne leur a succédé qu'en usufruit seulement et qu'il n'a pu céder et transporter à ses créanciers par sa cession de biens, plus de droits qu'il n'en avait lui-même, comme héritier de ses enfans,

En effet c'est une disposition formelle de la loi Espagnole, que le père ou la mère qui se remarie, est tenu de réserver à ses enfans du premier lit les biens qu'il tient de la libéralité de l'époux prédécédé, ou de la succession de quelques uns du précédent mariage.

C'est ce qu'on lit dans Febrero adicional vol.1 part.1 Chap 3 § unique page 242 et suivantes.

"La femme qui contracte un second mariage, dit Febrero, est obligée de réserver aux enfans du premier lit, la propriété de tous les biens qu'elle a reçus de son premier mari, par donation pour cause de noces; (arras) fidéicommiss, legs, donation entre vifs ou pour cause de mort ou à quelque autre titre lucratif. Febrero, vol.1-part 1- chap.3- § unique, No 1—"

"La femme, ajoute ensuite Febrero, est non seulement obligée de préserver les biens mentionnés dans le numéro précédent, mais encore ceux dont elle hérite ab intestat de quelques uns de ses enfans du premier lit, mais dans ce cas elle leur réservera seulement les biens dont les dits enfans ont hérité de leur père. Febrero—ibid. No 2."

Enfin Febrero termine pour dire que dans tous les cas ou la femme est obligée à faire cette réserve envers ses enfans, le mari y est également obligé sans exception s'il vient à se remarier, ce qui

est conforme aux dispositions de la Loi 4. tit-1.-liv.5 de la récopilation de Castille. Febrero ibid. No 3.

Or cette réserve que la loi Espagnole prescrit de faire en faveur des enfans du premier li[t] dont les pères ou mères se remarieraient, bien loin d'avoir été abrogé par le Code s'y trouve, au contraire pleinement quoiqu'indirectement confiné lorsque le code, après dit, en parlant de la donation que l'époux qui se remarie pourra faire à son nouvel époux "que cette donation ne peut porter en aucun cas que sur les biens propres de l'époux qui passe à de secondes noces et ne peut rien comprendre de ceux qui lui sont venus du prédécédé, soit par donation faite avant ou depuis le mariage, ou autrement, ou de la succession de quelqu'un des enfans du précédant mariage" ajoute "ces biens devant, d'après la loi, être réservés aux enfans dudit mariage, dans le cas ou leur père ou mère passerait à de secondes noces—" Code civil, Art. 227-page 259

Le code civil maintient donc les lois précédentes qui prescrivait cette réserve puisqu'il les cite à l'appui de la disposition qu'il établit pour restreindre les donations que les maris ou les femmes qui passent à de secondes noces, ayant des enfans du premier lit, peuvent faire à leur nouvel époux.

On ne doit pas croire que cette réserve soit uniquement relative au nouvel époux; le mari et la femme qui se remarient, ayant des enfans du premier lit, ne peuvent pas plus disposer des biens compris dans la réserve, en faveur d'autres personnes, qu'il ne le peuvent à l'égard de leur nouvel époux. C'est ce qu'enseigne Febrero après avoir parlé de la réserve à laquelle est obligé le mari ou la femme qui a passé à de secondes noces, lorsqu'il dit:

"En conséquence, elle (la femme qui se remarie ayant des enfans du premier lit) ne peut aliéner ni hypothéquer, ni engager ces biens (ceux compris dans la réserve) ni en disposer en faveur de ses enfans du second lit, ou de ses autres parens ou d'autres personnes, attendu que ces biens ne sont pas sa propriété, quoique les biens . . . seraient tacitement affectés . . . et elle doit même donner caution et sureté qu'elle les restituera et en usera en bon père de] famille, parce que par le seul fait de [s'être] remariée, elle perd le droit qu'elle avait sur eux et ne lui reste plus que l'usufruit pour . . . en jouir sa vie durant." Febrero . . . part.1. ch-3- § unique, No-1 vers le milieu.

Il semble, d'après ces autorités que si le mari ou la femme a hérité de quelques uns de ces enfans du premier lit, avant même d'avoir passé à de secondes noces, leurs droits de propriété sur les

biens de cette succession, se [condensent] en un simple usufruit. Il en doit donc résulter que lorsque le mari et la femme, ne succèdent à leurs enfans du premier lit, qu'après avoir passé à de secondes noces, leurs droits de succession se réduit à un simple usufruit et que la propriété des biens qui la composent appartiennent aux enfans du premier lit. On conclut de [la] loi, que Pierre n'ayant hérité des biens de ses deux enfans du premier lit qui ne sont décédés, que depuis . . . [son] second mariage, n'a pu transmettre à ses créanciers, que l'usufruit des 15000 piastres qui revenaient à ses deux mêmes enfans, et qu'ainsi, lors de la distribution à faire par les syndics de ses créanciers, du produit de la vente de ses biens, les autres enfans du premier lit comme héritiers de leurs frères décédés quant à la propriété, peuvent valablement s'opposer à ce que 15000 piastres sur ce prix, ne soient distribués aux derniers créanciers en ordre, qu'à la charge pour eux de donner bonne et valable caution de bien restituer cette somme à la mort de Pierre.

