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The Continuing Influence of *le Droit Civil* and *el Derecho Civil* in the Private Law of Louisiana

J.-R. Trahan*

I. INTRODUCTION

If one were to conceive of Louisiana's private law as a "natural person,"¹ then it would not be unfair to say that the "parents" of that person are *le droit civil* of France and *el derecho civil* of Spain. It was, after all, from those two "civil laws" that Louisiana's private law was first born. As this "child" has grown up, it has, like any other child, differentiated itself from its parents, both physically and psychologically. Indeed, in the case of this particular child, one could say that, as it has grown up, it has, at the physical level, undergone a good bit of "cosmetic surgery," more than a few "organ transplants," and even some wholesale "amputations" and it has, at the psychological level, adopted a mindset that, at least in part, is at odds with that of its parents. But through it all and despite all these many changes, it remains the case that Louisiana's private law, in both its body and its mind, still bears a striking resemblance to its parents.

That is the burden—one that, I readily admit, is not all that difficult to carry—of my presentation: to bear witness to this continuing parent-child resemblance. In pursuit of this objective, I must, of necessity, review the history of Louisiana's private law. Now, unless I miss my guess, most of the Louisianians in the audience will not relish the prospect of being subjected to the recitation of yet another "history" of Louisiana's private law. This history has been given before, and on more than one occasion.² In

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1. La. Civ. Code art. 24, par. 2, sent. 1 ("A natural person is a human being.").

2. The literature regarding Louisiana legal history, in particular the history of Louisiana's private law, is abundant. See, e.g., A.N. Yiannopoulos, *The Civil Codes of Louisiana*, in La. Civ. Code XXXV (2003) [hereinafter Yiannopoulos, *Civil Codes*]; Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 La. L. Rev. 1 (2003); Louisiana: Microcosm of a Mixed Jurisdiction (Vernon Valentine Palmer ed., Carolina Academic Press 1999) [hereinafter *Microcosm*]; A.N. Yiannopoulos, *Civil Law System: Louisiana and Comparative Law* (2d ed. 1999); Alain A. Levasseur & Roger K. Ward, *300 Years and Counting: the French Influence on the Louisiana*

my defense, I would remind us Louisianians that there are many in the audience who hale from foreign shores and who, for that reason, are not as familiar with the origin, development, and current state of Louisiana's private law as we may be. Such a history will no doubt assist them in making sense of the remarks of the other speakers who will address more particular aspects of the past, present, or future of Louisiana's private law. But I dare to hope that even for us Louisianians, the retelling of the story of our private law—or at least this particular retelling—will have some value. My hope is built on what I take to be the only really distinctive characteristic of my retelling of the story, namely, its relatively positive focus: it emphasizes the extent to which Louisiana's civil law tradition remains intact. Unlike most prior histories of Louisiana's private law, which tend to point out that "the glass" is

Legal System, 46 La. B.J. 301 (1998); Alain A. Levasseur, Louis Casimir Elisabeth Moreau Lislet: Foster Father of Louisiana Civil Law (The LSU Law Center Publications Institute 1996) [hereinafter *Moreau Lislet*]; Shael Herman, *The Louisiana Civil Code: A European Legacy for the United States* (Louisiana Bar Foundation 1993); Kenneth M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: a Surprising Triumph for the American Influence*, 49 La. L. Rev. 1 (1988); Richard Holcombe Kilbourne, Jr., *A History of the Louisiana Civil Code: the Formative Years, 1803–1839* (1987); Edward F. Haas, *Louisiana's Legal Heritage* (Perdido Bay Press 1983); Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762–1828*, 42 La. L. Rev. 1485 (1982); Rodolfo Batiza, *Origins of Modern Codification of the Civil Law: the French Experience and its Implications for Louisiana Law*, 56 Tul. L. Rev. 477 (1982) [hereinafter Batiza, *Origins*]; Shael Herman et al., *The Louisiana Civil Code: a Humanistic Appraisal* (1981); A.N. Yiannopoulos, *Louisiana Civil Law: a Lost Cause?*, 54 Tul. L. Rev. 830 (1980) [hereinafter Yiannopoulos, *Lost Cause?*]; Rodolfo Batiza, *The Actual Sources of the Louisiana Project of 1823: a General Analytical Survey*, 47 Tul. L. Rev. 1 (1972) [hereinafter Batiza, *1823 Sources*]; Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculations: A Rejoinder*, 46 Tul. L. Rev. 628 (1972); Robert Pascal, *Sources of the Digest of 1808: a Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972) [hereinafter Pascal, *Reply*]; Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4 (1971) [hereinafter Batiza, *1808 Sources*]; Robert Pascal, *A Recent Discovery: a Copy of the "Digest of the Civil Laws" of 1808 with Marginalized Notes in Moreau Lislet's Hand*, 26 La. L. Rev. 25 (1965); John T. Hood, *Symposium: Louisiana and the Civil Law: a Crossroad in Louisiana History*, 22 La. L. Rev. 709 (1962); John T. Hood, *The History and Development of the Louisiana Civil Code*, 19 La. L. Rev. 18 (1958) [hereinafter Hood, *History and Development*]; Rodolfo Batiza, *The Influence of Spanish Law in Louisiana*, 33 Tul. L. Rev. 29 (1958); Kate Wallach, *Bibliographical History of Louisiana Civil Law Sources, Roman, French and Spanish* (Louisiana State Law Institute 1955); Samuel Groner, *Louisiana Law: Its Development in the First Quarter-Century of American Rule*, 8 La. L. Rev. 350 (1948); Henry Plauché Dart, *The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana*, 6 Tul. L. Rev. 83 (1931); John H. Wigmore, *Louisiana: the Story of its Legal System*, 1 So. L.Q. 1 (1916).

now “half empty,” mine reminds us that it is also yet “half full.”³ This is a reminder of which I stand in constant need.

II. CORPUS

A. *The Colonial Era (1699–1803)*

The history of Louisiana’s private law dates back to the time of the European colonization of Louisiana. During that period, Louisiana was owned, first, by France, then, by Spain, and finally, by France again. That Louisiana took its civil law from the civil law of both of those nations is not disputed. What is disputed is just how much and precisely what Louisiana took from each.

1. *The First French Period (1699–1762)*

Though the French began to colonize Louisiana as early as 1699, the French king made no provision for the administration of justice or the substantive law here until 1712.⁴ In that year, he issued “Letters Patent” to Sieur Crozat, his Secretary, directing him to assume the administration of the territory. That document made “Our [royal] Edicts, Ordinances & Customs and the Usages of the Provostry and Viscounty of Paris” applicable to the colony.⁵ These “edicts, ordinances, customs, and usages” included, among others, *la Coutûme de Paris* and *l’Ordonnance de 1667* (concerning civil procedure).⁶ As we will see later on, at least some elements of these early French legal authorities remain a part of Louisiana law even today.

3. By saying this, I intend no criticism of those scholars who have provided more negative accounts of the history of Louisiana’s private law, that is, those that emphasize the extent to which Louisiana’s civil law tradition has declined through the years. The “negativity” of these scholars, as I understand it, is the product of (i) their deep appreciation for that tradition, (ii) their recognition that the decline of the tradition, which has indeed been profound, continues still today, and (iii) their sense that the decline is in no small measure attributable to the ignorance, indifferentism, or unthinking conformism of many of those who have been charged with the tasks of making, interpreting, and applying Louisiana’s laws for the past century and a half. These are sentiments that I share completely. See Kenneth M. Murchison & J.-R. Trahan, *Western Legal Traditions and Systems: Louisiana Impact – Course Materials 290–91 & n.3* (2003) (the views attributed to the “pessimists” are in fact my own).

4. Yiannopoulos, *Civil Codes*, *supra* note 2, at XXXV.

5. Batiza, *Origins*, *supra* note 2, at 579.

6. Batiza, *1808 Sources*, *supra* note 2, at 5.

2. *The Spanish Period (1763–1800)*

In a treaty signed in 1762, France ceded Louisiana to Spain.⁷ Until fairly recently, there has been some debate about whether the Spanish ever introduced Spanish *substantive* law into the new colony.⁸ The first Spanish governor, Don Antonio de Ulloa, clearly did not do it. The question is—or was—whether the second Spanish governor, General Alexander O'Reilly, did so. The cause of the uncertainty is, at least in part, simply that no one has ever been able to find a decree in which O'Reilly put that law into effect.⁹ Notwithstanding this fact, nearly all—if not all—historians of Louisiana law today agree that O'Reilly must have issued such a decree.¹⁰ This opinion has multiple foundations. For one thing, O'Reilly had requested and received authority from the Spanish crown to do precisely that.¹¹ And for another thing, the records of Laussat, the French governor during the second French colonial period, indicate that Laussat had received a copy of such a decree upon his arrival here in Louisiana.¹² Finally, there's the witness of a number of Louisiana lawyers and judges who had lived through the transition from French to American rule (some of whom had been around even in the Spanish period). In the early part of the American period, these lawyers and judges consistently stated or, at the very least, assumed that the law which had theretofore been in force in Louisiana was "Spanish," not "French."¹³

Now, precisely what "Spanish law" O'Reilly put into effect in Louisiana is not entirely certain, inasmuch as the decree that put that law into effect has apparently been lost. But one must suppose that it was the same Spanish law that had been or would soon be put into force in Spain's other New World colonies. It was that law, after all,

7. Levasseur, *Moreau Lislet*, *supra* note 2, at 3.

8. The qualifier "substantive" is important here. It has long been known that O'Reilly, at the very least, put Spanish *public* and *adjective* (procedural) law into force, specifically, that reflected in the *Nueva Recopilacion de Castilla* and the *Recopilacion de las Indias*. See *Ordinances and Instructions of Don Alexander O'Reilly*, 1–2 La. L.J. 1 (Gustavus Schmidt tr., 1841); see also Levasseur, *Moreau Lislet*, *supra* note 2, at 9.

9. With only one limited exception, the "Ordinances and Instructions" referred to in the previous note seem to have been concerned exclusively with public and adjective law. The exception is the law of testaments. See 1–2 La. L.J., *supra* note 8, at 48–55.

10. See, e.g., Yiannopoulos, *Civil Codes*, *supra* note 2, at XXXV–XXXVI; Lorio, *supra* note 2, at 4 n.16; Levasseur, *Moreau Lislet*, *supra* note 2, at 8–12; Herman, *supra* note 2, at 28; Batiza, *1808 Sources*, *supra* note 2, at 5–6; Wallach, *supra* note 2, at 70.

11. Levasseur, *Moreau Lislet*, *supra* note 2, at 9–10, n.17.

12. *Id.* at 33–34.

13. See generally *id.* at 39–40, 55–56, 208–17 & 236–56.

that O'Reilly had asked the Spanish government for permission to put into effect here. That law included, among other things, various Spanish law digests or codes, such as the *Recopilacion de Castilla*, *Recopilacion de las Indias*, the *Leyes de Toro*, the *Fuero Real*, and the *Siete Partidas*, well as various Roman law digests or codes, in particular, the works of Justinian.¹⁴ At least some elements of this "Spanish law," as we will later see, ending up "sticking," that is, remain a part of Louisiana's private law even now.

