THE 1808 DIGEST OF ORLEANS AND 1866 CIVIL CODE OF
LOWER CANADA: AN HISTORICAL STUDY OF LEGAL CHANGE

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## Contents of Volume Two

<table>
<thead>
<tr>
<th>Chapter 5. Employment in the Louisiana Digest and Quebec Code</th>
<th>491</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>492</td>
</tr>
<tr>
<td>Part One. Employment in the 1808 Louisiana Digest</td>
<td>514</td>
</tr>
<tr>
<td>Part Two. Employment in the 1866 Quebec Code</td>
<td>573</td>
</tr>
<tr>
<td>General Conclusions on Employment in the two codes</td>
<td>608</td>
</tr>
</tbody>
</table>

### Part Three

| Chapter 6. The 1808 Digest of Orleans | 613 |
| Chapter 7. The Civil Code of Lower Canada | 687 |
| Chapter 8. Conclusion: Codification, lawmaking and legal change | 718 |

Bibliography

753
Chapter Five.

Employment in the Louisiana Digest and Quebec Code.
Introduction.

This chapter deals with the law relating to employment in the two codes: the Louisianian and Quebec provisions will be examined in their relationship to the law before codification and the sources drawn on by the codifiers. From the preceding chapter, it will be obvious that up to the eighteenth century, relations between family and servant, artisan and apprentice had been close. There are three matters to be discussed: first, the exclusion of the servant from the family; second, the development of wage labour; and third, the particular social and economic circumstances of Quebec. All three have been touched on in describing Quebec and Louisiana society; but here it is necessary to reformulate the material in order to confront more directly the three issues mentioned above, and to place the following discussion of the law in its appropriate context. The discussion of these three issues will be followed by an account of the civilian approach to them, as the received Roman law of Europe provided the basic material used by the redactors of the two codes.

(i) The exclusion of the servant from the family.

In the introduction to chapter 4, the intimacy of masters and servants was touched on: it is now appropriate to expand on this and to show briefly how the servant came to be excluded from the family. The impressive study of Ariès once more permits us to explore this difficult area. Up to the seventeenth century, the notion of "service" was not necessarily connected with menial tasks. Thus sons of noble families would wait at table or be sent off while young to serve another nobleman; but the seventeenth century was a period of confusion over the role and status of servants, who were henceforth to be on the same footing as manual labourers. Ariès points out, however, that although in the seventeenth century the status of servants became degraded:

"There still remained between masters and servants

1. See chapter two supra.
2. Ariès, op.cit. (chap. 4, note 5 supra), at p. 396.
something which went beyond respect for a contract or exploitation by an employer; an existing bond which did not exclude brutality on the one hand and cunning on the other, but which resulted from an almost perpetual community of life." 3.

Ariès surveys contemporary source material on masters and servants and concludes that: "A servant was not paid, he was rewarded: a master's relationship with his servant was not based on justice but on patronage and pity, the same feeling that people had for children." 4. Flandrin also emphasises this aspect of the master-servant relationship: "the notion of wages was nebulous, it was by ensuring the material independence of a servant that one recompensed his services"; 5. and he shows that servants were in a position similar to that of children in regard to the head of the household. 6. In other words, the master-servant relationship was not regarded as one based on contract, but as one of dependency analogous to the dependency of children on their parents. (The legal relationship will be discussed below.) In the course of the eighteenth century this changed. The family (narrowly defined) withdrew into itself; servants were excluded, and their relationship to their masters or employers became more formal, and as such more akin to a strict contractual relationship.

(ii) The development of wage labour.

So far we have been discussing service in the household, a service which might be loosely termed "domestic". Another aspect of service is that in a workshop, one artisan employing another (or one being apprenticed to another). This form of service took place within what might conveniently be called "artisan production". 7. That is, the independent artisan produced goods in his own workshop which he sold to the merchant: he was a small independent

4. Ibid., p.397.
6. Ibid., pp.140-50 and passim.
producer. Artisan production existed along with the inclusion of servants in the family. Although there might appear to be a difference between service with or apprenticeship to an artisan and domestic service, this difference is not real if the nature of society as a whole is considered. The place of production and hence of employment was the artisan's home: his servants in his labour and his apprentices would stay with him, and they formed part of his household. The unit of production and that of consumption were co-terminous. In the eighteenth century this "familial" relationship between the artisan and his "employees" was breaking down and re-forming along contractual lines. The employees and apprentices were excluded from the family and their status changed. At the same time, artisan production was in decline, to be replaced in the nineteenth century by industrial production. Industrial (factory) production involved the use of wage labour; that is, employees were in a formal contractual relationship with their employer, and sold their labour for wages. No longer were employees part of the household of an artisan, and the artisan household disappeared as the primary unit of production. Of course, wage labour has always existed; but it did not predominate until industrialisation.

Further, although servants had always been "employees", and perhaps, in some abstract formal sense, wage labourers, the content of the master (employer) -

8. Cf. Flandrin, op.cit., pp.62-3: "If a distinction has become established today between the worker and the domestic servant, the reason is that, with the exception of some 'agricultural workers', the worker today is no longer accommodated in the house of his employer. The co-terminous character of the unit of production and that of consumption, which was formerly customary, has become exceptional."

9. Cf. these statements of H. Braverman, Labour and Monopoly Capital, Monthly Review Press, New York, 1974, p.52: "It is important to note the historical character of this phenomenon. While the purchase and sale of labour power has existed from antiquity, a substantial class of wage-workers did not begin to form in Europe until the fourteenth century, and did not become numerically significant until the rise of industrial capitalism (that is, the production of commodities on a capitalist basis, as against mercantile capitalism, which merely exchanged the surplus products of prior forms of production) in the eighteenth century."
servant (employee) relationship changed from one of domestic dependency to one of formal contract, empty of domestic association.

(iii) The particular circumstances of Louisiana and Quebec.

In chapter 2, there was discussion of the changing nature of the relationship between master and servant in Louisiana and Quebec. Allan Pred has pointed out that, in the United States generally, techniques of industrial production were not used until after the first decades of the nineteenth century. Up to then, production used handicraft techniques rather than machines, and was organised on a household and workshop basis rather than on that of the factory, while being marked by rural dispersion, rather than concentration in urban centres. Cities themselves were mercantile rather than industrial in character.\(^\text{10}\) This amounts to what we have described as "artisan production"; Pred's description would fit economic life in Louisiana.\(^\text{11}\) There was little or no industrial production; the economy was based on trade and agriculture. There would correspondingly be few opportunities for employment as a labourer, especially when the institution of slavery is considered.\(^\text{12}\) Thus, the need for a developed law on employment would apparently be slight; although the developing individualist conceptions of society would suggest that employment would be regarded from a primarily contractual viewpoint, rather than from one of domestic dependency.

Quebec, however, is rather different: codification came


11. See chapter 2 supra.

12. For Baltimore, Steffens, op. cit., p.107, states: "Although slave labor contributed substantially to artisanal production in Baltimore, apprentices provided the chief source of workers."
only in 1866, and by then liberal capitalist notions of individualism had greatly affected the conception of the relationship between employer and employee, which was viewed from the perspective of classic contractual freedom. Artisans and journeymen were wage labourers; and there was a continuing transformation of the concept of employment or service.13 This said, it should be remembered that in Quebec, out of the total population, the numbers so employed were slight, the majority remaining peasant farmers.

Hence, there was a difference between Louisiana and Quebec at the time of their respective first codifications: Quebec by 1866 had gone much farther in transforming the relationship between master and servant than had Louisiana by 1808.

(iv) The civilian background.

The civilian legal systems have traditionally classed the contract for labour as one of hire: hire of labour being one aspect of the general contract of hire.14 Both the C.N. and the C.Q. deal with employment as hire. The D.O. does so, too; but it also includes a title on master and servant in its first book. This being so, it is necessary to describe the Roman law on the subject, and then to discuss the reception of that law in Castile and in France; it is useful, too, to examine the manner in which these latter two systems treated servants in general. The provisions of the C.N. and Proj. An VIII will also briefly be discussed, and some concluding remarks will complete this introduction before we consider the provisions of the D.O. and C.Q.

A. The Roman legal background.

In Roman law the hiring out of one's labour for gain

14. The new draft Quebec code breaks this tradition. See the Report of 1977, vol. 1, pp.440-443 (Draft) and vol. 2, tome 2 (Commentaries) pp.738-742; at p.738: "It will be observed that the term 'lease and hire of services' is henceforth dispensed with to make way for a notion closer to contemporary reality."
was part of the general law on hire: it was thus one aspect of the consensual contract of locatio conductio. Some scholars have suggested that the hiring out of one's own labour developed from the hiring out of slaves. Thomas disagrees, arguing that the leasing of the labour of free men is easily as old: his argument is plausible; but we need not concern ourselves with this point.  

Locatio conductio was a bonae fidei consensual contract with three requirements: consent, price (merces, which had to be certain and in money) and the thing. Modern commentators usually divide this contract into three main types (the trichotomy): locatio conductio rei; locatio conductio operis faciendi; and locatio conductio operarum. For the first and third of these the person who supplies the thing or services is the locator, the person who pays is the conductor; while for the second, the person who gives the order for the work to be done and who pays is the locator, the person who executes the work is the conductor. Although the terminology might appear confusing, if it is borne in mind that the locator is the one who "places" ("locat"), the reason for the difference in terminology will appear. Locatio rei needs no explanation: its meaning is obvious. Locatio operis faciendi is where the locator hands over something on which the conductor is to work, the latter being paid by the former: it is the putting out of work on contract. Locatio operarum was where a worker, the locator, is employed by the conductor as what we have termed a wage labourer.

One point should be stressed: the trichotomy is the product of modern commentators. The Romans did not make this

16. On certainty of price, see Gaius, Inst. 3.142; cf.3.144. See also D.19.2.2 pr.; h.t.19.3 (rent in produce). See also h.t.25.6 on locatio partiaris. Justinian is definite on rent being money: Inst. 3.24.2.  
17. See generally Buckland, Textbook, pp.498-506.
clear distinction. Schulz, for example, describes the trichotomy as "a product of continental legal scholasticism" and argues for its rejection, stating that it "leads to unnecessary difficulties." 18 Thus, in D.19.2., the title on this contract, texts relating to all three forms of locatio are scattered throughout the general discussion, no distinction being made as texts are fitted in to the general scheme of the title. Further, the jurists did not stick closely to the terminology. Thus, in D.19.2.22.2, an example of what we would call locatio operis faciendi, the jurist Paul starts off "correctly" according to the modern terminology, and then appends a clause stating that the conductor "locat...operam suam":

"Cum insulam aedificandum loco, ut sua impensa conductor omnia faciet, proprietatem quidem eorum ad me transfert et tamen locatio est: locat enim artifex operam suam, id est faciendi necessitatem."

It must be concluded that for the Roman jurists the distinction was of minimal importance: there was one contract: locatio conductio. This is indeed sensible. Wage labour would not be of any particular importance in Rome because of slavery, and the patron-client system: 19 "the sphere of the hired free worker at a wage, the locator operarum, is very restricted." 20 The contract operis faciendi was probably of considerably more importance, and this would explain the greater attention paid to it.

Thomas puts forward an interesting argument which, if accepted, helps explain the lack of attention paid to locatio operarum. He argues that the worker was originally regarded as letting himself out, and not his operae as a separate entity. Thus, the worker se locat rather than suas operas locat. 21 He argues that se locare is found in the early

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18. Classical Roman Law, Oxford, 1951, pp.542-4. F. Olivier-Martin has credited Voet with the invention of the trichotomy: see "Des Divisions en Louage en Droit Romain", 15 R.H.D.F.E., 1936, pp.419-475. (Hereafter this important article will be cited as Louage).
20. Ibid., p.195.
texts, and suggests that locatio operarum was not in use until the time of Hadrian (indeed, he conjectures that the term was invented by Julian). He argues that this change reflects both an upgrading of the status of wage labourers (mercennarii) and juristic development: the result was the realisation that what was concerned was not the leasing of an individual but of his services (operae).

If he is correct (and his argument is plausible) his suggestion helps explain why the jurists did not consider locatio operarum as being in any way different from locatio rei. There was absolutely no difference between letting of an object and letting of oneself: one let oneself as an object. If, as Thomas suggests, there had been an upgrading of the status of the wage labourer in the early Empire, to change the terminology from se locare to operas locare would provide a satisfactory euphemism: a euphemism both in line with the new status and conceptually satisfactory. The jurists, however, while changing the terminology in cosmetic fashion, continued to treat locatio operarum in the traditional way as letting of oneself, and did not concern themselves overmuch with this aspect of the contract.

This leads on to another point: upper class Romans despised the mercennarius, who was mercede conductus. (Lower class Romans, no doubt, did not despise the mercennarius in the same way; but, unfortunately for us, they have left no statements equivalent, for example, to those of Cicero.) The artes liberales could not be the subject of letting and hiring, although in some of the liberal professions it became possible to receive an honorarium as their work came...

22. D.19.2.60.7 (Labeo): "Se ipse se locasset", referring to slave letting himself out, rather than being let out by his master. See also D.47.10.11.4 (Proculus). 23. Op.cit., p.234 and pp.238-9. 24. See Ibid., pp.234-7. 25. Buckland, Textbook, p.505, note 1 also stresses the lack of textual authority. 26. It seems likely that much of the modern concern with locatio operarum arises out of the importance of this contract in the contemporary world: an importance it did not have for the Romans.
to be regarded as mandate (a supposedly gratuitous contract). The matter of the nature of the reward earned by members of the liberal professions is rather confused; but this need not concern us. 28. For our purposes, it is important to stress the menial nature of locatio operarum in the Roman law, the law from which the modern civilian systems drew many of their rules.

In law, the nature of the relationship between locator and conductor was a formal one of contract between abstract equals. Either party could be liable to the other for any damage done arising out of the former's culpa. Were the locator incompetent in the work he contracted to carry out, he would be liable for culpa. 29. Despite this formal equality the wage labourer (mercennarius) was in an inferior position. In the agricultural familia, he was described as being in loco servorum; 30. an obviously inferior status for a free born man. Indeed, the very silence of the legal texts on the subject of the mercennarius suggests his lowly status. Given Roman society, the nature of the contract would result in mercennarii always being of low status. 31. It would seem likely that, in some circumstances at least,

29. See D.19.2.9.5 and generally Buckland, Textbook, pp.504-505.
30. D.7.8.4 pr. and 43.16.1.18.
31. The evidence brought forward by Crook would support this: op.cit., pp.193-200.
the conductor would have the right of levis castigatio. 32.

We may conclude that locatio conductio operarum was not differentiated from the general law on locatio conductio; this was perhaps due to the historical origins of locatio operarum and its general unimportance (for the Roman jurists). The wage labourer was of low status; it is possible, however, that, in the second century A.D., the status of the mercennarius improved somewhat. Prestigious skills and tasks could not be the subject of locatio conductio. The locator and conductor were formally equal; but the evidence suggests that this equality was indeed only formal, and that the locator was in a dependent position. Few texts were devoted to locatio operarum. These were the skimpy provisions the Roman law bequeathed to the civilian systems.

B. The French law of the ancien régime.

An adequate account of the reception of the Roman law on locatio conductio would be a lengthy work: it is fortunate that such an account need not be given here. 33. In the following discussion, one point should always be recalled: the analysis of locatio conductio according to the trichotomy is a modern development. It is contended that

32. The case of the "apprentice" would suggest this: D.9.2.5 and 19.2.13.4. (Whether the contract should be classed as operis faciendi or operarum is irrelevant. The boy's father had an actio ex locato; this was the only matter of importance given that the Romans did not distinguish clearly between the three types of locatio.) It is explicitly stated that the conductor, the sutor, had the right of levis castigatio. Whether or not the boy is an "apprentice" is irrelevant (perhaps to speak of "apprenticeship" is unhelpfully anachronistic) and D.9.2.7 envisaged the father recovering for loss of future earnings from the boy. Anyway, that a master could chastise his mercennarius is hardly surprising. The "apprentice" texts are usually discussed within the context of Aquilian liability: see, e.g., Thomas, "The Case of the Apprentice's Eye", 8 Revue Internationale des Droits de l'Antiquité, 1961, pp.357-372.