Délibéré à la Nlle Orléans le 18 Décembre 1818.

(Signé) L. Moreau Lislet

avocat

La loi ne prévoyant pas le cas ou le père ou la mère convole à de secondes noces, après avoir hérité, par le décès d'enfans du premier lit, de ce qui était échu à ces enfans par la mort de leur père ou de la mère, il semblerait, au premier coup d'oeil, que la réserve n'est pas d'obligation, lorsque l'enfant décède après le second mariage. Mais si l'on veut réfléchir que l'esprit et le but de la loi sont de ne favoriser les secondes noces qu'autant que les enfans d'un premier lit n'en souffren[t] pas, et d'empêcher, à cet effet que les biens du père ou de la mère de ces enfans n'enrichissent ceux d'un second mariage, on doit sans peine, souscrire à l'opinion ci-dessus émise. En méditant cette loi on découvrira que les voeux restent simples usufruitiers des biens maternels et paternels de leurs enfans décédés depuis la mort de leurs conjoints. Ainsi, que le second mariage ait lieu avant ou après la mort de l'enfant du premier lit, cela ne peut rien changer à la qualité. Il serait ridicule que dans le cas ou la mort de l'enfant précède le convol en secondes noces, le père fut seulement usufruitier et que lorsqu'elle n'a lieu qu'après il fut propriétaire. Ajoutons que cela blesserait les droits des enfans frères du défunt aux intérêts desquels la loi a voulu prévoir.—Pour ces raisons, je partage l'opinion de Mr. Moreau.

(Signé) Mazureau¹⁴²

142. Consultation (Dec. 18, 1818), The Favrot Papers, Manuscripts Collection 550,

The following is the author's translation of the second consultation:

Consultation given on December 18, 1818.

Consultation¹⁴³

Pierre was married a first time and had seven children from this first marriage. His first wife had brought to him about 74000 piastres with which he had bought a dwelling and about one hundred negroes. After the death of his first wife, Pierre remarried, still the father of seven children from his previous marriage. Since his second marriage, two children have died without leaving any descendant and Pierre being under the necessity to surrender his assets to his creditors proceeded to sell the rights of his children of his first marriage, including the shares of the two previously deceased children; the total amount of the sale was about 52500 piastres, or 7500 for each child. The trustees for Pierre's creditors having sold his assets, three of Pierre's children bought back his house and some of the slaves whereas the remaining assets were sold to third parties; the trustees have not yet distributed the monetary amount received and have asked whether they can divide the 15000 piastres which were due to the two deceased children of Pierre as if it were an asset acquired by Pierre, in full ownership, as the natural heir of these same two children.

The undersigned counsellor at law believes that had Pierre not married a second time there would have been no doubt that having inherited from his two deceased children from his first marriage, his right to their succession would have been transferred to his creditors, by virtue of the surrender of assets he had made to them, in such a manner that the trustees could have proceeded with the full disposition of such assets.

Indeed the law provides in general, that fathers and mothers inherit from their children who have died without leaving any descendant, to the exclusion of any other ascendant as well as collateral:

Civil Code art. 30 page 150—

Document # R-725, Manuscripts Department, Special Collections Division, Howard Tilton Memorial Library, Tulane University (emphasis in original).

143. Liberal translation into English from the French text of this consultation as reported above.

Law 1, b.5, tit.8 of the *Recopilacion de Castille*.¹⁴⁴

But Pierre married a second time and it is since his second marriage that two of his children from the first marriage have died; it follows that he inherited from them the *usufruct only*¹⁴⁵ and that he could not transfer and deliver to his creditors by the surrender of his assets, more rights than he, himself, had received as heir of his children.

Indeed it is an absolute disposition of the Spanish law, that the father or the mother who remarries, is bound to reserve to his/her children of the first marriage the assets which he/she received by gratuitous act from the predeceased spouse, or from the succession of whomever from the first marriage.