3. *The Second French Period (1800–1803)*

By treaty signed on October 1, 1800, Spain retroceded Louisiana to France.¹⁵ Just as there was once uncertainty regarding whether the Spanish authorities ever put Spanish law into effect in Louisiana, there is also some uncertainty regarding whether the French authorities, upon their return to Louisiana, reinstated French law.¹⁶ Though there is admittedly some evidence to the contrary, the weight of the evidence favors a negative answer, that is, that the French authorities did *not* reinstate French law. First, there's the record of the correspondence between Laussat, the French governor, and authorities back in France. Though Laussat wanted to put French law—which, at that time, would have meant post-revolutionary French law—into force in Louisiana, the French government repeatedly declined his proposals.¹⁷ In addition, there is, once again, the consistent witness of those Louisiana lawyers and judges who had lived through the transition from French to American rule, according to whom it was Spanish law, not French law, that had been in effect when the Americans had assumed control.¹⁸

B. *The Territorial Era (1803–1812)*

1. *Louisiana's Civil Law Before the Digest*

In the Treaty of Paris, executed on March 22, 1803, France ceded Louisiana to the United States.¹⁹ The transition of power occurred on

14. These, at any rate, were the "Spanish law" authorities that the Louisiana Territorial Legislature identified in a resolution it adopted on May 22, 1806, entitled "An Act declaring the laws which continue to be in force in the territory of Orleans, and authors which may be recurred to as authorities within the same." See Levasseur, *Moreau Lislet*, *supra* note 2, at 54–57 & n.71; see also Batiza, *1808 Sources*, *supra* note 2, at 6 n.20.

15. Levasseur, *Moreau Lislet*, *supra* note 2, at 13.

16. *Id.* at 14; Herman, *supra* note 2, at 28.

17. Levasseur, *Moreau Lislet*, *supra* note 2, at 14–38.

18. See generally *id.* at 39–40, 55–56, 208–17 & 236–56.

19. Levasseur, *Moreau Lislet*, *supra* note 2, at 28.

December 20, 1803, the date on which the new American governor, William Claiborne, assumed his post.²⁰

Claiborne, who had been trained in the common law tradition and had served on the Tennessee Supreme Court, hoped eventually to establish the Anglo-American common law as the law of the new territory.²¹ When Claiborne's plan to "commonize" Louisiana law became public, it aroused intense opposition among Louisianians of Continental ancestry, partly for economic and partly for cultural reasons.²²

The fight to save Louisiana's civil law was centered in the Territorial Legislature, which the United States Congress had created at the behest of Claiborne's opponents.²³ One of the new legislature's first acts was to pass an act "declaring the laws which continue to be in force in the Territory."²⁴ Those laws, according to the act, consisted of:

1. The roman Civil code, as being the foundation of the Spanish law, by which this country was governed before its cession to France and to the United States, which is composed of the institutes, digest and code of the emperor Justinian, aided by the commentators of the civil law, and particularly of Domat . . . ; the whole so far as it has not been derogated from by the spanish law; 2. The Spanish law, consisting of the books of the *recopilation de Castilla . . .*, the [*siete*] *partidas . . .*, the *fueroreal*, the *recopiliation de indias . . .*, the laws *de Toro*, and finally the ordinances and royal orders and decrees, which have been formally applied to the colony of Louisiana²⁵

The purpose of the act was two-fold. The first, reflected in the act itself, was simply to clarify what law was then in force. The second, not reflected in the act, was to head off Claiborne's legal "commonization" effort.²⁶

When Claiborne vetoed the act, a firestorm of opposition blew up. The legislature responded, first, with a "Manifesto," complaining that Claiborne had repeatedly rejected its "most essential and salutary

20. *Id.* at 38.

21. Hood, *History and Development*, *supra* note 2, at 20; *see also* Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: the Third Legal Family* 260 (2001).

22. Palmer, *supra* note 21, at 261-62; *see also* Vernon Valentine Palmer, *Two Worlds in One: the Genesis of Louisiana's Mixed Legal System, 1803-1812*, in *Microcosm*, *supra* note 2, at 33-36.

23. Hood, *History and Development*, *supra* note 2, at 22.

24. Levasseur, *Moreau Lislet*, *supra* note 2, at 54-58.

25. *Id.* at 56, n.71.

26. *Id.* at 54-58.

measures” and, consequently, calling for the legislature’s immediate dissolution.²⁷ Of particular interest to us is the Manifesto’s description of the law then in force in Louisiana. In that regard, the Manifesto, somewhat curiously, speaks not of the law of *Spain* or the law of *France*, but the law of *Rome*:

those old laws are nothing but the civil or Roman law modified by the laws of the government under which this region existed before the latter’s cession to the United States In any case it is no less true that the Roman law which formed the basis of the civil and political laws of all the civilized nations of Europe presents an ensemble of greatness and prudence which is above all criticism.²⁸

The Manifesto, then, reflects the view that the law then in force in Louisiana was, at bottom, the Romanist *ius commune*.

The legislature’s second response to Claiborne’s veto was to adopt a resolution calling for the preparation of a “Civil Code” for the territory.²⁹ The act authorizing the preparation of the “code” directs the draftsmen to “make the civil law by which this territory is now governed the ground work of said code.”³⁰ This “civil law” was that reflected in the legislature’s earlier declaration of the laws that “continue[d] to be in force in the Territory,” that is, Spanish civil law.³¹

To execute this mandate, the legislature selected two prominent Louisiana lawyers, James Brown and Louis Moreau-Lislet.³² To judge from their backgrounds, they were an unlikely pair. Brown, a native of Virginia, had been trained in the common law;³³ Moreau-Lislet, a native of Santo Domingo, then a French dependency, had been trained in the civil law in France.³⁴ But both were fluent in French and Spanish and, more importantly, both were partisans of Louisiana’s civil law tradition.³⁵

2. *The Digest (1808)*

The new civil code, which Brown and Moreau-Lislet entitled “A Digest of the Civil Laws now in Force in the Territory of Orleans,”

27. *Id.* at 58.

28. *Id.* at 60–61.

29. Lorio, *supra* note 2, at 5.

30. Levasseur, *Moreau Lislet*, *supra* note 2, at 65 n.73.

31. Batiza, *supra* note 2, at 7 n.21.

32. Levasseur, *Moreau Lislet*, *supra* note 2, at 65.

33. Hood, *History and Development*, *supra* note 2, at 24.

34. Levasseur, *Moreau Lislet*, *supra* note 2, at 95.

35. Hood, *History and Development*, *supra* note 2, at 24.

was formally adopted by the territorial legislature on March 31, 1808.³⁶ Claiborne approved it sometime later.³⁷ It was then published in two official versions, one in French and the other in English.³⁸

Given that the commissioners had been instructed to make Spanish civil law the groundwork for the Digest, the "form" that they adopted is, perhaps, a bit surprising, for in that regard the Digest was heavily indebted to the *French* civil-law tradition.³⁹ Consider, first, the Digest's structure. Just like the French Code civil, but unlike the various Spanish law and Roman law compilations, the Digest opens with a preliminary title, followed by three books, entitled, respectively, "Of Persons," "Of Things," and "Of the Modes of Acquiring Things." Next, consider the phraseology of the Digest. As has been shown by Professor Batiza of Tulane,

the French *Projet*⁴⁰ and Code, combined, account for . . . 70 percent of the [Digest] . . . Domat contributed . . . 8 percent, Pothier, . . . 5 percent. The custom of Paris and the Ordinance of 1667 on civil procedure add to the French sources that account for about 85 percent of the [Digest].⁴¹

Thus, nearly 85% of the articles of the Digest are verbatim copies or at least extremely close paraphrases of articles or statements found in the *Code Civil*, the *Projet*, the Custom of Paris, and the treatises of the French scholars Domat and Pothier. Here are just a few examples of the Digest's reliance on French sources:

CODE CIVIL FRANÇAIS Art. 212	DIGEST (1808) Bk. I, tit. IV, art. 19	LA. CIV. CODE (rev. 1988) Art. 98
Les époux se doivent mutuellement fidélité, secours, assistance.	Le mari et la femme se doivent mutuellement fidélité, secours, et assistance.	Married persons owe each other fidelity, support, and assistance.

36. Lorio, *supra* note 2, at 5 & n.22.

37. Hood, *History and Development*, *supra* note 2, at 24-25.

38. *Id.* at 28.

39. See generally Levasseur, Moreau Lislet, *supra* note 2, at 184-206; A.N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in Louisiana's Legal Heritage, *supra* note 2, at 87-103.

40. *Projet du gouvernement*.

41. Batiza, *1808 Sources*, *supra* note 2, at 11-12.

<p>CODE CIVIL FRANÇAIS Art. 739 La représentation est une fiction de la loi, dont l'effect est de faire entrer les représentans dans la place, dans le degré et dans les droits du représenté.</p>	<p>DIGEST (1808) Bk. III, tit. I, art. 18 La représentation est une fiction de la loi, dont l'effect est de faire entrer les représentans dans la place, dans le degré et dans les droits du représenté.</p>	<p>LA. CIV. CODE (rev. 1981) Art. 881 Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented.</p>
<p>CODE CIVIL FRANÇAIS Art. 1382 Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par le faute duquel il est arrivé, à le réparer.</p>	<p>DIGEST (1808) Bk. III, tit. IV, art. 16 Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par le faute duquel il est arrivé, à le réparer, . . .</p>	<p>LA. CIV. CODE (1870) Art. 2315 Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.</p>
<p>COUTUME DE PARIS Art. 229 Hommes & femmes conjoints ensemble par mariage, sont communs en biens meubles, & conquets immeubles faits durant & constant ledit mariage.</p>	<p>DIGEST (1808) Bk. III, tit. V, art. 63 Tout mariage, contracté dans cet Etat, entraîne de droit société, ou communauté d'acquêts our de gains.</p>	<p>LA. CIV. CODE (rev. 1979) Art. 2327 The legal regime is the community of acquets and gains Art. 2334 The legal regime of community of acquets and gains applies to spouses domiciled in this state</p>

<p>Jean Domat, LES LOIS CIVILES DAN LEUR ORDRE NATUREL liv. prélim., tit. II, sect. I, nos 4 & 6</p> <p>4. Les enfans qui naissent morts sont considérés comme s'ils n'avaient été ni nés ni conçus. * * *</p> <p>6. Les enfans qui sont encore dans le sein de leurs mères n'ont pas leur état réglé, et il ne doit l'être que par la naissance; et jusque-là ils ne peuvent être comptés pour des enfans, non pas même pour acquérir à leurs pères les droits que donne le nombre des enfans. Mais l'espérance qu'ils naîtront vivans, fait qu'on les considère, en ce qui les regarde eux-mêmes, comme s'ils étaient déjà nés. Ainsi, on leur conserve les successions échues avant leur naissance, et qui les regardent; et on leur nomme des curateurs, pour prendre soin de ces successions.⁴²</p>	<p>DIGEST (1808) Bk. I, tit. I, art. 5</p> <p>Les enfans qui naissent morts, sont considérés comme s'ils n'étaient jamais nés, ou n'avaient jamais été conçus.</p> <p>Bk. I, tit. I, art. 7</p> <p>Les enfans qui sont encore dans le sein de leurs mère, ne peuvent être comptés pour des enfans, pas même pour faire jouir le père des droits et avantages que la loi peut accorder aux pères et mères, en raison du nombre des leurs enfans, cependant l'espérance qu'ils naîtront vivans, fait qu'on les considère, en ce qui les regarde eux-mêmes, comme s'ils étaient déjà nés; ainsi on leur conserve les successions échues que peuvent leur survenir avant leur naissance, et qui doivent leur appartenir; et on leur nomme des curateurs pour prendre soin de ces</p>	<p>LA. CIV. CODE (rev. 1987) Art. 26</p> <p>An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of its conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.</p>
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<p>Jean Domat, LES LOIS CIVILES DAN LEUR ORDRE NATUREL pt. II, bk. I, tit. I, sect. I, n° 3 On appelle succession ou hérédité la masse des biens, des droits et des charges qu'une personne laisse après sa mort, soit que les biens excèdent les charges, ou que les charges excèdent les biens. Et on appelle aussi hérédité ou succession, le droit qu'à l'heritier de recueillir les biens et les droits d'un défunt tels que ils pourront être.⁴³</p>	<p>successions à leur profit.</p> <p>Digest (1808) Bk. III, tit. I, art. 2 On appelle aussi succession ou hérédité la masse des biens, des droits et des charges qu'une personne laisse après sa mort, soit que les biens excèdent les charges, soit que les charges excèdent les biens.</p> <p>Bk. III, tit. I, art. 3 Enfin on appelle aussi hérédité ou succession, le droit qu'a l'héritier de recueillir les biens et les droits d'un défunt, tes qu'ils peuvent être.</p>	<p>LA. CIV. CODE (rev. 1982) Art. 872 The estate of the deceased means the property, rights, and obligations that a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property. The successors thus have the right to take possession of the estate of the deceased after complying with applicable provisions of law.</p>
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The influence of these French sources, as one can see from the third column of the chart (which sets out articles of the current Civil Code), remains alive even today.