33. On the reception of locatio conductio, much useful material may be garnered from Olivier-Martin, Louage (see note 18 supra).
two conflicting approaches to servants may be traced in the French juristic writings: one approach deriving from the Roman *locatio conductio*; the other treating the servant as a dependant of his master, not as an abstract contracting individual. The first approach will be demonstrated and exemplified by discussing a treatise of Pothier,\(^{34}\) the second by discussing the work of Pocquet de Livonière.\(^ {35}\) It will further be shown that under the *ancien régime* wage labour was regulated primarily as a matter of public policy, rather than of private law.

In pre-Code France little juristic attention seems to have been devoted to *locatio operarum*.\(^ {36}\) (I will continue to use the term for conciseness.) Pothier discusses the lease of personal services only in a number of provisions scattered through his discussion of *locatio rei*. He discusses *locatio operis faciendi* separately, as *louage d'ouvrage*. He states that there are two kinds of *louage*: *louage des choses* and *louage des ouvrages*.\(^ {37}\) The lease of personal services, he discusses as an aspect of *louage des choses*. Thus, for Pothier, *locatio operarum* is assimilated to *locatio rei*; he is making a bi-partite division not at all similar to the trichotomy. Further, the rules he enunciates on *louage des services* (*locatio operarum*) are few in number and not clearly worked out.\(^ {38}\) Tucker suggests that Pothier's treatment of *louage des services* (which he misleadingly calls *louage d'ouvrages*) was the result of the fact that "lease of services ... was not yet important"

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35. *Règles du Droit Français*, 1737, 3d. edn., (hereafter cited as *Pocquet*, Bk. 1, tit.2, sectn. 4, pp.54-8. (This work has been used already. See, e.g. *supra* chap.4, note 619.)
36. See e.g. *D'Espeisses*, op. cit., Part One, vol.1, tit.2, sectn. 1, p.87, where he defines *louage*, stating it has two forms: he does not mention the form now called *locatio operarum*, though he was aware of its existence (as is obvious from section 2 n.6, p.92). He does not clearly distinguish *locatio operarum* from the other forms.
38. They will be discussed *infra*. 
enough to the order of things to warrant careful
development...[T]he contract... was not economically important
enough to merit much more than academic notice...." 39.
There is undoubtedly some truth in this; but this statement
is by no means the whole truth, and requires qualification.
First, the existence of regulation of labour by the public
authorities would suggest that some importance was attached
to wage labour (and this will be discussed below). Second,
what, above all else, seems to have influenced Pothier's
treatment of louage des services is the inherited academic
tradition of Roman law. Pothier's discussion reflects the
Roman attitude of not clearly distinguishing between locatio
rei and locatio operarum. Tucker does not appear to
appreciate that the trichotomy was a modern development not
followed by Pothier: and this accounts for the latter's
treatment of louage des services. 40.

Pothier also follows the Roman law in confining louage
to lowly services; he excludes the artes liberales:
"Observez ... qu'il n'y a que les services ignobles
et appréciables à prix d'argent qui soient
susceptibles du contrat de louage, tels que ceux
des serviteurs et servantes, des manoeuvres, des
artisans, etc.

Ceux que leur excellence, ou la dignité de la
personne qui les rend, empêche de pouvoir s'apprécier
à prix d'argent, n'en sont pas susceptibles.

C'est pourquoi le contrat qui intervient entre
un avocat et son client... n'est pas un contrat de
louage, mais un contrat de mandat." 41.

Neither Cujas nor Bartolus make this distinction between
operae liberales and other operae. 42. In fact, in direct
contradiction of D.50.13.1.4 and 5, 43. Cujas states:

"Et juris professor, si ad docendum suas operas

40. On Tucker's misapprehension, see his Persons, pp.268-70.
41. Mulligan, who translated Pothier's T.C.L., appears to make
42. See Olivier-Martin, Louage, p.456, and note 3 thereon.
the same mistake: see C.A. Mulligan, Pothier's Treatise on
43. See note 27 supra.
the Contract of Letting and Hiring, Durban, 1953, p.1,
his note on Pothier's Introduction. His statement is
slightly ambiguous.
41. T.C.L, no. 10, Bug. 4, p.7.
42. See Olivier-Martin, Louage, p.456, and note 3 thereon.
The exemption of the *artes liberales* gained ground, however. Thus, we find Pasquier pouring scorn on the exclusion of advocates from being subject to the contract of *louage* because theirs is a dignified profession. He characterises this exclusion of advocates as "une hypocrisie de droit inventée par les jurisconsultes, pour auctoriser leur science." Despite the sympathy one may feel for Pasquier's view, Pothier does correctly state the law for the eighteenth century.

Pothier may be taken as an example of an author treating *louage des services* from a formal contractual standpoint, using categories inherited from Roman law. His treatment of *serviteurs* as abstract contracting individuals does not fit with the reality of the relationship between master and servant of his period: neither master nor servants would consider each other as equal individuals bound only by the formal tie of contract. What is most obvious in Pothier's account is civilian tradition.

Pocquet de Livonnière treats servants separately from the contract of lease. The fourth section of the first book of his work is entitled "De la puissance des Maîtres": he thus categorises the relationship between masters and servants as being of the nature of those between fathers and children, and between husbands and wives. His approach is interesting, and radically different from the notions of formal contract found in Pothier and the Roman sources. What seems important to Pocquet about the relationship between master and servant is that *serviteurs* place

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45. Pasquier, op.cit., chap. 56, p.693. (See chap. 4, note 992 supra for details.)
46. One obvious reason why Pothier discusses *locatio operarum* with that *rei* is that for both the person who paid was the *conductor*. No doubt sources for this usage could be traced.
themselves in the power of and under the authority of their maître. The rules he provides, however, are no more detailed than those scattered through Pothier's discussion; nor, in content, are they radically different from those of the latter. The significance of Pocquet's treatment of the material is his approach: he does not consider the relationship between master and servant as one of formal contract between free, equal and abstract individuals, but rather as one of dependency and power within a definite set of social relations. He may also be influenced by the Roman classification of the first division of the law of persons, and by feudal concepts of service between lord and vassal; but, especially as regards the former, even if existing, such influence is slight. What is worthy of stress is that Pocquet is treating "service" as a status, similar to that of being a wife or a child in power. His approach to the tie between master and servant from a perspective other than that of contract would seem to be more in line with the social relations of master and servant than would the approach of Pothier. Traces of the attitude of Pocquet may be found in other works. Thus Merlin acknowledges lease of services as part of louage, but he prefers to discuss lease of services under "domestique" and "ouvrier", where an account of the relationship between master and servant will not be hampered by notions and categories inherited from Roman law. His discussion of, for example, "domestique" is far removed from the formal Roman law and, making due allowance for the legal viewpoint, recognises the real social bond between master and servant described by Ariès.

To state that the law of the ancien régime in France on what we have called wage labour is only that found in the juristic writings would be to mislead. Those jurists who discussed the legal aspect of wage labour from a purely

47. See sections (i) and (ii) of this introduction.
49. See ibid., vol.4 (1812), s.v. "domestique", pp.2ff.
50. See ibid., vol.8 (1813), s.v. "ouvrier".
51. See text at note 3 supra.
Roman perspective would tend, following the Roman tradition, both to give a brief account and to show little interest in the topic. Pocquet, on the other hand, because of his stress on the power and authority aspect of master-servant relations, tends to discuss the topic within the confines of domestic service. All this gives an impression of a lack of legal regulation of employment; but such an impression is false. Originally, as in Europe generally, the trade guilds had regulated employment and apprenticeship. The guilds, with their particular rules for admission and apprenticeship, were suppressed by an edict of February, 1776. The position is complex; but one may say that generally industry was regulated and controlled, and that industrial work was regulated corporately by special royal ordinances and the body of industry itself. The regulation of labour was more a matter of policy than of formal law. Hence, the jurists, concerned with the formal law and operating mainly within the inherited Roman tradition, would not be concerned with the regulation of labour; their discussion of service would accordingly be limited to the Roman categories. In this, the redactors of the Louisiana and Quebec codes would be likely to follow the jurists. The C.N. devoted only two articles to locatio operarum; they would be a prime source for the redactors in Louisiana and Quebec. The loi de 22 Germinal, an XI, one year before promulgation of the C.N., regulated industrial work in Napoleonic France, again, as under the ancien régime, from a perspective oriented towards policy; the loi contained regulations on employment and apprenticeship. This loi,

52. See F. Olivier-Martin, Histoire (see chap. 3, note 30), pp. 170-176.
55. C.N. 1780 and 1781. The Projet, An VIII included rather more; the Projet's articles have been influential on the D.O.
as with the legislation of the ancien régime, might not provide a usable source for the two sets of redactors. 57.

C. The Castilian law.

Consideration of the position of wage labourers in Castilian law indicates the same conflict as in the French ancien droit between treatment of the labourer according to the categories inherited from Roman law, and recognition of the special relationship between master and servant. The Siete Partidas themselves show this conflict of methods of dealing with servants.

On reading through the Partidas, the impression one gains is of the servant's place in the family, of his part in the household and of his personal dependency on the head of the household. To demonstrate this, it is sufficient to examine a few texts. Thus, Part. 7.33 describes those serving (servientes) as part of the familia under the power of the señor de la casa; those serving being both his slaves (servios) and other (free) servants (criados). 59. The same text defines domésticos as domestics, field labourers (los labradores que labran sus heredades) and freedmen (aforrados), all of whom are also part of the familia. Part. 7.8.9 states that a master may chastise his servant; although if a master kills his servant, he is subject to the penalty for homicide. 60. Part. 3.31.21 states that if a man is given the use (usus) of a house, he may live there with his wife, sons and compañía, which, in this

57. It is most unlikely that the D.O. redactors would have access to it; perhaps it might also be considered as too dependent on conditions in France.
58. See supra, chapter 4, text at note 166, where quoted.
59. Note that in the 1844 Lopez edition, slaves, servios, are not mentioned. See chap. 4, note 166 supra. The point is not important here.
60. "Castigar puede ... el señor á su siervo ó á su homel libre.... Home libre placed here in apposition to siervo (slave) must mean servant: literally his free man. It cannot mean freedman, the word for which in the Partidas is aforrado though no doubt it encompasses such. Sons are also mentioned.
context, means personal attendants. Under Part. 7.14.4., a master may be liable for the crimes of his servants, though only in very limited circumstances. Part.3.2.6 in general forbade servants to sue their masters. All these examples, and especially the last, show that the Partidas do not generally envisage the relationship between master and servant as being primarily contractual: in this, the Partidas are not following the Roman law on *locatio operarum*. Under the Roman law, one who *locat suas operas* would definitely be able to sue the *conductor* under the *actio locati*. These texts of the Partidas consider the servant as a member of the family, a personal dependent of the señor, in a position analogous to those of children and slaves. This conception of the relationship is undoubtedly rooted in the social circumstances of the period of compilation of the Partidas.

On the other hand, the Partidas also contain Roman-inspired versions of the tie between master and servant: and it is instructive in this respect to examine the eighth title of the Quinta Partida, a title called "De los Logueros et de los Arrendamientos"; that is, "Of locatio conductio". The treatment of letting and hiring is of a pervasively Roman cast, even to the extent of the examples used. The compilers of the Partidas paid to *locatio operarum* as little attention as did the Roman jurists: this is instructive. The requirements stated for the contract were the same as in Roman law. There had to be a certain price (*cierto prescio*) which had to be paid in money (*en dineros contados*); if not, there was not *locatio* but rather an innominate contract. There had also to be a thing (*cosa*), the subject of the contract; and this could be work (*obras*). No distinction is made between the various aspects of *locatio conductio*, and, as in Justinian's Digest, references

61. Thus Part.5.8.10 gives as an example the liability of a workman if a precious stone cracks: the same example as used in D.19.2.13.5. Cf. the barrels in Part.5.8.14 in which oil or wine is put with the wine jars of D.19.2.18.1. Mingúijón in his Historia, vol.1, remarks at p.155:"Las Partidas se ocupan extensamente de esto contrato [i.e. Arrendamiento] inspirándose en las doctrinas Romanas..." It is unfortunate for us that he does not discuss contracts of service.
62. Part.5.8.1.
to what would now be classified as *locatio operarum* are few: *locatio operis faciendi* was obviously of more interest to the compilers.\(^63\) *Locatio operarum* does, however, receive mention. Part.5.8.3 states: "Obras que home faga con sus manos... pueden ser logadas ó arrendadas." This would include the contract *operarum*. Part.5.8.9 deals with entitlement to the salary of a deceased ascendant, mentioning, among others, royal officials who appear to have been paid an annual salary: the contract concerned must have been, in modern classification, *locatio operarum*.\(^64\) *Abogados* were mentioned in this text, and though this would (now) be classed as *locatio operis*, it may be concluded that in the *Partidas* not only menial tasks were the subject of *locatio conductio*.

We may conclude this discussion of workers in the *Partidas* with the following remarks. Servants, whether domestic or otherwise, were in a relationship with their masters which was not primarily regarded from a contractual viewpoint. Nevertheless, influenced by the Roman law, there was in the *Partidas* a discussion of *locatio conductio*; a discussion which inevitably touched on contracts of service. The *Partidas*, however, are more concerned with the putting out of work on contract to artisans (i.e. *locatio operis faciendi*).\(^65\) Artisans are also discussed in connection which their apprentices who pay them for training.\(^66\) The stress on individual artisans rather than wage workers is an obvious reflection of the organisation of work at the time of the writing of the *Partidas*.

In this discussion, we have been employing the terminology of the modern trichotomy; to do so is, of course, anachronistic. The authors of the *Partidas* are obviously quite unconcerned about the nature of any particular *locatio*: they regard all *locationes* as specific

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\(^{63}\) See Part. 5.8.10,11, 12 and 16 - all referring to *locatio operis faciendi*.

\(^{64}\) Part.5.8.15 refers to shepherds - *locatio operarum* or *operis faciendi*? This indicates the problems caused by use of the modern classification.

\(^{65}\) See Part.5.8.10 and 12.

\(^{66}\) Part.5.8.11: influenced by D.19.2.13.4.
examples of the one contract. This is important. In the
Partidas, the hiring of workers generally refers to the
hiring of artisans to undertake some specific task. In
all the leyes which refer to the hiring of workers, the
reference is fitted in to the general (rather loose)
conceptual scheme of the title: thus, Part.5.8.10 and 11
are particular examples of liability for culpa; a similar
remark may be made on leyes 15 and 16. There was no
attempt made to differentiate the hiring of work from that,
for example, of barrels. One may conclude that the
contractual hiring of wage labour was relatively unimportant
(except for that of artisans for specific tasks) and that
service was regarded from a fundamentally different
viewpoint: servants were considered part of the family,
their bond with their master not being of an abstract
contractual nature. Discussion of servants in title eight
of the Quinta Partida is largely a reflection of the
influence of Roman law on academically trained jurists.

More modern works on Castilian law are also of interest,
and show development subsequent to the Partidas. Febrero
gives a fairly conventional definition of lease and hire
(not even making a bipartite division). 67. He remarks:

"Todas las cosas del comercio humano ya sean
muebles, raíces ó semovientes, y las obras de manos
pueden ser arrendadas con libre y espontáneo consentimiento
del locador y conductor...." 68.