This is what one can read in Febrero adicional, vol.1, part.1, chap.3, § 1, page 242 and following:

"The wife who remarries, says Febrero, is *bound to reserve*¹⁴⁶ to the children of the first marriage, the ownership of all assets which she has received from her first husband by way of donations on account of the marriage, (arras) fideicomis, legacies, donations inter vivos or mortis causa or by any other onerous title. Febrero, vol.1- part 1- chap.3- § 1—"

"The wife, adds Febrero, is not only bound to hold the assets mentioned in the preceding paragraph, but also those assets which she inherits *ab intestat* from any one of her children of her first marriage, but in this case she will hold back for them only those assets which the said children have inherited from their father. Febrero, id. No 2—"

Lastly Febrero ends by saying that in every case where the wife is bound to hold back in reserve some assets for the benefit of her children, the husband is bound likewise to the same obligation without any exception should he remarry, which is in total compliance with the dispositions of law 4. tit.1. book 5 of the *Recopilacion de Castille*. Febrero id. No 3.

144. If one looks at the sources of this same article as they are cited in the Digest annotated by Moreau Lislet, page 150 of "The de la Vergne Volume" under the title "of The Succession of Descendants," this same reference to the *Recopilacion* is noted in exactly the same format. Many additional references to Spanish laws, in particular, and to Domat are also given. Professor Batiza could only give the Compilation of Castille as the source of this same article of the Digest. See Batiza, *supra* note 9, at 73.

145. Emphasis in the original French text.

146. Emphasis in the original French text.

Moreover, this particular reserved share that the Spanish law requires that it be kept in favor of the children of the first marriage when the father or the mother remarries, far from having been repealed by the Code is, quite to the contrary, fully incorporated in the Code, although indirectly where the Code, referring to the donation that the spouse who remarries can make to the new spouse, states "the donation . . . can, in no case, affect any property, but the estate belonging to the man or woman who contracts a second marriage, and cannot comprise any effects which came to him or her, from the deceased spouse, either by donation made before or after the marriage or otherwise or by the succession of some of the children of the preceding marriage; these effects being, according to law, reserved to the children of said marriage, in case their father or mother marries again."¹⁴⁷

Thus the Civil Code maintains the preceding laws which had provided for this particular reserved share since it refers to them in support of the provision it lays down to restrict the donations that husbands or wives who remarry, and who have children of their first marriage, can make to their new spouse.

This is not to say that this special reserved share is of concern only to the new spouse; the husband and the wife who remarry, and who have children of their first marriage, cannot any more dispose of the assets which make up this reserved share in favor of any other person, than they can in favor of their new spouse. This is what Febrero states after he has addressed the issue of the reserved share to which is held the husband or the wife who has remarried, where he says:

"As a consequence, she (the wife who remarries and who has children of a first marriage) can neither dispose, nor give a mortgage, nor commit those assets (i.e. the assets making up that reserved share), nor transfer them to the children of the second marriage, nor in favor of her other relatives or third persons, since these assets are not her property, and she must even give a

147. Emphasis in the original French text. In "The de la Vergne Volume," Moreau Lislet gives many Spanish texts as the sources of article 227 of the Digest. In his search for the sources of the Digest, Professor Batiza also only cited Spanish texts—*Quinta Partida* and *Febrero Adicionado*. It is obvious, therefore, that where Spanish law was different from French law and from any text written in French, Spanish law was to be included in the Digest drafted by Moreau Lislet and James Brown, leaving no room for Professor Batiza to speculate.

personal security and a surety to make sure that she will return these assets and will make use of them as a faithful administrator, *because by the mere fact that she remarried she lost the right that she has over them, and she is left only with the usufruct to enjoy for the rest of her life.*¹⁴⁸ Febrero 1, ch.3,- single §, No 1 around the middle.

It appears, from these authorities, that if the husband or the wife has inherited from some of the children from their first marriage, even before he or she enters into a second marriage, the assets, rights of ownership over the assets of that succession, are transformed into a simple usufruct. We draw the conclusion from the law, that since Pierre did not inherit assets from his two children from his first marriage and who died after his second marriage, he could transfer to his creditors, only the usufruct of the 15000 piastres who were the shares of these two children, and that, therefore, the children of the first marriage, as heirs of their predeceased brothers with respect to the ownership of these 15000 piastres, can validly raise objections to these 15000 piastres being distributed to the creditors in their proper order, or only if these creditors agree to give adequate security to ensure the return of this amount of money upon Pierre's death.

Prepared and done in New Orleans, this 18th of December 1818.