As for the other 15% of the articles in the Digest, most were taken from various Spanish sources, such as the *Siete Partidas*, the *Recopilacion de Castilla*, and the *Fuero Real*, and the writings of Spanish commentators José Febrero and Hevia Bolaños.⁴⁴ The following are some examples of those Spanish sources:

42. Œuvres Complètes de J. Domat 99–100 (Joseph Remy 1835).

43. Œuvres Complètes de J. Domat 307–08 (Joseph Remy 1835).

44. Batiza, *1808 Sources*, supra note 2, at 12.

<p>LAS SIETE PARTIDAS pt. VI, tit. III, ley XI</p> <p>Declarar deue e nombrar el fazedor del testamento por si mismo el nome de aquel que establesciere por heredero. Ca si el otorgase poder a otro que lo establesciere en su lugar, no valdria, maguer dixese asi, aquel sea mio heredero que sulano quisiere, o estableschiere por mio que lo sea. Esto es porque el establescimiento del heredero e de las mandas, non deue ser puesto en aluedrio de otrto. Pero si alguno rogase al testador, que siziese su heredero a otrto, nombrandolo, si el que sizo el testamento quere caber su ruego, e lo estableschiere por su heredero valdra. Otrrosi dezimos, que si el sazedor del testamento dixese a algun escriuano de concejo, ruego te, e mando te, que escriuas como establezco</p>	<p>DIGEST (1808) Bk. III, tit. II, art. 88</p> <p>L'usage de disposer, soit par testament, soit par codicile, par l'intermédiaire d'un commissaire ou fondé de pouvoir, est aboli. Ainsi l'institution d'héritier, ou toute disposition testamentaire commise au choix d'un tiers, est nulle, quand bien même ce choix aurait été limité à un certain nombre des personnes désignées par le testateur.</p>	<p>LA. CIV. CODE (rev. 1997) Art. 1572</p> <p>Testamentary dispositions committed to the choice of a third person are null, except as expressly provided by law. A testator may delegate to his executor the authority to allocate specific assets to satisfy a legacy expressed in terms of a value or a quantum, including a fractional share.</p> <p>The testator may expressly delegate to his executor the authority to allocate a legacy to one or more entitles or trustees of trusts organized for educational charitable, religious, or other philanthropic purposes. The entitles or trusts may be designated by the testator or, when authorized to do so, by the executor in his discretion. In addition, the testator may expressly delegate to his</p>
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<p>por mio heredero a sulanoe que mando tantos marauedis: o tantas cosas, o tanto heredamiento, que sea dado por mi anima, diziendo aque personas lo manda dar, o quanto cada vnoante siete testigos, e mando te que vayas a algun ome sabio, e en la manera quel ordenare que sea secho mio testamento, e departidas mis mandas, ue lo escriuas tu asi, porque tengo por bien, que vala como lo el ordenare. Estoncebien valdria lo que asi suese secho, por mandalo del testador.⁴⁵</p>		<p>executor the authority to impose conditions on those legacies.</p>
<p>LAS SIETE PARTIDAS pt. VI, tit. VII, ley IV Ciertas razones son porque los padres pueden desheredar sus hijos, asi como quando el hijo a sabiendas, e sañudamenta, mete manos yradas en su padre, serirle, o para prenderle: o si le deshonrrase de</p>	<p>DIGEST (1808) Bk. III, tit. II, art. 130 Les justes causes pour lesquelles le père et mère peuvent déshériter leurs enfans légitimes, sont au nombre de douze; savoir: 1. Si l'enfant a porté la main sur son père or sa mère pour les frapper; ou</p>	<p>LA. CIV. CODE (rev. 2001) Art. 1621 A. A parent has just cause to disinherit a child if: (1) The child has raised his hand to strike a parent, or has actually struck a</p>

<p>palabra gravemente, maguer non lo siriese: o si lo acusase sobre tal socas, de que el padre deue morir, or ser desterrado si gelo prouasen: o ensamandolo en tal manera porque valiese menos. Pero si el yerro de que le acusaua suese a tal, que tanxese ala persona del Rey, o al pro comunal dela tierra, estonce, si lo prouase el hijo, non lo puede el padre desheredar porende. Otrosi dezimos, que el padre puede deseredar al hijo, si suere sechizero, o encantador, o siziese vida con los que lo suesen, o si se trabajase de muerte de su padre, con armas, or con yeruas, o de otra manera qualquier: o si el hijo yoguyese con su madrastra, o con otra muger que touiese su padre paladinamenta por su amiga, o si enfamase el hijo a su padre, o si le buscasse tal mal, por quel padre ouiese a perder gran par tida de lo suyo, o a menoscabar. Ca por</p>	<p>s'il les a réellement frappés, mais une simple menace, ne suffirait pas;</p> <p>2. S'il s'est rendu coupable envers eux de sévices, délits ou injures graves;</p> <p>3. S'il a attenté à la vie de son père ou de sa mère;</p> <p>4. S'il les a accusés de quelque crime capital, autre toutefois que celui de haute trahison;</p> <p>5. S'il leur a refusé des alimens, lorsqu'il avait le moyen de leur en fournir;</p> <p>6. S'il a négligé d'en prendre soin, dans le case où ils seraient tombés en démence;</p> <p>7. S'il a négligé de les racheter, lorsqu'ils étaient détenus en captivité;</p> <p>8. S'il a employé quelque voie de fait ou quelque violence pour les empêcher de tester;</p> <p>9. Si l'enfant mâle a eu un commerce incestueux avec la femme de son père;</p>	<p>parent; but a mere threat is not sufficient.</p> <p>(2) The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury.</p> <p>(3) The child has attempted to take the life of a parent.</p> <p>(4) The child, without any reasonable basis, has accused a parent of committing a crime for which the law provides that the punishment could be life imprisonment or death.</p> <p>(5) The child has used any act of violence or coercion to hinder a parent from making a testament.</p>
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<p>qualquier destas razones, que sean puestas en el testamento del padre, o del auuelo si fuere prouado, deue el hijo, o el nieto perder la herencia, que pudiera auer de los bienes de los, si non ouiese fecho por que. Otrosi dezimos: que seyendo el padre preso por debda que deuiere, o de otra manera, si el hijo non le quisiere siar en quanto pudiere, para sacar lo de la prision, que le puede deseresar el padre. E esto se entiende de los hijos varones, e non de las mugeres. Ca las mugeres desiende les el derecho, que non puedan siar a otri. E aun puede el padre deseredar el hijo, si le embargare que non saga testamento. Ca si el padre siziere despues otro testamento, puede lo deseredar en el, por esta razon. E de mas dezimos, que aquellos a quien tiene el padre en voluntad de mandar aldo, e non lo pue de</p>	<p>* * *</p>	
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<p>sazer por embargo que le sizo el hijo pueden lo acusar por esta rason, e si lo prouaren, deue perder el hijo aquella parte que deuia auer de la herencia del padre, e ser del Rey. E cada uno de los otros quien queria mandar algo en el testamento, deue lo auer segund que fallaren en verdad, que el testador auia voluntad de les mandar, si el testamento ouiese fecho.⁴⁶</p>	<p>11. Si l'enfant mineur, de quelque sexe que ce soit, se marie sans le consentement des ses père et mère.</p>	<p>(6) The child, being a minor, has married without the consent of the parent.</p> <p>(7) The child has been convicted of a crime for which the law provides that the punishment could be life imprisonment or death.</p> <p>(8) The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years, unless the child was on active duty in any of the military forces of the United States at the time.</p>
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<p>RECOPIACIÓN DE LAS LEYES DESTOS REYNOS lib. V, tit. IX (1567) I. Como quier que el derecho diga, que todas las cosas que han marido, hasta que la muger muestre que son suyas, pero la costumbre guardada es en contrario que los bienes que han marido, y muger, que son de ambos por medio, salvo los que probare cada uno que son suyos apartadamente; y ansi mandamos que se guarde por ley.⁴⁷</p>	<p>DIGEST (1808) Bk. III, tit. V, art. 67 Lors de la dissolution du mariage, tous les biens que le époux possèdent réciproquement, sont présumés biens communs ou acquêts, sauf à eux à justifier quels sont ceux desdits biens qu'ils ont apportés en mariage, ou qui leur ont été séparément donnés, ou dont ils ont hérité respectivement.</p>	<p>LA. CIV. CODE (rev. 1979) Art. 2340 Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property.</p>
<p>LAS SIETE PARTIDAS pt. 6, tit. 13, ley 7 Paganse los omes á las vegadas de algunas mugeres, de manera que casan con ellas sin dote, maguer sean pobres, por ende guisada cosa, é derecha es pues que las aman, é las honran en su vida, que non finquen desamparadas á su muerte; é por esta razon tuvieron por bien los Sabios antiguos, que si el marido non dejasse</p>	<p>DIGEST (1808) Bk. III, tit. V, art. 55 Lorsque la femme n'a point apporté de dot, ou que ce que'elle a apporté en dot n'est presque rien par rapport à la condition du mari, si le premier mourant des deux époux est riche, et que le survivant soit dans la nécessité, il a le droit de prendre dans la succession du prédécédé ce que l'on appelle la quartе maritale, c'est-à-dire, le quart</p>	<p>LA. CIV. CODE (rev. 1979 &1987) Art. 2432 When a spouse dies rich in comparison with the surviving spouse, the surviving spouse is entitled to claim the marital portion from the succession of the deceased spouse.</p> <p style="text-align: center;">* * *</p> <p>Art. 2434 The marital portion is one-fourth of the succession in</p>

<p>á tal muger en que pudiese bien, é honestamente beuir, nin ella lo oviese de lo suyo que pueda heredar fasta la quarta parte de los bienes del, maguer baya fijos, pero esta quarta parte non debe montar mas de cient libras de oro, quanto quier que sea grande la herencia del finado. Mas si tal muger como esta oviesse de lo suyo, con que pudiese vivir honestamente, non ha demanda ninguna, en los bienes del finado, en razon de esta quarta parte.⁴⁸</p>	<p>de ladite succession en propriété</p>	<p>ownership In no event, however, shall the amount of the marital portion exceed one million dollars.</p>
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As the third column of this chart (which contains articles of the current Civil Code) makes clear, the influence of these Spanish sources, too, has been enduring.