In the whole of his chapter "De los Arrendamientos" Febrero
does not properly deal with locatio operarum: locatio rei
is what interests him. 69. Asso and Manuel give more
consideration to lease of work. They state:

"En tres cosas pues consiste este contrato: en el
consentimiento de las partes; en la cosa ó obra
que se alquila, ó arrienda; y en el precio." 70.

They point out that only illiberal or mechanical work may
be the subject of this contract. 71. Of great interest is the

67. Febrero, Primera Parte, chap. 9, §1 no. 1, p.234. (See
chap. 4, note 101 supra).
68. Febrero, Primera Parte, chap. 9, §1 no. 4, p.235.
69. See his Primera Parte, ch.9 generally, pp.234-262.
70. Asso y Manuel, vol.2, Bk.2, tit. XIV, p.112. (See
chap. 4, note 95, supra).
71. Asso y Manuel, vol.2, p.112: "Que todas las cosas capaces
de uso y las obras iliberales se pueden arrendar".
following remark on the price: "el precio ha de ser justo, cierto, y en dinero contado." The notion of lesion has been applied to wages. The Nueva Recopilación has several relevant leyes; but the important point here is that none of the relevant ones are found in its titles on arrendamiento. Rec. Cast. 4.15.9 (in the title on prescriptions) states that, in general, those who have been in the service of another have to seek their wages within three years of quitting such service. Titulo XI of Libro Septimo of the Recopilación is entitled "De los oficiales, y jornaleros, y menestrales y mesoneros"; it contains various regulations on menial trades, but makes no allusion to the contract of hire.

Thus, in the Castilian law, as in the ancien droit of France, there are two competing traditions for dealing with servants. One tradition, derived from Roman law, treats servants and their masters as parties contracting according to the rules of lease: this approach is best exemplified by Asso and Manuel, who deal with servants only in connection with arrendamiento. Even so, there was no developed division of lease into anything similar to the trichotomy in the sources; lease was generally still viewed as a single contract. Only the illiberal, mechanical arts could be the object of lease. Further, by the time of Asso and Manuel, remuneration had to be just. The other tradition treated the servant divorced from the Roman contract; the employment of artisans was regulated by the Crown. Relationships between master and servant were based on the dependency of the latter on the former, in a position analogous to that of a child. Servants were not merely wage labourers bound by contractual ties.

73. See ibid., p. 114 on how disputes over "just" wages were solved. See also Rec. Cast. 7.11.3.
74. See Rec. Cast. bk. 9, titles X, XI, and XII.
75. Febrero shows this clearly; so also Asso y Manuel.
76. Asso y Manuel show the law has changed from the time of the Partidas; it should be recalled that Bartolus did not limit the contract to the illiberal arts.
77. As the Nueva Recopilación shows.
D. The Code Napoléon.

The C.N. and its 1800 projet were important possible sources for the redactors of the two codes. The C.N. contains only two short articles directly relating to lease of labour, C.N. 1780 and 1781, and it is useful to quote them here for easy reference:

"Chapitre III. Du louage d'ouvrage et d'industrie.
1779. Il y a trois espèces principales de louage d'ouvrage et d'industrie:
1. Le louage des gens de travail qui s'engagent au service de quelqu'un.
2. Celui des voituriers, tant par terre que par eau... [etc.];
3. Celui des entrepreneurs d'ouvrages par suite de devis ou marchés.

Section Première. Du louage des domestiques et ouvriers.
1780. On ne peut engager ses services qu'à temps, ou pour une entreprise déterminée.
1781. Le maître est cru sur son affirmation, pour la quotité des gages; pour le paiement du salaire de l'année échue; et pour les à-comptes donnés pour l'année courante."

Other articles relating to lease of labour will be referred to in discussing the C.Q. and D.O.; it is appropriate, however, to mention that in the C.N. the modern civilian trichotomy is not used to analyse louage. So states C.N. 1708:

"Il y a deux sortes de contrats de louage: Celui des choses, et celui d'ouvrage."

This might seem to be the same division as that of Pothier; but he (as seen) classed locatio operarum as part of locatio rei, the other division being only locatio operis faciendi. In the C.N., locatio operarum and locatio operis faciendi are subdivisions of louage d'ouvrage. Olivier-Martin suggests that in their division of louage into two the C.N.

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78. See Olivier-Martin, Louage, p.465.
79. See supra, text at notes 36-46.
redactors were influenced by Domat. This may well be so; but the division of *louage* into two forms was common in the eighteenth century.

A further source of provisions on *louage* would be the *Proj. An VIII*. The Louisiana redactors obviously used this work; the C.Q. redactors must have had access to this *Projet*, though they do not appear to have used it. On *louage d'ouvrages*, in the sense of *locatio operarum*, the *Proj. An VIII* had four articles not found in the C.N.: *Proj. An VIII*, 3.13.109 is equivalent to C.N. 1779; *Proj. An VIII*, 3.13.110 corresponds to C.N. 1781 and 3.13.111 to C.N. 1780. *Proj. An VIII*, 3.13, 112-116 were excluded from the final redaction of the C.N.; they regulated termination of *louage* and damages. The D.O. redactors used them.


81. For example, Gerhardt Noodt, *Opera Omnia*, vol. II, 1724 edn., Commentary on some titles of the Digest, *Ad lib. XIX* Tit. II Locati conducti (p.421): "Ait praetor, *Quod locatum et conductum esse dicetur*. Quid haec verba proprie significant et quamadmodum distinguantur non caret difficultate. Mihi sic videtur, quod locatio est duplex: alia rerum, alia operarum. Nonius: *locandi manifesta, significatio eat ut aut operis locandi, aut fundi.*" Guyot, *Répertoire*, vol. 11, s.v. "Louage", at p.46 states: "Louage. C'est une sorte de contrat dont on distingue deux espèces: l'une est le contrat de Louage des choses; ...l'autre est le contrat de Louage d'ouvrage...." Merlin, *Répertoire*, vol. 7 (1813) s.v. "Louage", p.573 still states the same, with the addition of remarks between double square brackets to take account of the C.N.'s wording. An important point is Guyot discusses only *locatio operis faciendi* under *louage*, for *locatio operarum*, one has to turn to his article on "Domestique", vol. 6, p.162.

82. The *Projet* is printed in vol. 2 of Fenet's *Recueil Complet*, a work available to the Codification Commission; see McCord's 1867 edn. of C.Q., abbreviations.

Some concluding points.

We may conclude this introduction by pointing out that, in general, the two sets of redactors were not provided with any particularly useful set of rules to regulate the employment of wage labour. The traditional Romanist sources provided a minimum of rules; this minimum was not always clearly distinguished from other aspects of the law of lease. In Louisiana, this lack of useful or comprehensive rules might not have been recognised as being important given the organisation of manufacturing in the territory and the widespread use of slave labour. In Quebec, on the other hand, since industry was in the process of developing, the nature of the contract for the hire of labour could well have been of acute importance; but it should be pointed out that the redactors might not have considered that there was a need for a more developed regulation of labour, especially when their belief in classic economic liberalism might well have caused them, supporting freedom of contract, to accept the sufficiency of minimal statements embodying formal equality and freedom as found in the traditional civil law.

Part One. Employment in the 1808 Louisiana Digest.

The contract for hiring labour is part of the general law on contracts in Louisiana, aspects of which will be discussed in a later chapter. Only the special provisions contained in the D.O. on hire of labour will be discussed here. These provisions are found mainly in Title Six of Book One, "Du Maître et du Serviteur", chapter two of which is entitled, "Des Serviteurs Libres", and Title Eight of Book Three, "Du Louage", chapter three of which is called "Du louage d'Ouvrage et de Service", the Section Première of this chapter being headed "Du Louage des Domestiques et Ouvriers".

The first article with which we shall deal, however, is

84. See chapter six infra.
from the second title of Book One, "Du Domicile". D.O. 8 (p.13) states that:

"Les majeurs qui servent ou qui travaillent habituellement chez autrui, ont le même domicile que la personne qu'ils servent ou chez laquelle ils travaillent, pourvu qu'ils demeurent avec elle."

This is virtually identical to C.N. 109. The D.L.V. refers to Part. 3.2.32, to Domat (to his Le Droit Public, suite des Loix Civiles dans leur Ordre Naturel, rather than to his Loix Civiles) and to Febrero. Part. 3.2.32 concerns before which judge a plaintiff (demandador) ought to bring his action; the connection of this ley with D.O. 8 (p.13) is tenuous. There are two provisions in the ley which are slightly related to the D.O. article: first, a wife should answer a summons before the judge having jurisdiction over her husband; and second, a knight (caballero) who receives pay or other benefits from a señor (rescibe soldada ó bienfecho de señor) ought to be summoned before the judge of the place where he lives by reason of his service as a knight (caballeria). Part.3.2.32 is obviously not a source, nor even an oblique inspiration, for D.O. 8 (p.13). Domat - as cited - likewise gives only a loosely analogous provision. He states: "Il y a des personnes dont les liaisons sont telles, que la domicile de l'une est celuy de l'autre." He does not mention servants as such people; he refers to children and married women, and discusses the domicile of widows. He points out that marriage only changes domicile when accomplished. Thus say the provisions of Domat to which the D.L.V. referred; but nowhere in the third section of the relevant title of Domat's work are servants mentioned. Febrero does make relevant remarks. The passage cited is

85. According to Batiza, C.N. 109 is the "almost verbatim" source of the D.O.'s article.
86. Droit Public, Bk.1, tit.16, sect. 3, arts. 10-13. Note that a reference to Domat alone always refers to his Lois Civiles.
87. See Febrero, Primera Parte, chap.1, §1 no.6, pp.5-6 for relevant text on domicile; this reference differs from that of D.L.V. for reasons already explained. It is likely that this is the relevant text; but if not, no matter, as it expresses Febrero's opinion on the domicile of servants. See chap. 4 note 101 supra.
88. Art. 10.
89. Arts. 10-13.
concerned with deciding who may properly be classed as resident in any particular domicile: intention to remain is of crucial importance ( ánimo de permanecer ). Sons of a family under the potestad of their father, and domestic servants who are unmarried and live and eat in the house (but not those who are married and live outside on the portion given them) are considered to reside with the head of their household. The provision is roughly the same as that of D.O. 8 (p.13); the mode of expression is, however, very different. It is obvious that the D.O. redactors have followed C.N. 109; the significance of the coincidence of their provision with this statement of Febrero's is, however, difficult to assess. The C.N. provision itself was new law settling a disputed point: the prior French law had been uncertain as to the domicile of servants. There were some sources in the Digest of Justinian which could have been used here, and which do seem to have been considered in connection with the C.N. and C.Q.; there is no specific reference to them in the D.L.V. opposite any articles, though there is a general reference for Book One, Title Two to "Digeste liv. 50 tit. 1 ad municipalem et de incolis". Nothing in D.50.1 has had an influence on the article here discussed, and the title does not deal with servants (unless liberti are taken as analogous to servants).

It should be concluded that this article has been adopted from the C.N. The servant appears to have a domicile of dependency, deriving from the authority of his master over him. The suitability of this provision, and the extent to which it is compatible with the contractual aspects of service will be considered later.

Title Six of Book One of the D.O. has no equivalent in

90. Reference as note 87 supra.
92. See interleaf of D.L.V. facing p.12 of D.O.
93. These Roman texts will be discussed in connection with the C.Q. Domat, of course, in his Droit Public referred to these Roman texts, and was himself cited by the D.L.V.
either the C.N. or C.Q.; indeed (as far as I am aware) there is no similar title in any nineteenth century code. D.O. 1 (p.37) states that: "On distingue dans ce Territoire deux espèces de serviteurs, les libres et les esclaves." This article hints at why this title may have been included in the book, "Des Personnes", of the D.O. A slave was a particular kind of juristic person, in law partaking to some extent of the characteristics of both a natural person and an object. In Roman law, the slave was dealt with under the first division of the law of persons: this seems likely to have influenced the redactors in placing the articles on slaves here. This does not explain why master and servant were dealt with here. The redactors must have been influenced by the analogy between a servant and a slave. Chapter Two, on free servants, contains thirteen articles, of which three define the various kinds of serviteur - D.O. 2-4 (p.37). D.O. 5-10 (pp.37-9), six articles in all, deal exclusively with engagés and apprentices. For D.O. 11-14 (p.39) there appears to be a return to providing regulations for servants generally. Engagés and apprentices were bound to their masters in a way rather different from that in which other servants were. A master had more rights over his apprentices and engagés: they were in a position more similar to that of a slave than was that of other free servants. This could have influenced the redactors in their placing of these articles. (In this connection, it may be noted that D.O.4 (p.37) refers to the title on louage for the regulations on the service of servants other than apprentices and engagés, though D.O. 11-14 (p.37) do apply to the former as well.)

As will be shown, Blackstone seems to have had some influence. This whole problem may be pursued more satisfactorily after the discussion of the articles of the code. 94. A further spur to including these particular articles in this part of the code may have been the recent (1806) Act on

94. See infra, conclusion to first part of this chapter.
apprentices and indented servants (engagés). 95.

The first article of the chapter "Des Serviteurs Libres", D.O. 2 (p.37), states that:

"Les serviteurs libres sont en général toutes les personnes qui louent vendent ou engagent leurs services à quelqu'un dans ce Territoire, pour y être employés à quelque travail, commerce ou occupation quelconque, au profit de celui qui contracte avec eux, moyennant un certain prix ou rétribution, ou à de certaines conditions."

The D.L.V. gives no references. Batiza states the source of the article to be Blackstone's Commentaries: 96. a "partial influence". Tucker does not attribute any source to this article; 97. and he must be correct. Batiza must be mistaken in his assertion that Blackstone is the source, as the particular passage he cites does not resemble the Digest article; 98. nor does any other passage from the relevant chapter of Blackstone. 99. The source is unimportant, as the article merely provides a definition of serviteur libre: the phrasing and content will be considered infra.

D.O. 3 (p.37) gives the following classification:

"Il y a deux sortes de serviteurs libres dans ce Territoire savoir:

Les serviteurs proprement dits, c'est-à-dire ceux qui se louent ou s'engagent envers un autre pour être employés à un travail ordinaire ou de force; tels que les domestiques de maisons, les ouvriers manœuvreurs et tous ceux qui s'engagent pour travailler aux champs et sur les habitations etc.

95. Louisiana Acts, 1806, ch.11, May 21st., 1806: An Act for the regulation of the rights and duties of apprentices and indented servants. In the 1823 Projet p.11, the redactors state: "We have been under the necessity of altering this chapter in order to insert in it the principal dispositions of the Act of May 21, 1806, entitled "an act to regulate the rights and duties of apprentices, etc." Though the redactors have recast this part of the D.O., the provisions are not incompatible; they have merely included more of the provisions of the 1806 Act, ch.XI than did the redactors of the D.O.


97. Persons, p.280, note 84.

98. The passage he cites states: "There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial capacity; such as stewards, factors, and bailiffs: whom however the law considers as servants, pro tempore, with regard to such of their acts as affect their master's or employer's property."

99. This is important, lest the reference have been a misprint. Batiza might no have changed his mind on this attribution; the relevant work was unavailable to me. This, however, would not be important here; the content of the rule is not of interest.
Et les apprentis qui sont ceux qui s'engagent à servir quelqu'un à l'effet d'apprendre quelque art, métier ou profession."