L. Moreau Lislet

Counselor at law

Since the law does not provide for the case where the father or the mother would remarry, after having inherited from their deceased children of their first marriage the share of inheritance which these children had themselves inherited on account of the death of their father or mother, it would appear, at first glance, that the reserved share is not a requirement of the law when the child dies after the second marriage. But if one does understand that the spirit and the goal of the law are to encourage second marriages only to the extent that the children of the first

148. Emphasis in the original French text.

marriage do not suffer from them, and to prevent, in that respect, that the assets of the father or the mother of these children lead to the enrichment of the children of the second marriage, one must necessarily endorse the opinion given above. When meditating over this law one will find out that a widower or a widow is only a usufructuary of the assets inherited from their father or mother by those children who have died since the death of their spouse. Thus, whether the second marriage takes place before or after the death of the child of the first marriage, this cannot change anything in the legal relationships. It would be ridiculous to have a case where in the event the child would die before his father remarries, the father would be only a usufructuary, whereas should the child die after the second marriage the father would become a full owner. We can add that such a situation would prejudice the rights of the children who are the brothers of the deceased child, rights which the law did intend to protect. For these reasons, I share the opinion expressed by Mr. Moreau [Lislet].

[Signed] Mazureau¹⁴⁹

The following is another source in support of our conclusion:

GAZETTE D'ETAT DE LA LOUISIANE

Mardi 20 Juin 1826

Journal de la Cour d'Accusation

(Impeachment)

Opinion de L. Moreau Lislet, sénateur, sur les chefs d'accusation portés contre le Juge Chinn.

. . . Pour démontrer que le Juge Chinn s'est rendu coupable à cet égard d'une violation manifeste des devoirs que lui prescrivait la loi, les commissaires chargés de la poursuite, ont cité une loi de la Recopilacion de Castille, en force dans cet Etat, par laquelle ils ont soutenu qu'il était formellement défendu aux juges et aux officiers de justice, de se rendre adjudicataires dans les ventes publiques faites par leur ministère.

. . .

il s'agit ici d'examiner si le Juge Chinn en achetant ainsi, a commis sciemment une infraction à la loi, qui puisse lui mériter d'être destitué Or à l'égard de la loi de la Recopilacion de Castille, sur la traduction de laquelle les commissaires de la poursuite et

149. Author's translation from French.

*les défenseurs de l'accusé n'ont point été d'accord . . . je pense que le Juge Chinn ne peut pas être puni d'avoir ignoré les dispositions d'une loi qui aurait contenu une semblable prohibition, lorsque l'on considère que cette loi se trouvait insérée dans un recueil écrit dans une langue étrangère qui n'est point entendue généralement par les habitants de cet Etat, que les lois de la Recopilacion de Castille n'existent que dans un petit nombre de bibliothèques de cet Etat, et qu'elles n'ont jamais été traduites en Anglais et publiées par l'ordre de la Législature comme l'ont été les lois des Partidas*¹⁵⁰

The following is the author's translation of Moreau Lislet's opinion:

GAZETTE OF THE STATE OF LOUISIANA

Tuesday, June 20, 1826.

Journal of the *Cour d'Accusation*

(Impeachment)

Opinion of L. Moreau Lislet, senator, on the charges brought against Judge Chinn.¹⁵¹

To establish that Judge Chinn is guilty of an obvious violation of the duties he is bound to under the law, the commissioners in charge of the prosecution have cited a law of the *Recopilacion de Castilla* in force in this State, according to which they have argued that it was expressly prohibited for any judge and any officer of the court to become a successful bidder in public sales held under their supervision and authority.

Our purpose here is to determine whether Judge Chinn, in so acquiring, has willfully committed a violation of the law to such an extent that he should be removed from office.

As to the law of the *Recopilacion de Castilla*, on the translation of which the commissioners for the prosecution and the counsels for the defense have not agreed . . . I believe that Judge Chinn should not be punished for having been unaware of the existence of a statute which would have included such a prohibition, when one must be aware of the fact that such a statute was a part of a compilation written in a foreign language by and large not understood by the inhabitants of this State, that the

150 GAZETTE D'ETAT DE LA LOUISIANE, June 20, 1826.

151 Liberal translation from the French text.

laws of the *Recopilacion de Castilla* can be found only in a few libraries in this State and that they have never been translated to English, nor published by order of the Legislature, as has been the case of the laws of the *Partidas*¹⁵²

Once again, we have included this published "opinion" by Moreau Lislet for the purpose of emphasizing that Spanish law was the law of the land in Louisiana. Moreover, it was a controlling law even though it was written in Spanish, a language unknown to many "inhabitants," including Judge Chinn who was supposed to enforce a law or legislation he apparently could not understand. It is also important to point out that this opinion was given by Moreau Lislet who had just contributed to the writing of the Louisiana Civil Code of 1825, a progeny of the Digest of 1808, which was also drafted mainly by Moreau Lislet. It definitely shows consistency in the sources of law of the Louisiana legal system from 1808 to 1825 and establishes, in conjunction with the two consultations cited in this conclusion, that these sources were Spanish in substance.

152. Author's translation.