Given that the Digest, at least in terms of its "formal" sources, was 85% French and 15% Spanish, some observers have suggested that the Digest drafters effectively changed the *substance* of law of Louisiana from Spanish law to a mixed law that was predominantly French.⁴⁹ But for many observers, things are not as simple as they might at first appear. Just because the drafters chose to use French phraseology for the bulk of the rules of the Digest does not mean, necessarily, that the substance of those rules was French as opposed

45. Las Siete Partidas del Sabio Rey don Alonso el Nono 16 (1555).

46. Las Siete Partidas del Sabio Rey don Alonso el Nono 46 (1555).

47. Recopilacion de las Leyes destos Reynos 19 (1640).

48. Las Siete Partidas del Sabio Rey don Alonso el Nono 92-93 (1555).

49. The principal proponent of this thesis was Professor Batiza. See, e.g., Batiza, *Origins*, *supra* note 2, at 584-89, 595-96, 601.

to Spanish. The truth is that between the French civil law and Spanish civil law of the time, there was considerable overlap, in other words, the law was in the main the same.⁵⁰ That is hardly surprising since both were rooted in the Romanist *ius commune* of Europe.⁵¹ As to those rules, then, it would be possible to say that the substance was no less Spanish than it was French. Further, in drafting, it could be that the drafters thought of themselves as using French form to express Spanish substance.⁵² And, in fact, there is at least some evidence that that is precisely what they thought they were doing. It is clear, for example, that the Digest's drafters took at least some pains to make sure that the rules the form of which they borrowed from French sources did not contradict Spanish civil law. Part of this evidence consists of the so-called *De la Vergne Manuscript*, which is now believed to have been Moreau-Lislet's own copy of the Digest. This manuscript contains handwritten notes, one set of which purports to identify the "titles of the Roman and Spanish laws that are related to the matters treated" under each title and the other of which lists the particular Roman and Spanish laws to which each article is related. These notes suggest that the draftsmen, before "adopting" each of the articles that they took over from the *Code Civil* or *Projet* or other French source, first checked it against Spanish law sources for consistency.⁵³

Be that as it may, to assess properly the impact that the enactment of the Digest had upon Louisiana's theretofore existing civil law, one must take into account the "repealer clause" that was included in the enactment. Unlike the "repealer clause" that had accompanied the enactment of the *Code Civil* in France, which purported to abrogate all theretofore existing civil laws, the Digest's repealer clause provided for the repeal of only those theretofore existing laws that were "inconsistent" with its provisions.⁵⁴ Consequently, the Digest left intact all Spanish private law rules for which it did not provide a contrary rule.

3. *Between the Digest and the First Code (1808–1825)*

During the period immediately following the enactment of the Digest, the influence of Spanish law stood at its full height. Courts

50. Levasseur, *Moreau Lislet*, *supra* note 2, at 177; see also Pascal, *Reply*, *supra* note 2, at 605–06 (noting that Spanish and French law "often resembled" each other and were "similar in substance").

51. Hood, *History and Development*, *supra* note 2, at 26.

52. This is the thesis of Professor Pascal. See, e.g., Pascal, *Reply*, *supra* note 2, at 604, 606–07.

53. Levasseur, *Moreau Lislet*, *supra* note 2, at 177–78.

54. Kilbourne, *supra* note 2, at 62 & n.6.

interpreted the repealer clause narrowly, so as to leave much of the pre-existing Spanish law in place.⁵⁵ And, in the interpretation of the Digest, the courts much more often than not followed Spanish rather than French authorities.⁵⁶ That they did so in interpreting the 15% of the articles that were definitely of Spanish origin is hardly surprising. What is surprising, at least if one believes that the other 85% of the articles were truly French in origin, is that the courts did the same with respect to even those articles.

The courts' predilection during this era for Spanish over French doctrinal authorities is reflected in a number of judicial decisions, excerpts from two of which are reproduced below. These cases, to use a good "common law" expression, are still "good law," that is, the interpretations reflected in them are still "correct" even today.

My first example is *Ozanne v. Delile*,⁵⁷ in which the court considered the appropriate sanction for a tutor's failure to prepare the required inventory of the minor's goods within ten (10) days of the opening of tutorship. The applicable Digest provision is a dead-ringer for the *Code Civil* provision:

<p>CODE CIVIL FRANÇAIS (1804) Art. 451 Dans les dix jours qui suivront celui de sa nomination, dûment connue de lui, le tuteur requerra la levée des scellés, s'ils ont été apposés, et fera procéder immédiatement à l'inventaire des biens du minor, en présence du subrogé tuteur.</p>	<p>DIGEST (1808) Bk. I, tit. VIII, art. 54 Le tuteur est tenu de faire bon et fidèle inventaire de tous les biens Cet inventaire doit être commencé au plus tard dans les dix jours de la nomination du tuteur et sera fait en présence du subrogé tuteur, par le juge de paroisse ou par un notaire public autorisé à cet effet par ledit juge.</p>
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And yet the court, relying on Spanish authorities, interpreted the article in a fashion different from that in which the French interpreted theirs:

55. See, e.g., *Cottin v. Cottin*, 5 Mart. (o.s.) 93 (1817).

56. *Kilbourne*, *supra* note 2, at 61-95; see also *Rabalais*, *supra* note 2, at 1504.

57. 5 Mart. (n.s.) 21 (1826).

***Interpretation of the
French "Source Article"***

Théophile Huc, COMMENTAIRE
THÉORIQUE & PRATIQUE DU
CODE CIVIL liv. I, tit. X, no 393
(1892)

Mais dans le case de défaut
absolu d'inventaire reconnu
infidèle, le tuteur serait exposé
aux conséquences suivantes: 1)
D'abord il pourrait être destitué
pour cause d'incapacité ou
d'infidélité

***Interpretation of the
Digest Article***

* * *

On the merits, the cause
presents three questions:

1st. Whether the appellee
should not be deprived of the
tutorship, for having failed to
make an inventory within ten
days after his appointment

* * *

I. In support of the first, the
plaintiff has referred to the
provision in our late code which
required the inventory to be
made within ten days. He has
also read to us the
commentaries of French jurists,
and the decisions of the
tribunals of France, on an article
in the Napoleon code, similar to
ours. It may be true, that the law
is so understood in France, but
it has escaped the attention of
counsel, that in construing our
law, though it may be expressed
in the same language as that of
the Napoleon code, we are often
compelled to come to a different
conclusion from that which is
rightfully drawn from it there,
because the textual provisions
of our statutes must be
interpreted in relation to our
former jurisprudence.

Our code does not formally
declare that the failure to make
an inventory in ten days, is a
cause of depriving the tutor of
the tutorship; it only directs the
tutor to do so; we must
therefore look to the ancient
laws of the country, to see
whether any such penalty was

affixed to such neglect. By a reference to them we find that the dative, legitimate and testamentary tutor, could be deprived of their office if they failed to make an inventory, but that this penalty did not attach to the father. As, therefore, the provision in our code does not declare that the failure to make an inventory is a cause for excluding the father from the tutorship, and as the Spanish law did not pronounce the forfeiture for this cause, we are at a loss to conceive on what grounds we can impose it. It would be going too far for a court to say, that the prescribing the same duty by a new law to one class of tutors, that was formerly required of another, brought with it the same penalties for the breach of it. This would be legislating by analogy, not reasoning by it. Penalties ought not to be extended by implication, more particularly where the reason on which we must suppose the rule founded does not apply. All other tutors except the natural, require the confirmation of the judge, and when they make the application to be so confirmed, the law may well presume they are in a situation to go on and make the inventory within ten days. It makes no presumption on their affection to the minor, and presumes danger to his interests from the neglect of the tutor to furnish evidence of the property which comes into his hands. But by the death of the

	<p>mother the tutorship is thrown <i>ipso facto</i> on the father. He may be at a distance when that event takes place. He may be confined himself to a bed of sickness, and without taking these exceptions to the general rule, we may, we trust, say, that in the greater number of cases, there is a moral impediment to his doing so. There are few, we hope, who within ten days of an event which had deprived them of their wife, and the mother of their children, who could have the composure of mind necessary to the making a correct inventory of the property, which had been the fruit of their mutual labor and care. Civ. Code. Febrero, p. 2, tit. 1, cap. 1, § 2, n. 198.</p>
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To the same effect is *Rowlett v. Shepherd*,⁵⁸ in which the court considered whether a buyer who refuses to pay the purchase price because of some “trouble” with the seller’s title must, once the problem is resolved, pay not only the price itself but also interest on the price. The applicable Digest provisions seem to have been copied from the *Code Civil*:

<p>CODE CIVIL FRANÇAIS (1804) Art. 1652 L’acheteur doit l’intérêt du prix de la vente jusqu’au paiement du capital, dans les trois cas suivants: . . . Si la chose vendue et livrée produit des fruits ou autres revenus</p> <p>Art. 1653 Si l’acheteur est troublé ou a juste sujet de craindre d’être</p>	<p>DIGEST(1808) Bk. III, tit. VI, art. 84 L’acheteur doit l’intérêt du prix de la vente jusqu’au paiement du capital, dans les trois cas suivants: . . . Si la chose vendue produit des fruits ou autres revenus</p> <p>Bk. III, tit, VI, aart. 85 Si l’acheteur est troublé par une action, soit hypothécaire, soit en</p>
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58. 4 La. 86 (May 1832).

<p>troublé par une action, soit hypothécaire, soit en revendication, il peut suspendre le paiement du prix jusqu'à ce que le vendeur ait fait cesser le trouble, si mieux n'aime celui-ci donner caution, ou à moins qu'il n'ait été stipulé que, nonobstant le trouble, l'acheteur payera.</p>	<p>revendication, il peut suspendre le paiement du prix jusqu'à ce que le vendeur ait fait cesser le trouble, si mieux n'aime celui-ci donner caution.</p>
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Once again, however, the court adopted an interpretation of the Digest provisions that was at variance with the interpretation of the correlative *Code civil* provisions:

<p><i>Interpretation of the French "Sources Articles"</i></p>	<p><i>Interpretation of the Digest Articles</i></p>
<p>Victor Marcadé, EXPLICATION DU CODE CIVIL liv. III, tit. VI, art. 1653, no. I (1875) Cet article [Code civil art. 1653] se comprend assez par lui-même. Ajoutons seulement: 1) que les intérêts, lorsqu'ils sont dus, courraient néanmoins pendant la suspension du paiement, puisque la crainte d'un trouble ni le trouble lui-même, tant qu'il n'y a pas éviction, n'enlèvent pas la chose à l'acheteur: celui-ci ne pourrait faire cesser les intérêts que par la consignation de son prix</p>	<p style="text-align: center;">* * *</p> <p>Immediately after the establishment of this court, in the year 1814, it was decided the buyer could not resist the payment of interest by reason of mortgages existing on his property, unless he had offered the money to the seller, and in case of his refusal to receive it, consigned it for his use. [<i>Duplantier v. Pigman</i>] 3 Martin, 245. That decision was not followed, and in several cases which have arisen since, a different principle has been acted on. [<i>Bouthemys Ex'r v. Ducournau</i>] 6 Martin [O. S.] 659. [<i>Miles v. Oden</i>] 8 Martin N. S. 214. [<i>Pemberton v. Grass</i>] 1 L. Rep. 81.</p> <p>The case in 3 Martin was decided on the provisions found in the French, and in the Roman law. By these systems of jurisprudence, where the</p>

property sold produced fruits, the buyer owed interest from the time of delivery, although a term had been given him for the payment. It is not surprising, therefore, that in these countries, where the purchaser owed interest before the price could be demanded of him, he also owed interest when he retained the money in consequence of the incumbrances which affected the property; for the right to retain which the law gave him in the one case, could not be stronger than that conferred on him by the terms of the contract in the other. Pothier, indeed, on the authority of Covarrurias, denies the buyer owes interest before the credit given for payment expires. But his opinion has not been adopted in France. Paillette, in his notes on 1652 and 1653 articles of the Napoleon Code, examines the subject, and treats it with his accustomed learning. The rule, he says, was otherwise, and the Napoleon Code has not changed it. He adds, as a corollary, from the obligation of the buyer to pay interest from the moment he enters into possession that, even in those cases where, by the terms of the contract, the buyer is authorized to retain the money until mortgages are removed, he still owes the interest. In support of this opinion, he cites several decisions of the tribunals of France. Manuel de Droit Francais, Code Nap. arts.