It should be noted that only the D.O. regulates apprenticeship: the C.N., Proj. An. VIII and C.Q. do not do so. Batiza gives passages of Blackstone as the source, classifying them as a "substantial influence". Tucker refers to the 1806 Act, ch. XI, s.1, and Pothier. The section cited of the 1806 Act regulates the indentures of apprentices and engages: it cannot be described as a source, though it may well have inspired, to some extent, the last paragraph of the article. Pothier's provision cannot be taken as a source either; but his list of the various kinds of work capable of being the object of louage has some similarity to the list in the D.O., though this is hardly surprising given that both the D.O. and Pothier have similar notions of lease of work. Batiza is probably correct in giving Blackstone as the origin of this article; though he ought also to have cited another relevant passage. The wording of the D.O. does not follow Blackstone closely (perhaps it is influenced by Pothier to a slight extent); but what seems to indicate that the redactors were influenced by Blackstone is the similarity of the material covered in his work and in the D.O., and especially the discussion of apprentices, even though apprentices are the subject of the 1806 Act ch. XI. (It is important to note that Blackstone gave a modern discussion of the law on apprenticeship; none of the civilian sources consulted by the redactors seem to have done the same, while the 1806 Act, ch. XI only regulates certain aspects of the contract of apprenticeship.)

D.O. 4 (p.37) is of considerable interest:

100. This will be considered infra.
101. 1 Commentaries, § 1 nos. 2 and 3 (p.426), ch.XIV.
102. See Tucker, Persons, p.280, note 84.
103. See Pothier, T.C.L. no. 10, Bug. 4, p.7. The passage is quoted in relevant part supra at note 41.
104. To the reference in note 101 supra probably should be added no. 1 (p.425). Note that this article of the D.O. was amended and improved in the 1823 Projet, pp.11-12. The Projet's recommendation became C.L. 157.
“Lorsque quelqu’un s’est engagé à en servir un autre pendant un temps fixé, moyennant une certaine somme d’argent une fois payée, cette convention équivalent à une vente, les obligations qui en résultent sont beaucoup plus étroites et plus rigoureuses que celles des personnes qui ne font que louer leurs services journaliers, moyennant de certains gages.

Les obligations de ces derniers et les règles qui en fixent l’étendue et les bornes sont établies au titre du louage.”

Batiza gives as the source Domat and Pothier, classed as "partial influences". The D.L.V. gives no references; nor does Tucker. Batiza is mistaken in his "sources". Both Pothier and Domat (as cited) are dealing with that locatio classed by modern civilians as operis faciendi; the D.O. is concerned with locatio operarum. The D.O. article deals with engagés, or indentured servants, who bind themselves for a fixed time in return for a certain sum of money in a contract regarded as equivalent to or analogous to a sale. It is this reference to sale which seems to have caused confusion for Batiza: the redactors are comparing the contract made by an indentured servant to that of sale (indeed a curious comparison, discussed further below); while Pothier and Domat are discussing whether a contract is one of sale or lease of work. The question posed by Pothier and Domat is one beloved of Roman jurists, and it is a question specific to the giving out of work on contract (locatio operis faciendi). The nature of this question, and the extent to which it differs from the D.O. article, may most readily be grasped by giving an example. Suppose A contracts with a gloviers that the latter should make him a pair of gloves. Is the contract lease of the gloviers services to make the gloves, with A as locator paying and the gloviers as conductor carrying out the work, or is it sale of the gloves by the gloviers to A? What if A supplies the leather for the gloves, or what if the gloviers supplies it himself? This is the nature of the debate found in Pothier and Domat, and, as pointed out, it is a debate

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105. Domat, Part. 1, Bk. 1, tit. IV. Sect. VII, footnote to art. 3; Pothier, T.C.I. no. 394, Bug. 4, p. 134.
It is obvious that the provision of D.O. 4 (p.37) has nothing to do with this debate; in fact, the texts of Pothier and Domat simply cannot be compared to the D.O. article. The only similarity is in the mention of sale. Thus Pothier starts by saying: "Ce contrat a aussi beaucoup d'analogie avec le contrat de vente." Domat makes a similar statement. 107 The Batiza references cannot be to "sources", as the matter being discussed is quite different from that in D.O. 4 (p.37); nor is there any similarity in the wording of the D.O., Pothier and Domat such as would entitle one to argue that there has been influence on the language of the code. Batiza is here simply mistaken. If further proof were needed, it should be sufficient to point out that, as regards those who let their services daily, the D.O. here refers to its title on louage; no such reference is made for those who let their work for a "temps fixé". Locatio operis faciendi is also dealt with in the title on lease, while the service of engagés is not, being dealt with in this title of Book One: it is obvious that the D.O. is in this article not dealing with the same subject matter as Pothier and Domat. It may be concluded: first, that D.O. 4 (p.37) deals with engagés and those who lease their services (locatio operarum); second, that, following a long tradition, Pothier and Domat (as cited by Batiza) are debating whether certain circumstances amount to sale or lease of labour for a specific task (locatio operis faciendi); third, that Batiza is mistaken in his claim that Pothier and Domat are the source of D.O. 4 (p.37); and fourth, that, Batiza being wrong, and no other source being traced, the redactors must have drawn up this article without borrowing from any single obvious source.

The article, distinguishing clearly between engagés and servants who were not indented, was probably prompted by the existence of the 1806 Act, ch. XI: in any case, it provides useful definitions, and refers the reader of the

106. See D.19.2.2.1 and h.t.22.2. Justinian attempted to solve the problem; see Inst. 3.24.4.
107. See references in note 105 supra.
code to the title on *louage*. Indentured servants were very much a part of life in Louisiana: penniless immigrants would bind themselves to serve for a term, and in return would have paid their passage to the New World. A supply of labour and of colonists was thus provided. 108.

D.O. 5 (p.37) states thus:

"Ceux qui ont vendu ou engagé leurs services pour un certain temps, et moyennant une certaine somme une fois payée, comme aussi les apprentis qui se sont engagés pour un certain temps, à l'effet d'apprendre un art, métier ou profession, doivent être contraints à l'exécution spécifique de leurs engagements respectifs, pour le temps qui est marqué dans l'acte à moins qu'ils n'aient une juste cause pour en être dispensés, ainsi qu'il est dit ci-après."

Batiza gives s.1 of the 1806 Act, ch. XI as a source of "substantial influence" on the D.O. article. D.L.V. also refers to s.1 of this Act. Tucker states that s.5 is the "source" of the D.O. article. S.1 provides:

"That all and every person or persons who may be bound to serve either as an apprentice in any art, mystery or occupation, or as a servant for the sole purpose of ordinary or hard labor, shall be bound to serve the term of time expressed in their indentures respectively...."

The section continues, providing that minors required the consent of their parents, guardians or curators to be bound thus, 109, and that the apprenticeship of minor females should end at or before they reached eighteen years of age while that of minor males should end at or before they reached twenty-one years; if either the male or female were over twenty-one at the time of entering "into indenture of apprenticeship or servitude", they could bind themselves for a period of up to seven years. 110. S.5 states that absconding apprentices or indentured servants may be forced to serve

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109. Were there no such parents, guardians or curators in the country where the apprentice or servant resided, the mayor, or judge, or justice of the peace had to consent.

110. The 1823 Projet changed this to five years. See p.12 of the Projet; this recommendation became C.L. 160.
their masters or mistresses two days for every one day they have been absent without leave, or may be compelled to pay damages. Tucker states thus:

"One wonders why the draftsmen chose the right of specific performance over the already integral English actions for wrongful departure and wrongful retainer. Whatever their motives, the choice must have been a conscious one since the latter are clearly exhibited in Blackstone." 111.

Four points should be made. First, to say that these actions "are clearly exhibited in Blackstone" is to exaggerate. 112. Second, since the redactors are not setting out to codify Blackstone, there can be no reason for surprise at the rejection of the English actions. Third, the "English actions" are "integral" only if one presupposes that the law in this section of the Digest is intended to be, and in fact is, identical to the English law. There is no reason to suppose this was the intention of the redactors. Fourth, the 1806 Act, ch. XI presupposed that *engagés* and apprentices be forced to the specific implement of their contract. Pothier also points out that servants may be compelled to return to their masters. 113. Thus, in their provision, the D.O. redactors here embodied the existing law on apprentices and *engagés*. As Tucker himself points out, given the existing social and economic conditions in the Territory, to compel apprentices and indentured servants to make specific implement of their contracts was sensible: 114. Apprentices and *engagés* traditionally could be compelled to perform their contracts. 115.

112. There is no discussion of these actions in ch. 14 of the Commentaries, vol. 1; Blackstone makes glancing references to causes of departure and servants being retained: see, e.g., the passage quoted infra in note 124 and the one quoted in the text infra, between notes 133 and 134.
113. See T.C.L. no. 176, third paragraph, Bug. 4, p.64.
115. See Blackstone, Commentaries, vol. 1, ch.14 §1 no. 2 p.426 (in some circumstances certain apprentices could be compelled to serve out their time); on the punishments for bound servants who ran away, see Dechêne, op.cit., pp.69-71; she points out, at pp.66-7, that masters could sell their *engagés*. 
D.O. 6 (p.37) gives a straight reference to the 1806 Act, ch. XI for the form of the indentures of apprentices and *engagés*; as such it need not be considered here. 116.

D.O. 7 (pp.37-9) states as follows:

"Il est de l'essence de l'engagement formé entre le maître, l'engagé ou apprenti que celui-ci s'oblige à servir le maître pendant tout le temps de l'engagement, et que le maître s'oblige de son côté à le nourrir et entretenir pendant ce temps.

Le maître doit en outre, à l'égard de l'apprenti, l'instruire dans son art, métier ou profession; et il est assez d'usage qu'en raison de cette dernière obligation, le maître reçoive une certaine somme de l'apprenti, comme prix ou récompense de l'instruction qu'il doit donner." 117.

Batiza gives s.2 of the 1806 Act, ch. XI as the "substantially influencing" source of this article. The D.L.V. also refers to s.2 of the Act, to Part. 5.8.11 and to Febrero. 118.

Tucker states the sources to be ss.1, 2 and 6 of the 1806 Act, and Blackstone. 119.

The ley of the fifth Partida is of relevance. It starts: "Resciben los maestros salario de sus escolares, et otrosi los menestrales de sus prentices para mostrarles sus menestres"; but then the ley goes on to deal with the right of teachers and artisans to chastise their pupils and apprentices, which is the real subject of the text. In so far as the ley states that masters may receive payment from their apprentices, it has some relation to the subject matter of D.O. 7 (pp.37-9); but this is the extent of its relevance. Though this ley cannot be said to be the source of D.O. 7 (pp.37-9), it is quite compatible with the Digest's article. Febrero states that fathers may place their sons as pupils or apprentices with masters who shall teach them some art or trade, to which end, masters may

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116. 1806 Act, ch. XI, s.2.
117. Note that the English version renders: "Il est de l'essence de l'engagement" as: "An implied condition of the contract" and: "nourrir and entretenir" as "to maintain". The significance (if any) of these differences is unclear.
118. Febrero, Parte Primera, ch. 15, § 4, no.32, pp.245-246.
119. Commentaries, vol. 1, p.426 of ch. XIV.
chastise their apprentices as allowed by Part.5.8.11.\textsuperscript{120.} The passage from Febrero also is obviously compatible with the D.O. article. The Blackstone text is of similar import, stating in relevant part that:

"Another species of servants are called \textit{apprentices} (from \textit{apprendre}, to learn), and are usually bound for a term of years, by deed indented, or indentures to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction...."\textsuperscript{121.}

(It should be noted that the English version of D.O. 7 uses "premium" for "prix" and "to maintain" for "nourir et entretenir".) The 1806 Act is also obviously relevant. The forms and styles of indentures for apprentices and bound servants found in s.2 say much the same as D.O. 7, though in considerably more detail. In s.6 it is said that if there is a school in the place where apprentice or servant are bound, should such apprentice or servant be under twenty-one years of age, a clause must be put in their indentures binding the master or mistress to teach or to cause to be taught the apprentice or servant to read and write, and to be instructed in arithmetic.

The D.O. article is obviously compatible with a whole range of provisions. What is of importance though, is that it gives an abbreviated version of the rules found in s.2 of the 1806 Act, ch. XI: the D.O. here is continuing the law in force. This said, it is obvious that Blackstone has exerted some influence on the wording of the article. The article, however, describes the standard relationship between apprentice and master, the nature of which was identical all over Europe; this is why the D.O. redactors were able to borrow the phrasing of Blackstone, and why the article is compatible with the Castilian texts. This is an important point, and it will be returned to later.

\textsuperscript{120.} We have already discussed this text of Febrero in connection with \textit{puissance paternelle}; see \textit{supra}, ch.4, at notes 587-588.
\textsuperscript{121.} \textit{Commentaries}, vol.1 ch.XIV, § 1 no. 2, p.426.
D.O. 8 (p.39) provides thus:
"Les engagemens fait entre les engagés, les apprentis et les maîtres peuvent être réduis avant le temps fixé dans le contrat, soit à la requête desdits engagés ou apprentis respectivement, soit à celle des maîtres, s'ils ont une juste cause pour demander cette résolution, et dans ce cas, le juge ordonnera la restitution d'une partie du prix payé sur l'engagement, proportionnée au temps qui reste à courir sur celui qui aurait été fixé, si ce n'est que la résolution ait été causée par la faute de celui qui avait payé ce prix, dans lequel cas il n'y aura lieu à aucune restitution."

The D.L.V. gives no references; Batiza and Tucker both refer to Blackstone, 122. Batiza limiting himself to §1 no. 2 p.426, while Tucker refers to pp.425 and 426, thus including no. 1 of §1. 123. Batiza classes Blackstone as a "substantial influence". Batiza must be correct: I cannot see any relevance in no. 1 of §1, p.425, which deals with menial servants or domestics. 124. The passage of the D.O. does differ from Blackstone, however; Blackstone states that "Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters," and he adds that the judges "may...if they think it reasonable, direct restitution 125. of a rateable share of the money given with the apprentice...."

It should be noted that, first, Blackstone appears to state the judges as having more discretion in the matter of restitution of money, and, second, he does not mention engagés. Engagés were included in the article because of the 1806 Act, ch. XI and their importance in the Territory. Although the 1806 Act, ch. XI has no section providing specifically as D.O. 8 (p.39), and although the article has been influenced strongly by Blackstone, the provision is

123. See Tucker, Persons, p.280, note 84.
124. The only passage from this section of Blackstone that could be taken as having any relevance here is the following:
"and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace...." Pp.425-6. I am not convinced that this has any bearing or has had any influence; it has nothing to do with engagés or apprentices.
quite compatible with the Act, which, in its s. 3, governed
the matter of either party violating the contract: this
section states, inter alia, that if a master or mistress
has not discharged his or her duty towards his or her
apprentice or (indentured) servant or if the apprentice or
servant has not discharged his or her duty towards his or
her master or mistress, the aggrieved party could apply to
the judge of the county who could "take such order and
direction between the master and mistress, apprentice or
servant as the equity and justice of the case may require."
This must cover the same circumstances and results as the
"just cause" and possible restitution of D.O. 8 (p.39). 126.
Though no Castilian source has been referred to, the law
there presumably would have contained similar provisions,
as would only have been just (cf. Part. 5.8.11).

D.O. 9 (p.39) states that:
"Si un maître maltraite son engage ou son apprenti,
or se conduit cruellement ou ne remplit pas les
obligations qu'il avait contractées envers lui; et
de même si ledit engage ou apprenti se sauve ou
s'absente de chez son maître, sans permission ou s'il
ne remplit pas son devoir ou ses obligations envers
lui, chacun de ses actes pourra être considéré comme
une juste cause pour décharger la partie lésée de
ses engagements, ou pour lui accorder telle autre
réparation que l'équité ou la nature du cas pourra
exiger, à la discrétion du juge."

Tucker 127. and Batiza both give the source of this article
as s. 3 of the 1806 Act, ch. XI; the latter classifying
it as an "almost verbatim, in part" source. The D.L.V.
refers to ss. 3 and 5 of the Act, and Part. 5.8.11. Tucker and
Batiza here are surely correct; s. 3 is the obvious direct source.