1652, 1653.

Our Civil Code required interpretation with reference to the laws of Spain, not those of France or Rome; and if, in any instance, that rule was departed from, it was the duty of the court to retrace its steps. It has done so; and now, on an attentive consideration of the authorities within our reach, we think it wisely retraced them. The Spanish law differed from the French on this subject. Where the object sold produced fruits, it gave interest from the time the money was payable, and not before. Febrero states, that the buyer may retain the price until he is made secure against the threatened eviction. The author of the *Curia Phillipica*, thus lays down the rule where the buyer reaps fruits from the property: "En recompensa de ellos debe pagar al vendedor el interes del precio porque se la vendio, desde que se le debia pagar, hasta que se le pague."

He should pay interest from the time he ought to have paid the price, until he does pay it. *Curia Phillip.* lib. 2, cap. 2. no. 24. Febrero, p. 1, cap. 7, § 1, no. 44.

By the rule established in the Civil Code, when ought the buyer to pay the price? Not at the time the money is payable by contract if a suit is pending, but at the time that suit is determined, unless the seller chooses to give security . . .

These decisions, clearly enough, are difficult to explain except on the theory that, at least as far as the courts and the bar were concerned, Louisiana's private law, however French it may have become, nevertheless remained profoundly Spanish at that time.

4. *The First "Code" (1825)*

In early 1822, the Louisiana Legislature appointed a commission to "revise the Civil Code (of 1808) by amending the same in such manner as [they] will deem it advisable."⁵⁹ The team consisted of Moreau-Lislet, whom we have already met; Edward Livingston, a New York lawyer who had immigrated to Louisiana in 1803 and had helped spearhead opposition to Claiborne's attempts to commonize Louisiana's private law;⁶⁰ and Pierre Derbigny, a political refugee from Revolutionary France who had earlier served as Claiborne's "civil law" advisor and had later served as a Justice of the Louisiana Supreme Court.⁶¹

Why the legislature called for the new code is reflected in the commissioners' preliminary report, dated February 13, 1823.⁶² According to the commissioners, the legislature's objective was

to provide a remedy for the existing evil, of being obliged in many Cases to seek for our Laws in an undigested mass of ancient edicts and Statutes, decisions imperfectly recorded, and the contradictory opinions of Jurists; the whole rendered more obscure, by the heavy attempts of commentators to explain them; an evil magnified by the circumstance, that many of these Laws must be studied in Languages not generally understood by the people [i.e., Latin and Spanish]

. . . .⁶³

The "law" to which the commissioners were referring, of course, was not the civil law that had been set forth in the Digest, but rather the supplementary civil law—the Spanish private law that the Digest had left intact.⁶⁴ That law was scattered here and yon in several different statutes and codes, the pecking order among which was often uncertain and all of which were written in Latin and Spanish.

59. Kilbourne, *supra* note 2, at 108.

60. Hood, *History and Development*, *supra* note 2, at 29.

61. Kilbourne, *supra* note 2, at 17, 110; Hood, *History and Development*, *supra* note 2, at 16.

62. Kilbourne, *supra* note 2, at 110.

63. *Id.* at 111.

64. See generally Kilbourne, *supra* note 2, at 111; Hood, *History and Development*, *supra* note 2, at 28–29.

The report also tells us something about the sources from which the commissioners planned to and on which they presumably did base their work. The commissioners pledged to keep a "reverent eye" on (i) the *Siete Partidas*, (ii) the French *Code Civil*, (iii) the English common law, and (iv) *above all* the works of the Roman jurists.⁶⁵ The commissioners pointed out, however, that they would not follow those sources slavishly. As they candidly admitted, they planned to innovate, cautiously to be sure, to eliminate what they perceived to be "great inconveniences" and "inconsistency" in the existing law.⁶⁶

The commissioners presented their *Projet* to the legislature in late 1823.⁶⁷ True to their word, the commissioners drew upon a variety of sources in preparing the *Projet*. But they did not draw upon them equally. Most of the new provisions came from French, not Spanish, sources, in particular, the works of Pothier and various commentaries on the French *Code Civil*, especially that of Toullier.⁶⁸ On the whole, then, the *Projet* was even more French than the *Digest*.⁶⁹

Reproduced here are a few examples of the use of French law models in the redaction of the Code of 1825:

<p>CODE CIVIL FRANÇAIS Art. 546 La propriété d'une chose, soit mobilière, soit immobilière, donne droit sur ce qu'elle produit et sur ce qui s'y unit accessoirement, soit naturellement, soit artificiellement. Ce droit s'appelle <i>droit d'accession</i>.</p>	<p>LA. CIV. CODE (1825) Art. 490 La propriété d'une chose, soit mobilière, soit immobilière, donne droit sur ce qu'elle produit et sur ce qui s'y unit accessoirement, soit naturellement, soit artificiellement. Ce droit s'appelle droit d'accession.</p>	<p>LA. CIV. CODE (rev. 1979) Art. 482 The ownership of a thing includes by accession the ownership of everything that it produces or is united with it, either naturally or artificially, in accordance with the following provisions.</p>
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65. Kilbourne, *supra* note 2, at 111-12; Batiza, *1823 Sources, supra* note 2, at 3.

66. Kilbourne, *supra* note 2, at 112-13.

67. Hood, *History and Development, supra* note 2, at 29-30.

68. Batiza, *1823 Sources, supra* note 2, at 22-24.

69. *Id.* at 24.

<p>Robert Pothier, TRAITÉ DU DROIT DE DOMAINE DE PROPRIÉTÉ pt. I, ch. I</p> <p>15. Le domaine de propriété . . . suppose nécessairement une personne dans laquelle ce droit subsiste, et à qui il appartient.</p> <p>Il n'est pas nécessaire que ce soit une personne naturelle, telle que sont les personnes des particuliers, à qui le droit appartient: ce droit . . . peut appartenir à des corps et à des communautés, qui n'ont qu'une personne civile et intellectuelle.</p> <p>16. Le droit de propriété étant . . . le droit par lequel une chose nous appartient privativement à tous autres, it est de l'essence de ce droit, que deux personnes ne puissent avoir chacune pour le total le domaine de propriété d'une même chose</p> <p>17. Plusieurs ne peuvent à la vérité avoir la propriété de</p>	<p>LA. CIV. CODE (1825) Art. 485 Le droit de propriété suppose nécessairement une personne dans laquelle ce droit subsiste, soit que ce propriétaire soit une personne réelle, comme un individu, ou une personne civile ou intellectuelle, telle qu'une corporation.</p> <p>Art. 486 Il est de l'essence du droit de propriété que deux personnes ne puissent avoir, chacune pour le total, le domaine de propriété d'une même chose. Mais elles peuvent être propriétaires de la même chose en commun et pour la part que chacune d'elles peut y avoir.</p>	<p>LA. CIV. CODE (rev. 1980) Art. 479 The right of ownership may exist only in favor of a natural person or a juridical person.</p> <p>Art. 480 Two or more persons may own the same thing in indivision, each having an undivided share.</p>
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<p>la même chose pour le total; mais ils peuvent avoir cette propriété en commun, chacun pour une certaine part.⁷⁰</p>		
<p>Robert Pothier, TRAITÉ DES DONATIONS TESTAMENTAIRES ch. VII, sec. 1, regs. prem. & II [O]n doit principalement s'attacher à découvrir quelle a été la volonté du testateur. . . . Il ne faut pas néanmoins s'écarter de la signification propre des termes du testament⁷¹</p>	<p>LA. CIV. CODE (1825) Art. 1705 Dans l'interprétation des actes de dernière volonté, on doit principalement s'attacher à découvrir quelle a été la volonté du testateur, sans s'écarter néanmoins de la signification propre des termes du testament.</p>	<p>LA. CIV. CODE (rev. 1999) Art. 1611 A. The intent of the testator controls the interpretation of his testament. If the language in the testament is clear, its letter is not to be disregarded under the pretext of pursuing its spirit</p>
<p>C.-B.-M. Toullier, DROIT CIVIL FRANÇAIS liv. III, tit. 1, sec. II 81. Mais la saisine de l'héritier n'étant que la continuation de la possession du défunt, elle en a tous les vices, aussi bien que les avantages. Le changement de propriétaire n'opère aucun changement, aucune interversion dans la nature de la possession. L'étendue des droits</p>	<p>LA. CIV. CODE (1825) Art. 937 Le droit de possession qu'avait le défunt, étant continué dans la personne de son héritier, il en résulte que cette possession est transmise à l'héritier, avec tous ses vices, comme avec tous ses avantages, le changement de propriétaire n'opérant aucune</p>	<p>LA. CIV. CODE (rev. 1997) Art. 936 The possession of the decedent is transferred to his successors, whether testate or intestate, and if testate, whether particular, general, or universal legatees. A universal successor continues the possession of the decedent with all its advantages and defects, and with no</p>

<p>du défunt règle ceux de l'héritier qui succède à tous les droits transmissibles, c'est-à-dire, à tous ceux qui ne sont pas, comme l'usufruit, attachés à la personne du défunt.</p> <p>82. La saisine légale produit deux effets remarquables: le premier est de donner, dès le moment de la mort du défunt, à celui que la loi appelle, le droit de transmettre la succession à ses propres héritiers, en sorte que, ne mourût-il qu'un seul instant après celui auquel il a succédé, ses héritiers personnels recueilleraient la succession dont il était saisi, même sans qu'il le sût, et ils en seraient saisis dès le moment de son décès. . . .</p> <p>The second effet de la saisine est d'autoriser l'héritier à former</p>	<p>altération dans la nature de la possession.</p> <p>Ainsi l'étendue des droits du défunt règle ceux de l'héritier qui succède à tous les droits transmissibles, c'est-à-dire, à tous ceux qui ne sont pas, comme l'usufruit, attachés à la personne du défunt.</p> <p>Art. 938 L'héritier étant censé avoir succédé au défunt dès l'instant de son décès, le premier effet de ce droit, est qu l'héritier transmet la succession à ses propres héritiers, même avant de l'avoir acceptée, ou d'avoir connu qu'elle était ouverte en sa faveur, sous le bénéfice de la même acceptation.</p> <p>Art. 939 Le second effet de ce droit est d'autoriser l'héritier</p>	<p>alteration in the nature of the possession.</p> <p style="text-align: center;">* * *</p> <p>Art. 937 The rights of a successor are transmitted to his own successors at his death, whether or not he accepted the rights, and whether or not he know that the rights accrued to him.</p> <p>Art. 935. Acquisition of ownership; seizin</p>
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<p>immédiatement toutes les actions, même possessoires, que le défunt avait droit de former, et de suivre toutes celles qu'il avait formées</p> <p>. . . pour tout dire, en un mot, il le <i>représente</i>; il est mis de plein droit en sa place, tant pour l'actif que pour le passif. . . .⁷²</p> <p>C.-B.-M. Toullier, DROIT CIVIL FRANÇAIS bk. III, tit. III, sec. I, § II, art. I</p> <p>37. . . . L'erreur sur le motif, ou la fausseté du motif déterminant, anéantit donc l'obligation. . . .</p> <p style="text-align: center;">* * *</p> <p>39. Mais on ne se détermine pas toujours par un motif unique. Au motif principal il se joint ordinairement des motifs accessoires qui aident et concourent à déterminer la volonté. La fausseté ou la non existence de ces motifs accessoires, qui n'ont pas été la</p>	<p>à former immédiatement toutes les actions, même possessoires, que le défunt avait droit de former, et à suivre toutes celles qu'il avait intentées; car l'héritier représente en tout la personne du défunt; il est mis, de plein droit, à sa place, tant pour l'actif que pour le passif.</p> <p>LA. CIV. CODE (1825)</p> <p>Art. 1819</p> <p>Pour que l'erreur sur la cause empêche le contract d'être valide, il faut que cette cause soit la principale, lorsqu'il y en a plusieurs. Cette principale cause est celle sans laquelle le contract n'aurait pas été fait.</p>	<p style="text-align: center;">* * *</p> <p>Prior to the qualification of a succession representative only a universal successor may represent the decedent with respect to the heritable rights and obligations of the decedent.</p> <p>LA. CIV. CODE (rev. 1984)</p> <p>Art. 1949</p> <p>Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.</p>
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<p>cause principale de la convention ou du consentement, n'anéantit pas l'obligation, parce qu'il n'est pas certain que sans eux le contract n'eût pas été passé. . . .</p> <p>40. . . C'est à celui qui veut faire dépendre la convention de la réalité d'un motif inconnu de s'en expliquer, et d'en faire une condition de son obligation . . .</p> <p style="text-align: center;">* * *</p> <p>41. Mais il n'est pas nécessaire de faire une condition expresse de ce motif, il suffit que l'autre partie l'ait connu ou dû connaître</p> <p style="text-align: center;">* * *</p> <p>42. C'est par la manière dont l'acte est conçu, par la nature du contract, par l'objet de la promesse, enfin par les circonstances, qu'on peut juger quel a été le motif déterminant⁷³</p>	<p>Art. 1820</p> <p>L'erreur sur la cause n'empêche le contract d'être valide, que dans le cas où l'autre partie a été informée que cette erreur était la principale cause du contrat, ou lorsque, d'après la nature de l'affaire, on doit présumer qu'elle l'était.</p>	
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As one can see from the third column (which sets out provisions of the current Civil Code), these French law sources, like so many others

from which the drafters of the Code of 1825 drew, retain a place in Louisiana law even to this day.

5. *Between the Codes (1825–1870)*

Throughout the period between the enactment of the Code of 1825 and its revision in 1870, Louisiana's courts not uncommonly turned to Spanish and French authorities, be it for assistance in interpreting that code or for ideas for resolving cases for which that code did not seem to provide.⁷⁴ Though Spanish authorities continued to dominate at first, the courts made a marked turn toward French and away from Spanish authorities in the early 1840s.⁷⁵

What lay behind this "French turn" is not entirely clear. It was almost certainly attributable, if only in part, to the Repealing Acts of 1828, the effect of which was to abrogate all theretofore existing civil law, which, as we have already seen, was Spanish private law.⁷⁶ But that explains only why the courts stopped treating Spanish authorities as sources of *supplementary law*; it does not explain why the courts stopped drawing *interpretive guidance* from them. Perhaps the explanation for this latter development is simply loss of access: it could be that by this relatively late date there were few lawyers and judges left in Louisiana who could read Spanish. Then again, perhaps

70. Œuvres de Pothier 107 (Jean Joseph Bugnet 1861).

71. Œuvres de Pothier 399 (Andre-Marie Dupin ed. 1825).

72. C.-B.-M. Toullier, *Le Droit Civil Français* 201 (1837).

73. C.-B.-M. Toullier, *Le Droit Civil Français* 261–62 (1837).

74. See generally Rabalais, *supra* note 2, at 1505.

75. *Id.* My own research on this point (which I conducted using Westlaw) yielded the following results:

Number of cases containing citations to the authorities (in five-year intervals)

	1825–30	1830–35	1835–40	1840–45	1845–50
Spanish legislation	42	28	10	16	28
Spanish doctrine	50	38	9	7	19
French legislation	19	27	11	35	49
French doctrine	80	66	44	145	195

The authorities for citations to which I checked were as follows: (i) Spanish legislation: *las Siete Partidas*, the *Leyes de Toro*, the various *Recopilations*, and the various *Fueros*; (ii) Spanish doctrine: the works of José Febrero, Gregorio Lopez, Juan de Hevia Bolaños, Alphonso de Azevedo, and Ignacio Asso y del Rio; (iii) French legislation: the various *Coutumes*, the *Ordonnance de 1667*, and the *Code Civil*; and (iv) French doctrine: Demolombe, Troplong, Aubry and Rau, Pardessus, Duranton, Toullier, Delvincourt, Proudhon, Maleville, Merlin, Pothier, Domat, Ferrière, Ricard, and Furgole.

76. See Rabalais, *supra* note 2, at 1496; see also Kilbourne, *supra* note 2, at 158–61.

the explanation is to be found in the courts' recognition that the framers of the *Projet* of 1823, by virtue of the innovations that they have made in the theretofore existing law, had effectively rendered Louisiana's private law relatively more French and less Spanish. Finally, it could be that this development had something to do with then-current perceptions of French legal culture: at the time French civil law may have been perceived to be more "modern" than Spanish civil law, in particular, to be more compatible with "democratic" political values.

6. *The Second "Code" (1870)*

In the wake of the Civil War, the Louisiana Legislature decided to revise the Civil Code of 1825. The new code, which was entitled "The Revised Civil Code of the State of Louisiana," was adopted in 1870. It was substantially the same as the Code of 1825, except that it (i) eliminated the articles relating to slavery, (ii) eliminated other articles that the legislature had suppressed since 1825, and (iii) incorporated all of the new articles that the legislature had added by amendment since 1825. Unlike the Code of 1825 and the *Digest* before it, the Code of 1870 was published only in English rather than in both English and French. The new Code, in fact, appears on its face to be a verbatim reproduction of the English version of the old Code (with the modifications noted above). The act promulgating the new code contained no repealer clause. Thus, insofar as the Spanish and French content of Louisiana's private law is concerned, the "new" code seems to have made no great change.

7. *Between the Code of 1870 and the "Civil Law Renaissance": the Era of "Civil Law Decadence" (1870-1940)*

If one were to confine one's attention to the "law on the books" (as opposed to the "law in practice"), then one could justly assert that the seventy (70) or so years following the enactment of the Civil Code of 1870 witnessed few substantial changes in Louisiana's private law. To be sure, that Code was amended on a number of occasions, but the amendments were, all things considered, few and far between and largely *de minimis*. Though there was an attempt to revise the Code in the early 20th century, that attempt eventually failed. Thus, it would be fair to say that during this period no significant dilution of the Spanish and French content of Louisiana's *official* private law took place.

But if one turns one's attention from the law on the books to the law in practice during this period, then one confronts a quite different picture. In terms of day-to-day use of the official private law by

lawyers advising clients and judges deciding litigation, this was a period of steady decline. Now it is true that the courts, especially in opinions written in the early part of this period, did on occasion cite the Code or related legislation and, in some instances, even relied upon French authorities as interpretive aids.⁷⁷ But much more commonly, especially in opinions written in the latter part of this period, the courts ignored the Code altogether, instead drawing their rules of decision from Anglo-American authorities or sometimes, in a manner not unlike that of the devotees of the *Freirecht* movement in Germany sometime later, creating their own autochthonic rules of decision.⁷⁸ As Professor Yiannopoulos has aptly observed, “[r]eading the decisions of the 1920s and the 1930s, one has the feeling that the civil law was dead.”⁷⁹

8. *The “Civil Law Renaissance” (1940–1980)*

By the end of the 1930s, some observers of Louisiana’s private law took the position that Louisiana’s civil law tradition had, in fact, fallen into desuetude. Chief among these observers was Gordon Ireland, a young professor at the Louisiana State University Law School. In a now famous (or infamous) law review article,⁸⁰ Ireland asserted, among other things, that “the Civil Code . . . is now after all only a legislative statute to be construed and applied when there is no local decision in point.”⁸¹ For these and other reasons, he insisted, it was time to stop “pretending” that Louisiana’s private law was still civilian and to acknowledge forthrightly that “Louisiana is today a common law state.”

Whatever may have been the merits of Ireland’s position—it was immediately and hotly contested⁸²—his article provided a much needed “wake-up call”⁸³ to partisans of Louisiana’s civil law tradition. Now awakened to the reality and the dimensions of the problem, these partisans, at different times and in various ways, undertook a number of initiatives that they hoped would, at the very least, arrest the decline of that tradition and, beyond that, perhaps even reverse it.

77. See, e.g., *Cox v. Von Ahlefeldt*, 105 La. 543, 30 So. 175 (1900) (citing Pothier, Toullier, Laurent, and Baudry-Lacantinerie).

78. See Yiannopoulos, *Lost Cause?*, *supra* note 2, at 841.

79. *Id.*

80. Gordon Ireland, *Louisiana’s Legal System Reappraised*, 11 Tul. L. Rev. 585 (1937).

81. *Id.* at 596.

82. See, e.g., R.L. Tullis, *Louisiana’s Legal System Reappraised*, 12 Tul. L. Rev. 113 (1937); Harriett Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 Tul. L. Rev. 12, 41 (1937).

83. Lorio, *supra* note 2, at 6.

The earliest of these initiatives came from the state's law schools. Professors of civil law prevailed upon their colleagues to revamp law school curricula so as to give greater emphasis to instruction in the civil law.⁸⁴ In addition, these professors, having dedicated themselves anew to the production of civil law scholarship, began to publish periodical articles and monographs on civil law topics.⁸⁵ The culmination of this renewal of civil law scholarship was the founding of the Louisiana Civil Law Treatise series,⁸⁶ the first installment of which, entitled "The Civil Law of Property," appeared in 1966. As of today this series, which covers such basic private law fields as property, obligations, matrimonial regimes, and successions, comprises seventeen (17) volumes and more are still on the way.