126. This section is quoted in note 128 infra.
127. Persons, p.280, note 84.
128. S. 3 states thus: "And be it further enacted, That if any
master or mistress shall abuse or cruelly or evilly treat or
shall not discharge his or her duty towards his or her
apprentice or servant, or if said apprentice or servant shall
abscond or absent him or herself, from the service of his or
her master or mistress, without leave, or shall not do or
discharge his or her duty to his or her master or mistress, then
said master or mistress, or apprentice or servant, being
aggrieved, shall or may apply to the judge of any county where
the parties reside for redress, who, after giving due notice
to the party against whom the complaint is lodged, and bring
said parties (by warrant or otherwise) before him, and take such
order and direction between the said master and mistress,
apprentice or servant as the equity and justice of the case
may require."
S. 5 concerns only absconding apprentices and bound servants; it states that such may be compelled to serve two days for every day of unauthorised absence, or pay such damages as are decided to be "equitable and just". Thus, though the provision of s. 5 is not specifically covered by D.O. 9 (p.39), s. 5 is related to the circumstances laid out in the article, and the D.L.V. has referred to a provision which is relevant to the D.O. article, though not a source of same. Part. 5.8.11 deals exclusively with masters beating their apprentices pretty severely. There it is said that the apprentice ought to be freed from the apprenticeship, to receive back the payment made (el daño), and that the master ought to make amends "como este á bien vista del juzgador et de homes bonos...". The Partidas' text is thus more restricted than the D.O.; it is nonetheless quite compatible with the Louisianian article. The D.O. provision is only reasonable, and obviously is taken from s. 3 of the 1806 Act, ch. XI. It is likely that any such apprenticeship contract would always be liable to resolution in this way: Blackstone stated that apprenticeships could be dissolved for "reasonable cause"; the circumstances narrated in D.O. 9 (p.39) would undoubtedly have amounted to such "reasonable cause".

D.O. 10 (p.38) is as follows:

"A master may correct his indentured servant or apprentice for negligence or other misbehaviour, provided he does it with moderation; but he cannot exercise such right with those who only let their daily services." 130.

Both Tucker 131 and Batiza give Blackstone as the source of this article, 132 Batiza describing him as the "almost verbatim" source. The D.L.V. refers to Part. 5.8.11 and Febrero. 133 Blackstone states:

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130. The French version, D.O. 10 (p.39) states thus: "Un maître, peut corriger son engagé ou apprentif, lorsqu'il est négligent ou se conduit mal, pourvu qu'il le fasse avec modération, mais il ne peut exercer un pareil droit envers ceux qui ne font que louer leurs services journaliers."
131. Persones, p.280, note 84.
133. Febrero, Parte Primera, ch. 15, §IV, no.32, pp.245-6.
"A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation: though if the master or master's wife beat any other servant of full age, it is a good cause of departure."

Part. 5.8.11 says, in relevant part:

"[L]os maestros...et otroslos menestrales...cada uno dellos es tenudo los [sc. escolares et aprentices] enseñar...et castigar con mesura...; pero este castigamiento debe ser mesuradamente et con recabdo de manera que ninguno dellos non finale lisiado nin ocasionado por las feridas quel diere su maestro."

It is obvious that ley 11 is compatible with the D.O. article; but Tucker and Batiza are correct in giving Blackstone as the source of D.O. 10 (p.39). Part-7.8.9 deals with the same point in a more general fashion, providing that a señor may beat his servants.\textsuperscript{134} Pebrero states that those instructing apprentices could chastise them, so long as the master "no los lisien en los cuerpos": he cites Part. 5.8.11 as authority. If Part-7.8.9 is taken along with 5.8.11, it is possible that D.O. 10 (p.39) changes the law. Certainly the test of what punishment is permissible (punishment given in moderation) is taken from Blackstone. It should be noted that implicit in Blackstone's statement is the idea that \textbf{any servant not of full age} may be beaten;\textsuperscript{135} this is different from the D.O., where it is specifically said that servants who are not apprentices and \textit{engagés} may not be beaten. The reason for the redactors not following Blackstone here is difficult to discover. Given that Louisiana was a slave-owning society, it might well have been considered inappropriate for free servants to be chastised, except for those who were indentured, as being rather more at the disposal of their masters. It should be noted that in the 1823 \textit{Projet} this article was amended to forbid chastisement of free servants using a whip; it was there stated that: "The reason of this restriction, in a

\textsuperscript{134} See supra, introduction to this chapter at note 60.
\textsuperscript{135} The relevant passage states that a master may beat his apprentice, but that if the master or his wife beats "any other servant of full age", it is "good cause for departure": obviously a master may beat any servant not of full age.
country like ours, needs no explanation." 136 Fear of treating free men as slaves might well have caused the restriction of chastisement to only apprentices and *engagés* (*engagées*, of course, are mentioned in none of the sources).

D.O. 11 (p. 39) states thus:

"Le maître peut intenter une action contre un tiers pour avoir battu ou estropié son serviteur, mais dans ce cas il doit fonder son action sur le tort qu'il a reçu par la privation de son service, et ce tort doit être prouvé lors du jugement de la cause."

Batiza gives, as the "almost verbatim" source, Blackstone; 137 as does Tucker. 138 Both are correct. 139 The D.L.V. gives no reference; but it is a fair assumption that the Castilian law would have allowed a similar action, though I can trace no relevant text in the *Partidas*. The important point is that the redactors are here following Blackstone. It should be noted that in this article the redactors have returned to using the generic term "serviteur"; this will be considered later.

D.O. 12 (p. 38) states thus:

"A master may justify an assault in defence of his servant and a servant in defence of his master; the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty for which he receives wages, to stand by and defend his master. " 140, 141. Batiza gives Blackstone as the "almost verbatim" source; 141.

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136. See 1823 Projet, p. 13; see C.L. 167.
139. Blackstone states: "A master also may bring an action against any man for beating or maiming his servant: but in such case he must assign, as a special reason, his own damage by the loss of his service; and this loss must be proved upon the trial."
140. The French version, D.O. 12. (p. 39) states thus: "Le maître peut se justifier d'avoir attaqué quelqu'un, s'il ne l'a fait que pour défendre son serviteur, et le serviteur peut se justifier d'une semblable attaque, lorsqu'il ne l'a faite que pour défendre son maitre, parce qu'il est de l'intérêt du maître de n'être point privé de son service, et qu'il est du devoir du serviteur, pour lequel il reçoit des gages, de se tenir près de son maître, et de le défendre."
141. Reference as note 137 supra: "A master likewise may justify an assault in defence of his servant, and a servant in defence of his master: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master."
Tucker does likewise. The D.L.V. refers to Part.7.8.6; this is an obvious mistake for Part.7.8.16. The latter ley deals with the duty of slaves and servants to aid their master, mistress and the latter's children, if someone attempts to murder or injure them: "Acorrer deben los servios et los sirvientes de casa al señor ó á la señora ó á los hijos dellos luego que vieren que algunos los quieren matar ó ferir." The ley goes on to detail the actions a servant should take in defence of his master, etc.: servants should protect their master by using their hands, or arms, or by putting themselves in the middle of those attempting to commit the murder or by shouting for help. Likewise a servant should prevent his master from murdering himself or his wife or his children in a fit of anger. If any servant failed to do these things, he ought to be killed. The ley expands on the penalty and on defences. Nowhere is there mention of the señor aiding his servant. The reference of the D.L.V. is to a ley with some bearing on the D.O. article; but it is obvious that the Louisiana redactors have copied their provision from Blackstone.

The D.O. states that the master and servant have a reciprocal duty to defend each other, based on their respective rights of service and to receive wages; the ley of the Partida Septima merely states that servants have a duty to defend their masters, without any reference to anything they receive in return, other than stating that if they do not defend their masters, they may be executed. The D.O. redactors here must have approved of Blackstone's formulation of a reciprocal duty of protection between master and servant; a duty arising out of their respective rights and duties under the contract. The Partidas in this ley put forward a very different conception of the relationship between master and servant: one which the Louisiana redactors have not adopted.

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142. Persons, p.280, note 84.
D.O. 13 (p.39) is as follows:

"Le maître est responsable des délits et quasi délits commis par son serviteur, suivant les règles établies au titre des quasi contrats et quasi délits."

Batiza and Tucker\textsuperscript{143} purport to find the source of this article in Blackstone\textsuperscript{144}: a "substantial influence". The D.L.V. refers to Part.7.13.4. Blackstone merely enunciates a rule of tortious liability:

"As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command either expressly given or implied: \textit{nam, qui facit per alium, facit per se}. Therefore if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful."

This is not really the "source" of D.O. 13 (p.39). Given that Blackstone seems to have been influential on the order of this chapter, it is possible (but only possible) that his work suggested the inclusion of this article. The D.O. article is only giving a reference to another title of the code; the rule that a master is liable for the delicts of his servants is stated only as a broad general principle, and to attribute influence to Blackstone is very misleading. Delictual liability for servants will be dealt with later, and Part.7.13.4 will be discussed then: likewise it is not a "source" of the D.O. article.

D.O. 14 (p.38) provides thus:

"The master is answerable for the damage caused to individuals or to the community in general, by whatever is thrown out of his house into the street or public road, in as much as the master has the superintendance and police of his house, and is

\textsuperscript{143} Persons, p.260, note 84.
\textsuperscript{144} Commentaries, vol. 1, ch. XIV, \S\S III 2nd. paragraph, p.429.
\textsuperscript{145} Ibid., pp.429-430.
\textsuperscript{146} Since Batiza founds conclusions on the numerical frequency of sources, the inclusion of a "source" such as this shows that his numerations are misleading: indeed the rules on the master's liability for servants in the relevant title are in fact of French origin.
responsible for the faults committed therein.\textsuperscript{147}. Tucker\textsuperscript{148} and Batiza give Blackstone\textsuperscript{149} as the source, classed as "almost verbatim". This must be correct. The D.L.V. refers to Part. 7.15.25 which deals with objects thrown from the house into the street: it does not mention servants in particular; but it is to be presumed that they would be included in the provisions of the ley by implication. Blackstone states that:

"A master is...chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people; for the master hath the superintendance and charge of all his household. And this also agrees with the civil law; which holds, that the pater familias, in this and similar cases, "ob alterius culpar tenetur, sivi servi sive liberti."\textsuperscript{150}

Thus, it may be seen that Blackstone states the rule as applying to members of the "family" generally: he obviously classes servants as members of the family. Second, Blackstone notes that the principle he gives is the same as that of the Roman law; it cannot be stated that in this article the D.O. has imported a rule of common law. Indeed, the principle of the Roman law is as cited by Blackstone, and is the same as the rule in Part.7.15.25. D.O.14 (p.39) differs in specifically applying the rule to servants; but this is merely a particular example of a general rule, and would be comprehended within the Roman provisions.\textsuperscript{151}.

\textsuperscript{147} The French version, D.O.14 (p.39), states thus: "Le maître est responsable pour tout ce qu'on jette de sa maison dans la rue ou dans le grand chemin et qui cause du dommage à quelqu'un en particulier, ou peut être préjudiciable aux habitants du lieu en général, car le maître a la surintendance de la police de sa maison et est responsable de toutes les fautes qui s'y commettent."

\textsuperscript{148} Persons, p.280, note 84.

\textsuperscript{149} Commentaries, vol. 1, ch.14, §III, p.431.

\textsuperscript{150} Ibid.

\textsuperscript{151} See D.9.3.1 pr: Praetor ait de his, qui delecercint vel effuderint: "Unde in eum locum, quo vulgo iter fiet vel in quo consistetur delectum vel effusum quid erit, quantum ex ea re damnnum datum factumve erit, in eum, qui ibi habitaverit, in duplum iudicium dabo." H.t. 5.1: Si quis gratuites habitationes dederit libertis et clientibus vel suis vel uxoris, ipsum eorum nomine teneri Trebatius ait: quod verum est." Also see Justinian's Inst.4.5.1.
Blackstone may have prompted the inclusion of this rule here; but the rule has a Roman origin. This article is similar to D.O. 17 (p.321) (Book 3, title 4), which gives a further refinement of the Roman rule; but this latter article need not be discussed, as its rule is consistent with D.O. 14 (p.39) and does not have a particular bearing on master and servant.  

It is now appropriate to consider Book Three, Title VIII, Du Louage, and to discuss the provisions it contains relating to master and servant. The first chapter of the title has some relevant provisions. D.O. 1 (p.373) states thus:

"Il y a deux sortes de contrats de louage, savoir:
Le louage des choses;
Et le louage d'ouvrage."

(It should be noted that in the English version, "louage d'ouvrage" is rendered "letting out of labour or industry"). Batiza gives as the equal "almost verbatim" sources of this article Proj. An VIII, 3.13.1 and C.N. 1708. He is correct. The D.L.V. refers to Part. 5.8.1, Domat, Pothier and Febrero. The Quinta Partida gives a definition similar to that of the D.O., but without the clear division found in the latter into lease of work and lease of things:

"Loguero propiamente es quando un home loga á otro, obras que ha de facer por su persona, á otorgar un home á otro poder de usar su cosa et de servirse della por cierto precicio quel ha de pagar en dineros contados...."

Febbrero gives a conventional definition of arrendamiento;  

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152. It is of interest to note that D.O.17 (p.321) is taken verbatim from Proj. An VIII, 3.3.17. This article was excluded from the final redaction of the C.N. D.O.17 (p.321) was suppressed by the 1823 Projet (p.293) and does not appear in the C.L. of 1825, the relevant chapter of which was recast to more resemble the C.N. The D.L.V. refers to Domat, Pt. 1, Ek. 2, tit. 8 sect. 1, arts. 1-6 and Part. 7.15.20 and 26; all of these give versions of the relevant Roman rules, for which see D.9.3, De his qui effuderint vel deiecerint.  

153. Part. 1, Ek. 1, tit. 4, preamble.  
155. Febrero, Parte Primera, chap. 9 §1, p.234, no. 1.
this definition lacks the clear division into two found in the French code. Pothier states that: "Il y a deux espèces de contrats de louage: le louage des choses, et le louage des ouvrages." Pothier, as already pointed out,\textsuperscript{156} treats locatio operarum as part of louage des choses; his louage des ouvrages deals solely with locatio operis faciendi (to use modern civilian terminology). Although Pothier's definition appears \textit{ex facie} to be the same as that of the D.O. and C.N., the meaning he attributes to chose and ouvrage is different from that found in the D.O. and C.N.; he could only have exerted an influence on the form of the French code's article. The first sentence of the preamble to Domat's title IV (as cited by the D.L.V.) is compatible with the provisions of the D.O. and C.N.; it is, according to Olivier-Martin, the source of the provision of the French code.\textsuperscript{157} Domat gives meanings to lease of work and lease of things identical to those found in the C.N.\textsuperscript{158} Thus, in this article the D.O. has followed the French redactors, who themselves followed Domat. The Castilian sources referred to by the D.L.V. obviously give similar definitions; but these definitions do not have the developed and clear division of louage into two types as found in the French sources, being closer to the Roman unified conception of locatio conductio.

\addcontentsline{toc}{section}{Notes}

\textsuperscript{156} See supra, text at notes 37-40.
\textsuperscript{157} \textit{Louage}, p.466.
\textsuperscript{158} Domat states thus: "Ce titre comprend le commerce que font les hommes, en se communiquant l'usage des choses, ou de leur industrie, ou de leur travail, pour un certain prix.... Car, comme il n'est pas possible que tous aient en propre toutes les choses dont ils ont besoin, ni que chacun fasse par soi-même ce qu'on ne peut avoir que par l'industrie, et par le travail, et qu'il ne seroit pas juste que l'usage des choses des autres, ni celuy de leur industrie et de leur travail fut toujours gratuit, il a été nécessaire qu'on en fust commerce.... [Ainsi on fait commerce de l'industrie et du travail ou à prix fait, ou à la journée, ou par des autres marchez." See note 153 supra for reference.
The next relevant article in the first chapter, D.O. 3 (p.373), provides as follows:

"Le louage d'ouvrage, est un contrat par lequel l'une des parties s'engage à faire quelque chose pour l'autre, moyennant un prix convenu entre elles."

C.N. 1710 is identical; Proj. An VIII, 3.13.3 is very similar, though perhaps phrased to account for locatio operis faciendi alone rather than for this locatio as well as that operarum. This infelicity in phrasing perhaps explains why the D.O. redactors preferred C.N. 1710. The D.L.V. refers to Part. 5.8.1 and 3, Domat, Pothier and Febrero. The relevant section of Part. 5.8.1 has been quoted above; lev 3 of that title, in relevant part, states:

"Obras que home faga con sus manos, et bestias [etc.]...et todas las otras cosas que home suele alogar, pueden ser logadas ó arrendadas."

The ley expands on this, except for giving further details of lease of work. The provision is obviously compatible with D.O. 3 (p.373), but lacks the clear division of lease, found in the D.O. and C.N., into louage des choses and louage d'ouvrage (and indeed the same may be said for the whole of this title of the Partidas). Febrero, as cited, states:

"Todas las cosas del comercio humano, ya sean muebles, raíces ó semovientes, y las obras de manos pueden ser arrendados con libre y espontáneo consentimiento del locador y conductor por tiempo limitado ó por la vida de alguno de ellas ó de ambos...[etc.]"

Though Febrero distinguishes work from objects of human commerce, he is not making the clear, conceptual distinction of arrendamiento into two found in the French sources; indeed, the rest of his chapter does not properly deal with...

159. Proj. An VIII, 3.13.3 states thus: "Le louage d'ouvrage est un contrat par lequel l'une des parties donne quelque chose à faire à l'autre, moyennant un prix convenu entre elles."

160. Batiza gives C.N. 1710 as the "verbatim" source, and Proj. An VIII, 3.13.3 as a subsidiary one.

161. Pt. 1, Bk. 1, tit. 4, sectn. 1, art. 1.

162. T.C.L. no. 393, Bug. 4, p.133.

163. Febrero, Parte Primera, ch. 9, § 1 no. 4, p.235.
lease of work. 164. Domat gives in the passage cited a general
definition of lease of things and lease of labour; this
definition is quite compatible with the article of the D.O.
Pothier treats specifically of locatio operis faciendi, not
of lease of work as a whole: although D.O. 3 (p.373)
comprehends locatio operis faciendi, it also includes locatio
operarum, which Pothier discusses under louage des choses. 165.
There can be no doubt that this article is copied from the
C.N.; rather than contradicting the Castilian law, however,
the article is more developed, in following a clear analysis
of louage into two forms. 166.

D.O. 5 (p.373) states that:
"Le louage d'ouvrage, ou service, se subdivise aussi
en plusieurs, espèces, ainsi qu'il sera expliqué
en son lieu."
The main effect of this article is to refer to subsequent
parts of the title. Both the C.N. (1711) and the Proj. An
VIII (3.13.4) had here defined the various forms of louage,
whether of choses or of ouvrage. In its articles 4, 5 and 6
(p.373) (the equivalent to C.N. 1711) the D.O. has departed
from the model of the French redactors: this has no
significance for us. 167. The third chapter of this title is

164. Note that Febrero's statement is hardly satisfactory:
there could not be a lease of one's labour for one's life,
as he seems to suggest. See infra, text and notes at
notes 177-178.
165. The second paragraph of T.C.L. no. 393, Bug. 4, p.133
states thus: "Dans le louage des choses, c'est le conducteur
qui s'oblige de payer le prix du louage au locateur; contra,
dans le louage d'ouvrage, c'est le locateur qui s'oblige
de payer le prix du louage au conducteur." This explains
why Pothier discussed locatio operarum with locatio rei (as
already suggested above in note 46); in the contract
operarum, the conductor paid the locator. See text supra
at notes 17-18.
166. By saying that the French sources are "more developed",
I should not be taken as implying they are somehow necessarily
better than the Castilian, in having progressed further in a
teleology culminating in the trichotomy: I should be
understood as implying that there has been an attempt to
refine the analysis of louage, and to make it more
conceptually satisfactory.
167. Note that in D.O. 4 and 6 (p.373), there are accounts
of the various forms of louage des choses, though there are
none such for louage d'ouvrage in D.O. 5 (p.373).
headed "Du louage d'Ouvrage et de Service": this is the chapter equivalent to those entitled by both the C.N. and Proj. An VIII as "Du louage d'ouvrage et d'industrie". It is interesting to note that the English version of the D.O. calls this chapter "Of the Letting out of Labour or Industry and is thus closer to the C.N. and its projet. 168. All three codes start this chapter with a general provision, which, in that of Louisiana, D.O. 55 (p.383), provides thus:

"Le louage a trois objets principaux:
1. Celui des gens de travail, qui se louent au service de quelqu'un;
2. Celui des voituriers, tant par terre que par eau, que se chargent du transport des personnes ou marchandises;
3. Les devis, ou marchés d'ouvrages."

The first line of the English version reads: "Labour may be let out in three ways," while its third subdivision reads: "Workmen hire out their labour or industry to make buildings or other works." Batiza states that the "almost verbatim" source of this article is Proj. An VIII, 3.13.109; he gives C.N. 1779 as a subsidiary source. Proj. An VIII, 3.13.109 is virtually identical to D.O. 55; the only difference of significance being that where D.O. 55 starts "Le louage a...", the Proj. An VIII's article starts "Ce louage": it thus is rather more sensible. 169. C.N. 1779 has been quoted already; 170. its first line reads: "Il y a trois espèces principales de louage d'ouvrage et d'industrie," while its third subdivision reads: "Celui des entrepreneurs d'ouvrages par suite de devis ou marchés". Thus, it may be seen that in form the English version of D.O. 55 is closer to the C.N., while the French version is closer to the Proj. An VIII: in fact, the English version resembles a translation of C.N. 1779 rather than appearing a translation of the French version of D.O. 55. In the 1825 C.L., the first

168. It is difficult to see what significance there is in this.
169. There are two other differences: first, the 1800 Projet has "des" before "marchandises" in its second subdivision; and second, it has no comma after "devis" in its third subdivision.
170. See text supra, introduction to this chapter, (iv) D. Subdivision two is not quoted there; this is unimportant, as it is identical to the same subdivision of the 1800 Projet.
The general provisions on lease in the D.O., setting out the distinction between lease of services (locatio operarum), and the other forms of lease have been set out above, as have the equivalent provisions found in the C.N., the Proj. An VIII, Domat, Pothier, title VIII of the Partida Quinta: this enables us to suggest the likely origins of the conceptual scheme of the D.O. on lease (but not that of title VI of Book One, which will be discussed infra as raising wider issues). It is obvious that the D.O. has followed either the C.N. or Proj. An VIII (or both; which is irrelevant) and thus the redactors have adopted the French bipartite division of louage, which probably originated in Domat. Pothier also has a bipartite division of louage, but his is different in substance from that of the D.O. and C.N. The Partidas do not contain this division; nor does Febrero: they do distinguish between the various objects of lease, but there is no distinction of a conceptual nature. In the manner of the Roman sources, neither the Partidas nor Febrero classify lease into various types according to the object and form of the contract: in similar fashion, they do not structure their discussion of lease to take account of different types of lease; for them there is one unified contract of lease which may have different objects. Thus, though the references made in the

171. The last line of D.O. 55 (p.383) stayed in its original form.
172. No satisfactory explanation can be suggested for this article. What of the fact that the English title of the chapter is closer to the C.N. than is the French?
D.L.V. to Castilian sources are to passages related to the subject matter of the articles of the D.O., these passages cannot be said to have been a source of the D.O.'s provisions. The D.L.V. also refers to Domat and Pothier: again, the references are to related passages, though since Domat probably inspired the C.N.'s approach to lease, he is closer to the D.O. than is Pothier. The conceptual scheme and the actual articles on the nature and types of lease found in the D.O. are of French origin, taken from the C.N. and Proj. An VIII, and deriving ultimately from Domat: the reasons for the actions here of the redactors will be canvassed infra.

The first section of chapter three of the eighth title of the third book is headed "Du Louage des Domestiques et Ouvriers"; it contains five articles. The equivalent section of both the C.N. and its projet has the same title. It will be recalled that the C.N. has only two articles in this section: 1780 and 1781.173 The D.O. has rejected C.N. 1781 and its 1800 projet equivalent, Proj. An VIII, 3.13.110.174 This article provided that, in certain disputes between master and servant, the master was to be believed on oath. That the oath of the master should be decisory in disputes between master and servant, in the absence of written proof, was the jurisprudence of the ancien droit.175 The master's decisory oath cannot have been rejected as being not found in Castilian law, as it is clear that in such circumstances the Castilian law, as previously applied in Louisiana, would have permitted proof by oath of the master; and the D.O. redactors must be presumed to have

173. See supra, introduction to this chapter, (iv) D.
174. This is identical to C.N. 1781; note that the Projet's equivalent of C.N. 1780 is 3.13.111.
175. See e.g. Guyot, Répertoire, vol. 6, s.v. "Domestique", p. 102; or Merlin, Répertoire, vol. 4 (1812) s.v. "Domestique", IV, p. 5.
known this. One may only conclude that the redactors considered that disputes between master and servant should not be governed by special rules of proof, and that the master should not be privileged. If this is correct, it could be taken as evidence of the influence of liberal individualism, notions of freedom of contract and belief in the formal equality of contracting parties; but this should probably not be stressed, and the reason for the rejection of this rule should be left undecided, though the rejection does indicate the treatment of relations between master and servant from a more conventional contractual viewpoint.

The first article of this section, D.O. 56 (p. 383) states that "On ne peut engager ses services qu'à temps, ou pour une entreprise déterminée." This is identical to C.N. 1780, and similar to Proj. An VIII, 3.13.111 (the former, according to Batiza, the "verbatim" source, and the latter a subsidiary one). The 1800 Projet states that "On ne peut engager ses services qu'à temps, et non pour la vie." The D.L.V. gives no references. A passage from Febrero's work, already quoted, appears to suggest that one may lease out oneself for life; this seems likely to be a careless slip on the part of Febrero, the result of a slackly composed sentence. It should be recalled that Febrero does not distinguish at all between lease of work and lease of things, and is more concerned with the latter than with the former. In his gloss on *Fuero Real* 4.4.8, Montalvo does discuss whether or not one could grant a lease of oneself for life (*in perpetuum*) and he concludes that one could not

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176. See *Fuero Real*, 4.4.8 and *Fuero Viejo*, 4.3.5, and the Latin gloss of Montalvo on *Fuero Real*, 4.4.8 as found in the 1544 edition. It should be pointed out that in both Fueros the provision on oaths is not so dogmatically phrased as in the C.N.: e.g. the *Fuero Viejo* states that the señor must be "tal ome, que sea sin sospecha a ben vista de judgador, e de omes bonas." Pothier, T.C.L. no. 175, Bug. 4, p.64, is also less firm than the C.N.: "[L]e juge doit-il s'en rapporter à la déclaration du maître? - Je reponds que la décision doit être laissée à l'arbitrage du juge, qui doit déterminer par les circonstances, et par la dignité du maître." 177. Quoted in text supra, at note 163-4.
do so validly, such a lease being unenforceable as in praedictum libertatis. The Partidas say nothing relevant on this point. The intention of the redactors of the D.O. is important; would they consider the passage already cited from Febrer0 to be accurately stating the Castilian law? There is no reference in the D.L.V. here to Febrer0, and nothing to indicate that this aspect of his passage was seriously considered; the question cannot be answered with certainty. What may be said, however, is that the redactors would have agreed with Maleville, who, after quoting C.N. 1780, stated: "Et non pour toute sa vie, car alors on serait une espèce d'esclave." 179.

D.O. 57 (p.383) provides as follows:

"Les domestiques attachés à la personne du maître, ou au service des maisons, peuvent être renvoyés en tout temps sans expression de cause, et peuvent de même quitter leurs maîtres"

This is identical to Proj. An VIII, 3.13.112, which is, according to Batiza, the "verbatim" source. The D.L.V. gives no references, and there is no equivalent article in the C.N. The reasoning behind this article would best be left undiscussed until the following articles have been taken into consideration.

D.O. 58 (p.383) states thus:

"Les personnes qui ont loué leurs services sur les habitations, ou dans toutes autres manufactures pour y être employées aux travaux qui s'y font, ne peuvent, ni quitter le propriétaire auquel ils se sont loués, ni être renvoyées par eux avant le temps convenu, que pour cause grave."

The English version starts: "Labourers who hire themselves out to serve on plantations or to work in manufactures...." There is no equivalent article in the C.N.; Proj. An VIII, however, does provide thus at 3.13.113:

"Les domestiques attachés à la culture, les servantes

178. See 1544 edn., gloss e, Si algun/a soldada. Inter alia, Montalvo states: "Si tamen quis operas suas in perpetuum locaret: tali pacto adiecto: ne liceat ei per substitum servire: nec interesse praestando liberari: tunc non valeret talis locatio: quia esset in praedictum libertatis[etc.]"

179. 3 Analyse, p.401.
de cour, les ouvriers artistes, ne peuvent ni quitter leurs maîtres, ni être renvoyés par eux, avant le temps convenu, que pour cause grave."

Batiza gives this as the "almost verbatim last part" source of the Digest's article. The D.L.V. gives no references. That the redactors were directly copying from the 1800 Projet is indicated by the curious mistakes in the French of the article: "ils se sont loués" ought to be "elles se sont louées", since the pronoun is referring back to "les personnes", feminine; and "par eux" ought to be "par lui", referring back to "le propriétaire". These mistakes would seem to be the result of copying the Projet An VIII without taking account of the Projet's use of "maîtres", plural, and of the masculine nouns, "domestiques" and "ouvriers". 180. Given that the redactors were following the Projet, it is obvious that the changes they made were quite deliberate. Consideration of their reasons is best left until we have examined the following articles, when we will examine the other French and Castilian authorities.

D.O. 59 (p.383) states that:

"Si hors le cas de cause grave, le propriétaire renvoie la personne qui lui a loué ses services, ainsi qu'il est marqué en l'article précédent, avant l'expiration du temps convenu, il doit lui payer le salaire de l'année ou du temps pour lequel il l'avait loué."

The English version describes the "personne qui...a loué ses services" as a "labourer". 181 The Proj. An VIII, 3.13. 114 provides thus:

"Si hors le cas de cause grave, le maître renvoie son domestique ou son ouvrier avant le temps convenu,

180. The 1800 Projet has, of course, no equivalent phrase to "ils se sont loués"; but in their composition of the article, the D.O. redactors must have paid too close attention to the Projet's nouns.
181. The English version, p.382, states thus: "If, without any just ground of complaint, a man should send away a labourer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to said labourer, the whole of the salaries which he would have been entitled to receive had the full term of his services arrived, whether said labourer was hired by the month or by the year." This could hardly be called an accurate translation; part of the French text is missed out, and the section underlined, were it a correct translation, would read: "the salary for the year or period for which he had been hired." See La. Leg. Arch., vol. 3, part II, p.1504.
il doit lui payer le salaire entier de l'année, ou du temps pour lequel il l'avait loué, déduction faite de la somme que le domestique ou l'ouvrier pourra vraisemblablement gagner ailleurs, pendant le temps qui reste à courir."

Batiza classes this as the "almost verbatim in part" source. The D.L.V. refers to the Fuero Viejo, 4.3.5 and the Fuero Real, 4.4.8 (and to a third reference which I cannot decipher).