Other initiatives came from the Louisiana Legislature. In 1938 the legislature set up the Louisiana State Law Institute, a law reform agency whose purpose, according to its founding charter, was in part to develop materials to promote "the better understanding of the Civil Law of Louisiana and the philosophy upon which it is based."⁸⁷ Ten (10) years later, the legislature charged the Institute with the task of revising the Civil Code of 1870. In 1960 the Institute formed a "Civil Law Section," the purpose of which was to promote civil law studies and to conduct the mandated civil code revision. Not long thereafter the Institute, in fulfillment of its charter, began to publish English translations of major doctrinal works in the French civil law tradition,⁸⁸ including Aubry & Rau's *Course of French Civil Law*, Planiol's *Elementary Civil Law Treatise*, and Gény's *Method of Interpretation*.

Eventually even the state courts joined the civil law partisans' cause. In 1967, Chief Justice Sanders, in an article published in the Louisiana Bar Journal, gently chided Louisiana attorneys for their "failure . . . to include pertinent code articles in their briefs" and "use of common law doctrinal materials, instead of available civil law authority."⁸⁹ And before long first the Louisiana Supreme Court and later the state's intermediate appellate courts began, once again, to resort to French and Spanish authorities for assistance in interpreting the Civil Code of 1870 and related legislation. A brilliant example of this new "civilian" jurisprudence is provided by *Bartlett v. Calhoun*.⁹⁰

84. Yiannopoulos, *Lost Cause?*, *supra* note 2, at 841-42.

85. *Id.* at 838-39.

86. Lorio, *supra* note 2, at 7.

87. 1938 La. Acts No. 166 § 4(7).

88. Lorio, *supra* note 2, at 7.

89. Joe W. Sanders, *The "Civil Law" In The Supreme Court Of Louisiana*, 15 La. B.J. 15, 18 (1967).

90. 412 So. 2d 597 (La. 1982).

Both lower courts were of the opinion that the holding of *Liuzza v. Heirs of Nunzio*, 241 So.2d 277 (La.App. 5th Cir. 1970) was controlling in the instant case. When confronted with the identical issue, the court in *Liuzza* came to the following conclusion:

In the very early case of *Devall v. Choppin*, 15 La. 566 (1840) the Supreme Court enunciated the proposition that if a successor showed that one of his authors was a possessor in good faith and had all the necessary ingredients for ten year prescription, he could acquire by such prescription even though he as well as an intermediary author possessed in bad faith. This interpretation has become the rule in our jurisprudence.

... We granted writs to determine whether the lower courts' conclusion that defendant's status as a good or bad faith possessor was not a material fact was proper. In so doing, we re-evaluate the soundness of the jurisprudential rule which permits a bad faith possessor to tack his possession to that of his good faith author in order to acquire ownership by acquisitive prescription of ten years.

"Tacking", or the "joining of possessors", allows the present possessor to count, besides his own possession, that of his predecessor in order to prescribe. M. Planiol, *Civil Law Treatise*, Part 2, Sec. 2673 (12th Ed. La.St.L.Inst. trans. 1959). As a result, it is not necessary that the same individual possess the immovable during the entire period required for prescription. This joining, or tacking, of possessions is authorized by C.C. art. 3493, which provides:

Art. 3493. The possessor is allowed to make the sum of possession necessary to prescribe, by adding to his own possession that of his author, in whatever manner he may have succeeded him, whether by an universal or particular, a lucrative or an onerous title.

By the word "author" this codal provision contemplates the person from whom another derives his right, whether by universal title or by particular title. C.C. art. 3494. Thus, it is imperative that a juridical link exist in order for a successor to acquire his predecessor's prescriptive rights. Though art. 3493 does not contain a separate provision for the universal successor as distinguished from the successor by particular title, we believe that a differentiation must exist due to the nature of these types of transfers.

The French commentators agree that the universal successor continues the deceased's possession and does not commence a new possession. 2 Aubry & Rau, *Droit Civil Francais* Nos. 218 (7th Ed. Esmein 1961), 2 *Civil Law Translations* at 365 (1966); Baudry-Lacantinerie & Tissier, *Traite' Theoreque et Pratique de Droit Civil, Prescription* Nos. 346, 347 (1924), 5 *Civil Law Translations* at 181 (La.St.L.Inst. trans. 1972). See also *Griffin v. Blanc*, 12 *La. Ann.* 5 (La.1857). As noted by Planiol:

The universal successor merely continues the deceased's possession (no. 2661). He succeeds to all of the latter's obligations as well as rights. It is thus not a new possession that begins but it is the deceased's possession that is transmitted to his heirs, with its virtues and its faults. Planiol, *supra*, Sec. 2674.

Because the universal successor's possession is nothing more than a continuation of the deceased's possession, he is bound by his author's good or bad faith and is powerless to alter the prescriptive rights transmitted to him. Aubry & Rau, Sec. 218, *supra*; Planiol, Sec. 2674, *supra*. For instance, the decedent possessed with just title and in good faith, an immovable belonging to another. He was thus in the process of prescribing ten to twenty years. His possession continues in favor of his heir with the same characteristics and the prescription will be completed at the end of ten or twenty years, commencing with the date when the decedent entered in possession. It is irrelevant that the heir is in bad faith at the moment when the possession is transferred to him.

The effect of vices in the possession will be always the same as if the possession continued for the benefit of the decedent. It follows that vices incurable with respect to the decedent can not be cured by the heir. For instance, if the decedent was in bad faith from the beginning of his possession, his heir can prescribe only by thirty years although he is personally in good faith. Baudry-Lacantinerie, Sec. 348, *supra*.

* * *

Contrary to the universal successor, an individual who acquires by particular title commences a new possession which is separate and distinct from his author's possession. Aubry & Rau, Sec. 218, *supra*.

This type of successor commences a new possession, completely distinct from that of his grantor. Here we

have two mutually independent possessions. Baudry-Lacantinerie, Sec. 350, *supra*.

Though the particular successor can cumulate his and his author's possessions, both must have all the statutory characteristics and conditions required for the completion of prescription. Domat, *The Civil Law in its Natural Order*, Sec. 2226 (2nd Ed., Cushing trans. 1861); Aubry & Rau, Sec. 218, *supra*; Baudry-Lacantinerie, Sec. 350, *supra*. The implications of this limitation on a particular successor's right to tack are fully explained by Planiol:

Assuming that the preceding possessor was himself in the process of prescribing, several combinations may arise. If both of them were entitled to prescribe within from ten to twenty years, the new possessor would certainly have a right to consolidate the two possessions. The same result would obtain if neither of them was entitled to prescribe within these terms. In both cases, the thirty year period would be the only one available. In these two cases, the two successive possessions of the successor and of his author may be added together. They are of the same nature and of the same quality.

But if it be assumed that the two successive possessors are not in the same position, from the standpoint of prescription-but one of them have a just title and being in good faith-complications arise. They are solved by this very simple rule: The years that apply to the thirty years prescription, which requires neither just title nor good faith, cannot be used in completing the prescription running from ten to twenty years. The latter prescription requires that both conditions exist. But, on the contrary, the years that have run in connection with this favored prescription may be counted in computing the thirty years prescription. All that it requires is possession.

* * *

Planiol, Sec. 2676, 2677, *supra*.

It is our opinion that this statement properly explains the restraints placed on a successor's right to join his possession with his author's possession for purposes of acquisitive prescription. Accordingly, any language to the contrary in previous opinions of this Court or of the courts of appeal must be disregarded. E.g. see *Liuzza v. Heirs of Nunzio*, *supra*; *Devall v. Choppin*, 15 La. 566 (1840) . . .

9. From the Late 20th Century to the Early 21st Century

One of the principal developments of the Civil Law Renaissance, as I noted earlier, was the legislature's charge to the Louisiana State Law Institute to revise the Civil Code of 1870. Before the revision could begin, the Institute, of course, had to decide on both the goal and the method of revision. As for the *goal* of revision, two possibilities presented themselves. The first was the relatively modest one of "bringing the text of the Code up to date in the light of judicial precedents and special legislation bearing on civil law matters" with "no major changes in organization and policies."⁹¹ The second was a much more ambitious "substantial revision" of the Code "with regard to structure, determination of policies, and drafting of new provisions."⁹² The Institute chose as its goal something in between these two extremes. With respect to the *method* of revision, there were, once again, two possibilities. The first was that of redrafting the Code "as a whole" in one fell swoop,⁹³ something that presumably would have required the appointment of a commission like that which the French set up in the 1950s to revise the *Code Civil*. The second was that of a part-by-part revision (or, as its detractors prefer to call it, "piecemeal revision"), that is, one in which first this set of Civil Code titles, then another, and then another would be independently revised as it might seem desirable and convenient.⁹⁴ Judging that the former alternative was far too ambitious, the Institute opted for the latter.

The revision process, which finally got underway in the mid-1970s, is today nearly complete.⁹⁵ Though there is considerable disagreement among scholars regarding the technical quality and political wisdom of the resulting product,⁹⁶ all would agree, I think, that the revision has had the effect of diluting the Spanish and French content of Louisiana's private law.

The cause of this dilution is that, in the course of the revision, the revisers have ended up introducing into the Civil Code scores of new

91. Yiannopoulos, *Civil Codes*, *supra* note 2, at XLVI.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at XLVI-XLVII.

96. Compare, e.g., the relatively negative and pessimistic assessments in Vernon Palmer, *The Death of a Code – The Birth of a Digest*, 63 Tul. L. Rev. 221 (1988), and Yiannopoulos, *Lost Cause?*, *supra* note 2, at 842–43, with the relatively positive and optimistic assessments in Joachim Zekoll, *The Louisiana Private Law System: the Best of Both Worlds*, 10 Tul. Eur. & Civ. L.F. 1, 13, 18–20, 27–28 (1995), and Julio Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 Tul. L. Rev. 147 (1989).

legal rules and even a few new legal institutions that were of neither Spanish nor French origin. The sources of these new non-Spanish and non-French rules and institutions are varied. Some can justly be called autochthonic, that is, they are original Louisiana creations.⁹⁷ Others have been drawn from Anglo-American law, be it "case law"⁹⁸ or legislation, such as the so-called "Uniform Laws" that have been developed in the United States.⁹⁹ The rest have been taken from the civil law of jurisdictions other than Spain and France, in particular, Italy, Greece, Germany, Quebec, Argentina, and, most exotic of all, Ethiopia.¹⁰⁰

Though the revision of the Civil Code has, then, diluted the Spanish and French content of Louisiana's private law, one must not exaggerate the extent of that dilution. The truth is that the

97. See, e.g., La. Civ. Code art. 3298 ("A. A mortgage may secure obligations that may arise in the future.") As the official revision comments to this article point out, this article was intended to provide a substitute for the so-called "collateral mortgage," a unique combination of pawn and mortgage. This real security device, which was an original creation of Louisiana lawyers, made it possible for lenders of money to take mortgages as security for revolving lines of credit.

98. See, e.g., La. Civ. Code art. 1477 (rev. 1991) ("To have capacity to make a donation *inter vivos* or *mortis causa*, a person must also be able to comprehend generally the nature and consequences of the disposition that he is making.") According to the official revision comments, this rule is "[i]n many respects derived from the common-law test for testamentary (donative) capacity." *Id.* at cmt. (b).