The provisions of the two Fueros are roughly equivalent to that of the D.O. (as are also propositions put forward by Pothier); but it is convenient to discuss these texts later.

The final article of this section is D.O. 60 (p.383); it states as follows:

"Si c'est au contraire la personne qui a engagé ainsi ses services, qui quitte le propriétaire, sans cause légitime, il perdra le salaire pour le temps qui s'est écoulé jusqu'alors sur son engagement, ou sera obligé de restituer au propriétaire ce qu'il aura reçu de lui d'avance sur l'année courante, ou sur le temps de l'engagement."

The English version once more renders "la personne" as "labourer". Proj. An VIII, 3.13.115 provides thus:

182. The Avant Propos of the D.L.V. contains, at its end, an explanation of abbreviations; this, however, is incomplete, and no abbreviation helps interpret or decipher the citation here. I suspect that the reference is Teatro, vol. 4, p.195: is this the work elsewhere referred to as the "Theatre de Xavier Perez"? This latter work has been cited in connection with D.O. 11 (p.27), but the Prácticas therein referred to could be obtained from another source. Therefore, if the work cited is as suggested here, it would have been unavailable to me any way, and unlike with D.O. 11 (p.27), there is no indication of the legislation (if legislation it be) which it is intended to cite here.

183. See his T.O.L. nos. 165-177, Bug. 4, pp.61-64.

184. The English version, p.382, reads thus: "But if, on the other hand, a labourer, after having hired out his services, should leave his employer, before the time of his engagement has expired, without having any just cause of complaint against said employer, the labourer shall then forfeit all the wages which may be due to him and shall moreover be compelled to repay all the money he may have received either as due for his wages or in advance thereof on the running year or on the time of his engagement." Note that the section underlined is a mistranslation; were the French version properly translated, this would read merely "in advance." This is a major difference in meaning, the English version severely penalises a servant who leaves his master. The clause was not altered in the 1825 C.L., and still remained in the 1870 Code. See La. Leg. Arch., vol. 3, part II, p.1504.
"Si c'est le domestique ou ouvrier qui quitte sans cause légitime, il doit être condamné, envers le maître, à une indemnité qui est fixée sur ce qu'il en coûte de plus au maître pour obtenir d'un autre les mêmes services."

Batiza claims this as the source copied for the Digest's article, classing it as a "substantial influence". The D.L.V. gives the same references as for D.O. 59 (p.383), and again they contain provisions roughly equivalent to the article of the D.O.

The following general remarks may be made on D.O. 57-60 (p.383). The D.O. appears to divide the servants therein discussed into two classes: first, domestiques attached to the person of a master or in the service of houses (families); and second, those who have hired themselves out to labour on plantations or in manufactures (factories). Following the rubric of this section, the first class will be called domestiques (personal servants) and the second ouvriers (labourers). The description of the first class is identical to that found in the Proj. An VIII; that of the second class, however, is not: the 1800 Projet speaks of farm hands, yard maids and artisans. The D.O. redactors may have chosen to describe ouvriers as those working on plantations or in factories as more accurately describing agricultural and other production in the territory; it is certain that none of the sources they appear to have drawn on (Pothier, Domat and Blackstone) thus describe ouvriers or labourers (the description in Proj. An VIII, 3.13.113 appears to be influenced by, or to be taken from, Pothier185). Given that the D.O. distinguishes so between domestiques and ouvriers (and Tucker reaches the same conclusion, if I interpret him correctly186), it seems that D.O. 59-60 are intended to apply only to ouvriers (and not to domestiques), since these articles employ the term propriétaire, not maître. Propriétaire must refer to the owner of the habitations and manufactures. The Proj. An VIII's equivalents to D.O. 59 and 60 (3.13.114 and 115) apply to both domestiques and ouvriers. Here the redactors of the D.O. must be parting deliberately from the Projet, since they...
have changed maître to propriétaire (as Tucker points out\textsuperscript{187}). Against this interpretation of the Projet, it could be argued that "domestiques" in the two articles refers to "domestiques attachés à la culture" and not to other domestiques; this would seem unlikely, and for two reasons: first, the normal meaning of domestique is that of personal or house servant\textsuperscript{188}; and second, given that two different types of domestique have been mentioned in articles 112 and 113, the mention of domestique unqualified in 114 and 115 must be, at least, a reference to both, and not to an unusual meaning. Even were it to be accepted that, in 3.13.114 and 115, the Projet An VIII was referring to domestiques attachés à la culture (and it is argued here that it should not so be accepted), the D.O. redactors, in their own articles 59 and 60 (p.383), have departed sufficiently from the Projet An VIII, for it to be clear that they did not consider they were taking their rule, that D.O. 59 and 60 should not apply to personal servants, from the Projet: the Louisiana redactors obviously thought that articles 3.13.114 and 115 of the Projet applied to both personal servants and labourers. Thus, the classification of servants into two kinds - domestiques and ouvriers - found in this section of the D.O., though obviously influenced by the Projet An VIII, does not exactly correspond to the Projet's classification, in so far as, in the Projet,

\textsuperscript{187} See ibid., p.292.
\textsuperscript{188} See Merlin, Répertoire, vol. 4 (1812), s.v. "Domestique", p.2: "On appelle ainsi quelqu'un qui reçoit des gages et demeure dans le maison de la personne qui le paye. Tels sont les valets, laquais, portiers etc." Article 3172 of the 1825 C.L. states thus: "On appelle domestiques ou gens de service, ceux qui reçoivent des gages, et demeurent dans la maison de la personne qui les paye et les emploie à son service personnel ou à celui de sa famille. Tels sont les valets, laquais, cuisiniers, maîtres d'hôtel ou autres qui sont à demeure dans la maison." Merlin is obviously the source of this article of the C.L. (potentially his predecessor Guyot, whom I have not checked). Batiza, "The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey", 47 Tul. L. Rev. (1972-3) pp.1-115, p.104 gives the source of the identical provision of the Projet as Pothier, T.O. no. 709 (5), Bug. 2, p.391 - he must be wrong. (In fact he cites no. 710; this is a slip or a result of the use of different editions, but the point is unimportant.)
the only distinction between domestiques and ouvriers is that the former may be dismissed more readily; the other provisions of Proj. An VIII in this section (3.13.114 and 115) apply to both kinds of servants. 189.

The Castilian sources cited by the D.L.V. do not appear to contain this distinction at all. Fuero Viejo, 4.3.5 mentions only "mancebo o manceba" and "señor" - general terms meaning "manservant or maidservant" and "master". The Fuero Real refers only to "mancebo" and "señor". A distinction such as that made here by the D.O. cannot be traced either in the eighth title of the Partida Quinta or in Febrero. 190. Part.7.33.6 does recognise a distinction among servants; but this distinction does not appear to have any legal results, as all (apparently) are classed as members of the familia. This ley thus defines familia as:

"el señor de la casa... et todos los que viven con él sobre que ha mandamiento, asi como los fijos, et los servientes, et los siervos et los otros criados.... Otrosi son llamados domésticos todos estos, et demas los labradores que labran sus heredades et los aforrados." 191.

Thus, although there is recognised to be a distinction between "domésticos" properly so called and "los labradores que labran sus heredades", any servant under the power of the señor is part of the familia, and no distinction of relevance to the D.O. is made. Further, this ley is concerned primarily with definitions, and it defines the relationships in terms of status; it does not consider the juridical relationship of locatio operarum. The distinction, found in D.O. 57-60 (p.383), between domestiques and ouvriers does not originate in the law of Castile.

The relevant D.O. articles all deal with termination

189. There is of course another article in this section of the 1800 Projet, 3.13.116, which states thus: "L'ouvrier artiste employé à la journée, n'est pas tenu de la mal-façon de son ouvrage." This article does not relate to the point presently at issue.
190. See Febrero, Parte Primera, ch.9, pp.234-262.
191. 1807 Real Academia edition; this varies slightly from the Lopez edn. here, but not in a material way. See note 59 supra.
of lease of work (in a wide sense). This is not a subject extensively treated of by Domat; no precedent may be traced in the relevant sections of his work.\textsuperscript{192} Pothier, however, in the few provisions in which he discusses \textit{locatio operarum},\textsuperscript{193} in total eighteen, devotes no less than thirteen of them to the ending of the contract.\textsuperscript{194} His views would be likely to be of major importance for the redactors of the D.O., the C.N. and the \textit{Proj. An} VIII (his influence on the \textit{Proj. An} VIII has been recognised by Tucker\textsuperscript{195}). The section of his treatise on hire most relevant for the articles of the D.O. under discussion is that contained in nos. 168 to 176.\textsuperscript{196} These provisions are in a section of the treatise on the remission of rent.\textsuperscript{197} No. 168 starts thus: "À l’égard des ouvriers et serviteurs qui louent leurs services pour une année, pour un mois, ou pour quelque autre temps limité... [etc.]." The text deals with remission of wages if the ouvrier or serviteur is ill. In no. 169, Pothier discusses remission of wages where a serviteur or ouvrier has left his master's employment of his own accord; indeed the master can take proceedings to compel the servant to return, and, if he does not, he may be forced to pay damages. In no. 170, the case of the servant (serviteur) leaving his master for an honourable reason is discussed; though the servant is still due damages, they should be less severe than if he had left for another reason. Pothier deals in no. 171 with a servant (serviteur) enlisting in the army, either voluntarily or compulsorily. Imprisonment of a servant (serviteur) is discussed in no. 172. No. 173 concerns a servant (serviteur) leaving because of ill-treatment, and no. 174 with a master dismissing the servant. In no. 175 Pothier discusses proof of the various complaints. No. 176 is as follows:

\begin{quote}
\textit{...}
\end{quote}

\begin{enumerate}
\item \textsuperscript{192} See Domat, Part One, Bk. 1, tit. IV, especially sections 7-9.
\item \textsuperscript{193} T.C.L. nos. 10, 40, 63, 66, 165-177 and 372, Bug. 4, pp.7, 19, 27-28, 29, 61-64 and 127.
\item \textsuperscript{194} T.C.L. 165-177, Bug. 4, pp.61-64.
\item \textsuperscript{195} Persons, p.274.
\item \textsuperscript{196} Bug. 4, pp.62-64. Nos. 165-167, T.C.L., Bug. 4, pp.61-2 concern the hire of labourers for a day. No. 177, ibid., p.64 states that the servants of army officers cannot leave such service until the end of the campaign, on penalty of being treated as deserters.
\item \textsuperscript{197} T.C.L., nos. 139-177, Bug. 4, pp.54-64.
\end{enumerate}
"Ces louages de services pour un temps déterminé, sont d'usage à l'égard des serviteurs de campagne, tels que les serviteurs de labour, de vigneron, de meuniers, etc., les servantes de cour. Ils sont aussi d'usage dans les villes à l'égard des ouvriers.

À l'égard des serviteurs qui louent leurs services aux bourgeois des villes, ou même à la campagne aux gentilshommes pour le service de la personne du maître, quoiqu'ils les louent à raison de tant par an, ils sont néanmoins censés ne les louer que pour le temps qu'il plaira au maître de les avoir à son service; c'est pourquoi le maître peut les renvoyer quand bon lui semble, et sans en dire la raison, en leur payant leur service jusqu'au jour qu'il les renvoie.

Mais il ne leur est pas permis de quitter le service de leur maître sans son congé, et ils doivent être condamnés à retourner, ou jusqu'au jour du prochain terme auquel il est d'usage dans le lieu de louer les serviteurs, ou seulement jusqu'à ce que le maître ait le temps de se pourvoir d'un autre serviteur, lequel temps lui est limité par le juge.

On doit, à cet égard, suivre les différents usages des différents lieux." 198.

A first point to be made is that Pothier does not use the terms serviteur and ouvrier to describe certain kinds of servant: serviteur is not equivalent to domestique, and may describe a farm hand or a valet de chambre. Ouvrier is used generally in a more restricted meaning, referring to manual labour. To indicate that these words are not used in a strict technical sense, it may be pointed out that Pothier talks in one passage of "les serviteurs et servants destinés aux ouvrages de la campagne". 199. Second, Pothier, however,

198. T.C.L. no. 176, Bug. 4, p. 64. 199. T.C.L. no. 372, Bug. 4, p. 127. Tucker, Persons, p. 274, states that Pothier used the term "serviteur" interchangeably with "domestique". He is mistaken. Pothier in fact uses domestique only once, in no. 177, Bug. 4, p. 64. Serviteur for Pothier clearly meant one who serves, no matter in what capacity. See the relevant texts, cited in note 193 supra, Elsewhere, Tucker suggests that Pothier used serviteur in the sense of domestique: see Persons, pp. 289-90 note 129, cited infra at note 231. To some extent Pothier contrasts serviteur and ouvrier; but generally he seems to treat ouvriers as a sub-group of serviteurs, and often in the phrases "serviteurs ou ouvriers", "serviteurs et ouvriers" he seems to be using a tautology to make his meaning certain. He quite definitely uses serviteur to cover ouvrier; he is also not quite consistent.
does distinguish between personal and other servants. His nos. 168 to 175 discussed above refer to serviteurs and ouvriers, and deal with such servants leaving or being dismissed: these provisions apply, as no. 168 states, only to those who let their services for a year, a month or some other limited time. The first sentence of no. 176 states that: "Ces louages de services pour un temps déterminé," are customary for rural servants and labourers in towns. The text then points out that the rules for personal servants are different, and then gives details of such rules. Thus Pothier makes the same distinction as the D.O. between personal servants, hired for as long as it pleases their master, though their services be let for a particular amount per year, and other servants, hired for fixed periods.

In applying D.O. 58-60 (p.382) only to servants who are not personal servants (ouvriers as they are called in the rubric) the Louisiana redactors are following Pothier. The fact situations governed by D.O.59 and 60 (p.382), though the rules are more generally phrased, are those Pothier deals with in nos. 168 to 175 of his Traité (though it should be said that other writers of the ancien régime make the same distinction as Pothier: see Guyot's Répertoire 200.). In this action, the redactors have rejected the Proj. An VIII's application of its articles 3.13.114 and 115 to both

200. For Pothier here T.C.L. nos. 168-175. Guyot, Répertoire, vol. 6, s.v. "Domestique", p.102 states thus: "Au surplus il faut observer que ce qui vient d'être dit au sujet des louages de service pour un temps déterminé, ne doit s'appliquer qu'à certains Domestiques tels que les valets de labour, les servantes de basse cour, etc. Quant aux Domestiques qui louent leurs services aux bourgeois des villes, ou même à la campagne, aux gentilshommes pour le service de la personne du maître, et quoiqu'il y ait une somme fixée pour les gages d'une année, ces Domestiques ne sont néanmoins censés engagés que pour le temps qu'il plait au maître de les avoir à son service. Ainsi le maître peut les renvoyer lorsqu'il le juge à propos et sans en dire la raison, en leur payant leurs gages jusqu'au jour qu'il les renvoi."
personal servants and ouvriers. As regards personal servants quitting, in D.O. 57 (p. 383), the redactors have followed Proj. An VIII, 3.13.112 rather than Pothier: why should they have done so? Pothier stated that a master could dismiss a personal servant at will with payment up to the date of dismissal; it may be presumed that this was because he conceived of personal service as based on a personal relationship which went beyond mere contract. A personal servant was his master's dependent: his master could dismiss him at will; he, however, required his master's permission (congé) to quit. The personal servant was in the power (puissance) of his master; were such a servant to quit without permission, he could be made to return to his master until the next term day (or as otherwise provided by local custom). The D.O. redactors apparently recognised this close personal relationship; but, because of the movement towards notions of abstract equality in the eighteenth century, they followed the Proj. An VIII in allowing a personal servant to quit with the same freedom as his master could dismiss him. The Proj. An VIII assimilated personal servants to ouvriers (doubtless because of recognition of the change in the nature of the relationship between master and servant); the D.O. redactors, however, chose not to follow here, perhaps because of legal conservatism or because they thought there to be still in Louisiana a difference between the personal servant and the labourer or workman: the former yet being in a close relationship with his master, to some extent outwith the nexus of abstract contract, the latter being in a relationship fully subsumed within the formal law of contract. Given how closely the D.O. here has followed the 1800 Proj. it is quite certain that the maintenance of the distinction between personal and other servants was a deliberate action on the part of the redactors.