99. See, e.g., La. Civ. Code art. 1593 (rev. 1997):

If a legatee, joint or otherwise, is a child or sibling of the testator, or a descendant of a child or sibling of the testator, then to the extent that the legatee's interest in the legacy lapses, accretion takes place in favor of his descendants by roots who were in existence at the time of the decedent's death.

According to the official revision comments, "[t]his Article establishes a species of anti-lapse statute for Louisiana, similar but not identical to Section 2-602 of the Uniform Probate Code." *Id.* at cmt. (d).

100. References to the civil codes of these countries abound in the official revision comments to the new Civil Code articles. With the assistance of Westlaw, I have sought to ascertain the number of new Civil Code articles the comments to which cite provisions of one or more of these foreign codes. The results of my survey, which I admit are not "scientific" and are merely approximate, were as follows:

<i>Civil Codes</i>	<i>No. of articles</i>
Italian	166
Greek	96
German	62
Ethiopian	46
Quebec	34
Argentine	29

In most of the comments in which some provision of one of these civil codes is cited, the cited provision is identified as a source of all or at least part of the pertinent new Civil Code article.

revision process, innovative though it has been, has nevertheless left intact the bulk of the theretofore existing private law, which was, as we have seen, almost completely Spanish and French in origin. Not only that, but the revision process has at points actually “added back” French and, to a lesser extent, Spanish content to that law. In addition to the new rules and institutions mentioned earlier (those that are not of Spanish or French origin), the revisers have added a number of others that owe their origin to French civil law, in particular, to the French Civil Code¹⁰¹ or French civil law doctrine. One example is new Article 477, which, according to the “source note” that follows the article, was based in part on Article 1166 of the French Civil Code:

<p>CODE CIVIL FRANÇAIS Art. 1166 Néanmoins les créanciers peuvent exercer tous les droits et actions de leur débiteur, à l'exception de ceux qui sont exclusivement attachés à la personne.</p>	<p>LA. CIV. CODE (rev. 1984) Art. 2044 If an obligor causes or increases his insolvency by failing to exercise a right, the obligee may exercise it himself, unless the right is strictly personal to the obligor.</p>
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Another example is new Article 477, which, according to the official revision comments to that article, was modeled on the following passage in the treatise of Planiol and Ripert:

<p>Marcel Planiol & George Ripert, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS vol. 3 ... [l]a propriété... [est] le droit en vertu duquel une chose se trouve soumise, d'une façon perpétuelle et exclusive, à l'action et à la volonté d'une personne.</p>	<p>LA. CIV. CODE (rev. 1979) Art. 477 Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing...</p>
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And in at least a few instances, the revisers have added new articles that were inspired by Spanish civil law sources. One interesting example is new Article 1, which, according to the official comments to that article, was based on Article 1 of the Spanish Civil Code:

101. Provisions of the French Civil Code are cited in the official revision comments to approximately 112 new Civil Code articles. In many of those comments, the cited French Civil Code provision is identified as a source of at least part of the new Civil Code article.

<p>CÓDIGO CIVIL ESPAÑOL 1 Art. 1 Las fuentes del ordenamiento jurídico español son la ley, le costumbre</p>	<p>LA. CIV. CODE (rev. 1987) Art. 1 The sources of law are legislation and custom.</p>
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For these reasons, then, it seems fair to say that Louisiana's private law—at least the law “on the books”—remains profoundly Spanish and French notwithstanding the innovations that have been introduced into that law through the revision.

The same can fairly be said, I think, of Louisiana's private law “in practice.” As the revision process has ground on, Louisiana courts have continued to use French and to a lesser extent Spanish authorities to assist them in interpreting the revised Civil Code articles. In the very recent case of *Berlier v. A.P. Green Industries, Inc.*,¹⁰² the court not only tapped the “usual” French scholars—Planiol and Aubry and Rau—but also reached all the way back to two commentators of the French *ancien régime*—Charles Dumoulin and Alcide d'Alciat—as the following excerpt from the court's opinion reveals:

The sole issue before us is whether the four defendants are solidarily obligated to pay the \$450,000.00 lump sum settlement.

The Louisiana Civil Code provides the framework for analyzing the types of obligations involving multiple persons recognized under Louisiana law, which are several, joint, and solidary obligations. LSA-C.C. art. 1786.

* * *

The final category is that of joint obligations. In part, a joint obligation is one where different obligors owe together just one performance to one obligee, or where one obligor owes just one performance intended for the common benefit of different obligees. LSA-C.C. art. 1788.

* * *

Next, to determine the effect of a joint obligation on the obligors, it is necessary to determine whether the joint obligation is divisible or indivisible, because the revision “leans heavily on the notions of divisible and indivisible obligations.” *Exposé, supra* § 5. If the joint obligation is divisible, neither obligor is bound for the whole performance; rather, each joint obligor is bound to perform only his portion.

LSA-C.C. art. 1789. On the other hand, if the joint obligation is indivisible, the joint obligors are subject to the rules governing solidary obligors. *Id.* One of the principal applications of the rules governing solidary obligors to joint and indivisible obligors is that the obligee, at his choice, may demand the whole performance from any of the joint and indivisible obligors. See LSA-C.C. art. 1795.

* * *

In Louisiana, divisibility of a joint obligation depends on divisibility of the object of the performance, unlike joint obligations at common law. Litvinoff, *Treatise*, supra § 7.94; *Hincks v. Converse*, 38 La. Ann. 871 (1886). This rule is expressed in LSA-C.C. art. 1815:

An obligation is divisible when the object of the performance is susceptible of division.

An obligation is indivisible when the object of the performance, because of its nature or because of the intent of the parties, is not susceptible of division.

French doctrine has always held that division of an obligation cannot take place when the object of the performance is indivisible. Litvinoff, *Treatise*, supra § 7.94 (citing 7 Planiol et Ripert, *Traite pratique de droit civil francais* 413 (Louisiana State Law Institute transl., 2d ed.1954)). Combining the ideas of Charles DuMoulin and Andre d'Alciat, Planiol explains that indivisibility is derived sometimes from the nature of the object due (*ex natura*), and sometimes from the intention of the parties (*ex voluntate*). 2 Marcel Planiol & George Ripert, *Treatise on the Civil Law*, pt. 1 no. 782 (La.St.L.Inst.trans., 11th ed.1939). Planiol also states that indivisibility is contractual, or *ex voluntate*, when the thing which makes the object of the obligation is in all respects divisible, but the parties intend that the obligation should be executed as if it were indivisible. *Id.* at No. 787. Authorities are in agreement that money, which is the object of the obligation at issue in the instant case, is "in all respects divisible." See, e.g., *Martin v. Louisiana Farm Bureau Cas. Ins. Co.*, 94-0069, p. 5 (La.7/5/94), 638 So.2d 1067, 1069 (stating that "[t]he obligation to pay money at issue here is susceptible of division and thus provides no basis for legal subrogation"); Planiol, supra (remarking that nothing is more divisible than money); Saul Litvinoff, *The Law of Obligations in the Louisiana Jurisprudence* 599 (1979) (stating that a sum of money is divisible as a matter of fact).

Although money, by its nature, is divisible, LSA-C.C. art. 1815 provides that an object can also be indivisible because the parties so intended. Thus, even where an object by its nature may be rendered in parts (such as a lump sum settlement for \$450,000.00), it must be performed as a whole where it is indivisible because of the parties' intent. Saul Litvinoff, *The Law of Obligations in the Louisiana Jurisprudence* 599 (1979).

In this case, it is apparent that the parties to the settlement agreement intended that "the obligation should be executed as if it were indivisible." If the parties had intended for the obligation to be divisible, then one would reasonably suspect that they would have determined each defendant's pro-rata portion, and each defendant would be bound for a sum certain. However, the parties never made such a determination, nor did they discuss such a method of payment Therefore, as this obligation is indivisible because of the parties' intent, it must be performed as a whole even though, by its nature, its object may be rendered in parts. Litvinoff, *Obligations*, *supra* at 599.

Of course, this is not to say that the obligation in question is indivisible merely because it was incurred in exchange for an indivisible obligation. Aubry & Rau, *Cours de Droit Civil Francais*, Vol. IV-Sixth Edition, translated in 1 *Civil Law Translations* § 301 (La.St.L.Inst.1965) (stating that a divisible obligation does not become indivisible merely because it is correlative to an indivisible obligation from a commutative contract). Rather, it is the sum total of the facts surrounding the defendants' obligation, as discussed above, which reveals that the parties' intent was that their obligation be indivisible.

For the reasons stated above, we find that there existed a joint and indivisible obligation which binds each of the defendants for the full \$450,000.00.

It must be acknowledged, however, that judicial citations to French and Spanish authorities have been on the wane during the last

decade or so.¹⁰³ But if one views this development in context, it does not, in fact, point to a decline in the influence of French and Spanish law within Louisiana's "law in practice." At the same time at which judicial citations to those authorities have been dropping, judicial citations to "domestic" civil law authorities (that is, the works of Louisiana's own civil law scholars) have been climbing.¹⁰⁴ And there is reason to believe that these two phenomena are causally connected, specifically, that the courts are now resorting to the domestic works in situations in which they would formerly have resorted to the foreign works (in other words, the former are seen as and are being used as substitutes for the latter). Now, the Louisiana scholars who are responsible for these new works, to the very last one, are themselves students of the French or Spanish civil law tradition (or, in many instances, of both traditions). Further, most of these works are shot through with citations to French and, in some instances, even Spanish civil code articles and doctrinal works. Thus, to the extent that the Louisiana courts are now citing these works, those courts are still "feeling" the influence (albeit now in a less direct fashion) of the French and Spanish civil law traditions.

III. CONCLUSION

Just over two hundred (200) years have passed since Louisiana's private law was first formed out of *le droit civil* of France and *el derecho civil* of Spain. In the intervening years various institutions and rules of French or Spanish origin have dropped out of that law, while institutions and rules of various other origins have been added to it. These changes, however, have been neither so extensive nor so profound as to alter that law's fundamental constitution.

103. See Lorio, *supra* note 2, at 22 & nn.122–23. My own research tends to confirm Professor Lorio's observations regarding the downturn in these citations. Judicial citations to classic French civil law doctrinal works (I looked for those of Planiol, Aubry and Rau, Baudry-Lacantinerie, Huc, Laurent, Demolombe, Marcadé, Coin-Delisle, Demante, Demogue, Troplong, Duranton, Delvincourt, Toullier, Maleville, Merlin, Pothier, Domat, Ferrière, Ricard, and Furgole), after reaching a peak of 227 in the second half of the 1970s, declined to 152 in the first half of the 1980s, jumped up slightly to 157 in the second half of the 1980s, then fell to 128 in the first half of the 1990s and to only 79 in the second half of the 1990s. Thus far in the 21st century, there have been 56 citations to these works.

104. See *id.* Once again, my own research tends to confirm Professor Lorio's observations. Judicial citations of Louisiana civil law doctrinal works (I looked for those of Yiannopoulos, Litvinoff, Lévassieur, Symeonides, Samuel, Spaht, Lorio, Swaim, Hargrave, Oppenheim, Pascal, Stone, and Cross) came to 204 in the second half of the 1970s, 189 in the first half of the 1980s, 287 in the second half of the 1980s, 252 in the first half of the 1990s, and 228 in the second half of the 1990s. From 2000 to the present, these works have been cited 167 times.

Notwithstanding the changes, the "family resemblance" between Louisiana's private law, on the one hand, and French and Spanish private law, on the other, remains unmistakable.