The rejection of the Castilian authorities requires

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201. See introduction, supra, at notes 1-12.
explanation. These authorities (as cited in the D.L.V.) did not distinguish between personal and other servants: both were regarded as being in a close personal relationship with the señor or paterfamilias. The closeness of this personal bond would be inappropriate in Louisiana of the early 1800's with what has been characterised in the introduction as the "exclusion" of the servant from the family.202. The conception of the link between master and servant found in these sources was overly based on the notion of service being a status within the family, for such conception to be appropriate for the social conditions of Louisiana, where there had been a limited development of wage labour. (It should always be remembered that in Castilian law there also was the contractual tradition of lease of services, so that the provisions in the D.O. in general had precedent in the Castilian law.)

One final article concerning servants should be mentioned; the fourth title of the third book of the D.O. is called "Des Engagemens qui se forment sans convention, ou des Quasi-Contrats et Quasi-Délits," and its article 20 (pp.321-3) states thus:

"On est responsable, non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous son garde:

Le père, et la mère après le décès du mari, sont responsables des délits de leurs enfants mineurs;

Les maîtres et les commettans, des délits de leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés;

Les instituteurs et artisans, des délits commis par les écoliers et apprentis;

La responsabilité ci-dessus, n'a lieu que lorsque les père et mère, maître, commettans, ont pu empêcher le délit et ne l'ont pas fait. Ils sont censés avoir pu empêcher le délit, lorsqu'il a été commis par suite de leur négligence à surveiller ceux dont ils sont responsables, ou lorsqu'il a été commis en leur présence.

Le propriétaire d'un animal, est responsable du

202. See supra at notes 2-12.
délit ou du dommage que l'animal a causé, soit que l'animal fut sous sa garde, ou qu'il fut égaré ou échappé."

This is virtually identical to Proj. An VIII, 3.3.20 and very similar to C.N. 1384: 203. there can be no doubt that the redactors have copied the former, and in the sections of the article relevant here there are no differences between the D.O. and Proj. An VIII. 204. The D.L.V. on this article refers to Domat 205 and the Partida Septima, title 13, ley 4 and title 15, leyes 22, 23 and 24. The passage of Domat cited states that:

"Les maîtres d'école, les Artisans, et autres qui reçoivent dans leurs maisons des Écoliers, des Apprentis, ou d'autres personnes pour quelque art, quelque manufacture, ou quelque commerce, sont tenus du fait de ces personnes."

This is obviously close to the provision of the D.O.; what is interesting to note is the stress on responsibility for those whom one takes into one's own house in order to teach them. Domat stresses control over the person under instruction. Another passage of Domat, uncited by the D.L.V., states that:

"Ceux qui pouvaient empêcher un dommage, que quelque devoir les engagait de prévenir, y auront manqué, pourront en être tenus, selon les circonstances. Ainsi, un maître qui voit et souffre le dommage que fait son domestique, pouvant l'empêcher, en est responsable." 206.

This is obviously a relevant text available to the redactors. Part. 7.13.4 deals with the liability of a señor for a robbery committed by his slaves or by "los otros homes que vivieren con él." If we ignore the question of robbery committed by a man's slaves, and look at robbery by homes.

203. Batiza gives the farmer as the "almost verbatim" source, and the latter as a subsidiary source.
204. C.N.1384 differs in lacking the last paragraph on damage by animals (covered in C.N. 1385), and in that the paragraph in the D.O. and 1800 Projet which starts "La responsabilité ci-dessus", has only one sentence: "La responsabilité ci-dessus a lieu, à moins que les père et mère, instituteurs ou artisans, ne prouvent qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité."
205. Part 1, Bk. 2, tit. 8, sectn. 1, art. 7.
206. Pt. 1, Bk. 2, tit. 8, sect. 4, art. 8.
libres, we may see that the señor with whom such homes libres live is not in general liable unless the robbery has been carried out with his approval (con placer del señor) or on his orders. Part. 7.15.22, 23 and 24 deal with an owner's liability for damage done by animals and are not relevant here. The principle in Part. 7.13.4 is similar to that in D.O. 20 (pp. 321-3), though the former deals with that which would now be classed as criminal law.

Though uncited by either the D.L.V. or Batiza, Pothier in his Traité des Obligations enunciates a rule similar to that of the C.N. and D.O.207: indeed one would suspect that the Proj. An VIII and the C.N. drew on Pothier for their rule on maître and domestique.

The D.O. redactors obviously preferred the provisions of the French code and its Projet. The French redactors provided them with a sophisticated rule dealing with liability for servants acting in the course of their duties. As regards servants, this sophistication was lacking in both Domat and the Siete Partidas. It should be noted that the liability for apprentices in the D.O. is greater than that for servants: this is presumably because apprentices being generally young people their masters were more in the position of parents, and had greater control over them. The D.O.'s conception of the master's liability for his servants is more in line with the early nineteenth century view of the relationship between master and servant than is that of Domat or the Siete Partidas; neither of the latter two sources deal in detail with the question of the master's negligence in supervision nor with the acting of the servant in the course of his duty. The article of Domat cited by the D.L.V. appears to make a master liable for all the actions of his apprentices; presumably this is because the apprentices live with him as members of his family, under his authority and complete control. The other article of Domat quoted above208 similarly does not mention

207. T.Q. no. 121, Bug. 2, p.58.
208. See text supra at note 206.
that for a master to be liable for his servants they should be acting in the course of their duties: it only states that he is liable if he has seen them do damage and has not prevented them. This also presupposes the relationship between master and servant as being more than merely one of a contract to work, and as being based on the servant's subjection to the authority of his master. There was developing in Louisiana a notion of the tie between master and servant as being more one of contract: this new notion of the relationship between master and servant would call for a rule more akin to that of the C.N. than to that of Domat.

A final problem in connection with D.O. 20 (pp.321-3) is that the French text talks only of "domestiques", and not of other servants (and apprentices are mentioned specially). Should this be taken as meaning that masters would not be liable for the actions of their "ouvriers" (or indeed of their "engagés", since they too are not mentioned)?

A first point to note is that both Proj. An VIII, 3.3.20 and C.N. 1384 also mention only "domestiques" in this connection; Pothier, however, had stated that: "On rend aussi les maîtres responsables du tort cause par les délits et quasi-délits de leurs serviteurs ou ouvriers". The English version of this article of the D.O. rendered "domestiques" as "servants". A further point is that D.O. 13 (p.39), which refers forward to this particular article, speaks of masters being liable for the délits and quasi-délits of his "serviteur": it thus uses a more general term. D.O. 3 (p.37) defined "serviteur", stating there were two kinds of free "serviteurs": first those who hire or engage themselves to another for ordinary or hard labour, such as "domestiques de maison", "ouvriers", "manoeuvriers" and all those who engage themselves to work on the fields or on plantations; and second, apprentices. Thus, D.O. 20 (pp.321-3) must be read along with D.O. 13 (p.39); from this we may deduce that the redactors intended all "serviteurs"

210. See text supra, at note 143.
211. Quoted supra, at notes 99-100.
to be covered ("serviteurs" having the meaning attributed to it in D.O. 3 (p.37)). Tucker would presumably disagree, since he gives a different meaning to "serviteur"; his arguments will be dealt with later. 212. If the above be correct, it is still necessary to explain why the term "domestique" was used in D.O. 20 (pp.321-3) rather than "serviteur". This is readily done. In D.O. 20 (pp.321-3) the redactors have copied Proj. An VIII very closely indeed; the only difference is that where the D.O. has "dans les fonctions auxquelles ils les ont employées", the Proj. An VIII has "dans les fonctions auxquelles ils les ont préposés" - the D.O. has here preferred the verb used by C.N. 1384.

The D.O. redactors have thus copied the noun used by the C.N. and its 1800 Projet, without considering the possible implications of doing so. It must be taken then that the use of "domestiques" in this article does not limit a master's liability for his servants acting in the course of their duty to only the actions of his house and personal servants: the D.O. redactors must have intended the law to be as stated by Pothier. 213. The third paragraph of the article covered liability for the first kind of free "serviteurs" as explained by D.O. 3 (p.37), while the fourth paragraph (on apprentices) covered the second kind of free "serviteurs". Any other interpretation would be ridiculous: if "domestique" meant only "house" or "personal servant", a master would not be liable if his ouvrier, acting in the course of employment, being negligently supervised, and with his master watching, through negligence in his work, injured a third party.

Conclusion on Employment in the 1808 Digest.

The first point to be made is that in all aspects of the law on master and servant discussed above (apart from

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212. See Persons, pp. 289-293 and see also note 129 on his p.289. For argument against Tucker, see infra, text at notes 222-245.
In Title Six of Book One, the redactors have departed drastically from the C.N. and its Projet. Some reasons for the placing of this title have already been canvassed. 214. Blackstone seems to have exerted a strong influence over these articles on servants (though perhaps not as much as Tucker and Batiza believe). Articles 1-4 (p. 37) of this title concern servants in general, and are devoted to defining and describing the various kinds of servants. Articles 5-10 (pp. 37-9) regulate the relationship between masters and their indentured servants (enragés) and apprentices. (D.O. 10 (p. 39) mentions other servants as well— but merely to exclude them from the rule propounded.) D.O. 11-14 (p. 39) are devoted to all serviteurs and deal

214. See text supra, between notes 93-95.
with master and servant relationships involving a third party. From the foregoing discussion of the sixth title's articles on servants, it will have been seen that there is a possible influence from Blackstone on D.O. 3 (p.37) and a certain influence on D.O. 8, 10, 11, 12 and 14 (p.39). It has been argued that all the rules in these articles are generally compatible with other sources, though Blackstone has provided the formulation. Thus, the use of Blackstone has not necessarily imported from the common law principles somehow alien to the civil law. Blackstone seems to have exercised influence over the disposition of the relevant articles in the sixth title of the first book, in so far as the treatment of the topics generally follows the order of the treatment of the same topics in chapter fourteen of his first book. Blackstone has obviously been a major source of inspiration for these articles. There are two issues: first, why include these articles at all; and second, why follow Blackstone? The redactors were faced with a recent act of the territorial legislature, regulating the service of apprentices and engagés. They also had to include rules on slavery. It would be obvious to the redactors that, following civilian tradition, slaves should be dealt with in the first book of the code, that on persons. This may have suggested to them the inclusion of some articles not found in the C.N. to deal with servants – especially with indentured servants and apprentices, for whom there was no place in the scheme of the C.N. If this suggestion is correct, once having decided to discuss engagés and apprentices here, it would have been necessary for the redactors to include general articles on the various kinds of servants, in order to make it clear just what was significant about engagés and apprentices. After resolving to include these articles, the redactors must have examined their sources to find suitable provisions: the C.N. and Proj. An VIII did not regulate apprenticeship, much less the

Tucker and Batiza would attribute influence from Blackstone to other articles. For the reasons for any disagreement, see text supra, at notes 94-152.
binding of servants by indentures; nor did Pothier nor the Castilian sources, except for some few provisions in the latter on apprenticeship. The only work readily available to the redactors containing useful and extensive provisions on apprenticeship would be Blackstone. Thus the rules on apprenticeship in the D.O. are an amalgam of Blackstone and the 1806 Act, ch. XI. The use of Blackstone would suggest the inclusion of provisions on other matters with which he deals: hence the redaction of D.O. 11-14 (p.39). It is not suggested that the redactors necessarily drew up the relevant chapter of the code in the manner here laid out; what is important is that the redactors, influenced by the 1806 Act, ch. XI, decided to regulate apprenticeship and indentured servants, and turned to Blackstone as the only source available to them providing comprehensive rules on apprentices. This said, the inclusion of these rules in Book One of the Digest must indicate that the redactors were willing to contemplate the relationship between master and servant as being more than merely contractual and as being analogous to the ties of dependency between father and son and between husband and wife. As Tucker rightly points out, to some extent to be a servant (according to the sixth title of the first book) is to have a particular status in the ordering of society: a servant is not only an abstract contracting individual but is a legal person. Further, the treatment of master and servant along with husband and wife, parent and child, guardian and ward and even with corporations, could have been influenced by Blackstone.

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216. It should be noted that the Castilian provisions on apprenticeship, e.g. Part. 5.8.11, are not part of a complete treatment of the law on apprenticeship, but are mentioned in the discussion of other matters.
218. The last title (X) of the first book of the D.O. is entitled "Des communautés ou corporations". There is no equivalent in the C.N. or its projet. It is plausible to suggest that the inclusion of this title was suggested by the inclusion in the first volume of Blackstone's Commentaries, Book One of which is "On the Rights of Persons" of a chapter (18) entitled "Of Corporations".
Tucker (if I understand him correctly) appears to believe that the treatment of servants as a class derives from Blackstone and that the provisions of the D.O. in this matter are somehow alien to the traditions of civilian legal systems. 219. I would suggest that here he is mistaken. Pocquet de Livonnière in his *Regles du Droit Français* treated servants as being in the power of their masters in the way a son was in the power of his father. 220. The notion—as Part. 7.33.6. shows—was hardly alien to the Castilian law. The law of civilian countries in the eighteenth century was well used to concepts of class—consider the French *noble, roturier* and *bourgeois*. Further, Tucker would seem to emphasise too much the dependency of the rules of the D.O. on the common law: as already argued, the provisions taken from Blackstone are not unique or remarkable, and it would seem unlikely that the redactors introduced the historical common law conception of the relation between master and servant as still "colored by the ancient concept of status—estate." 221. The rules taken from Blackstone are perfectly compatible with the traditions of the civilian systems on which the redactors of the Digest drew: there is no necessary connection between the law in the Digest on servants and the concept of tenure, as there would need to be for Tucker's argument to be correct. The rules are perfectly compatible with the traditional civilian treatment of servants as members of the family or as contracting parties: this is why the rules in title six of the first book of the Digest are compatible with the Castilian sources, and indeed with some French ones. That provisions have been drawn from Blackstone does not really affect the matter. It is clear that the redactors followed a civilian (but not Roman) concept of servant in line with sources describing the social relations between master and servant of the mediaeval and early modern period; they

220. See supra, text at notes 46-53.
221. See *Persons*, p.280 and pp.286-8.
borrowed from whatever texts they could to provide a coherent statement of their views and Blackstone provided convenient legal propositions and texts. As regards apprenticeship, the rules of Blackstone would be very appropriate, as the incidents of apprenticeship and its form were the same all over Europe: Blackstone would be a convenient source, because of his reasonably extensive discussion of apprenticeship.

The sources from which the redactors borrowed provisions for their articles were the C.N. and its projet, Blackstone and Pothier - the last indirectly in D.O. 57-60 (p.383). They did not adopt rules from any of the Castilian authorities. The rules adopted were not incompatible with the rules in the Castilian authorities; but the authorities the redactors used provided more sophisticated rules than did the Castilian sources: the provision on masters' liability for their servants' actions show this clearly. The rules the redactors borrowed were generally in a form rendering them easy to borrow, and also would be more in line with the redactors' view of the needs of their society.

The D.O. classifies servants into various types. The redactors in D.O. 1-3 (p.37) use serviteur as a general term for one who serves in any capacity, and they divide the class of serviteurs into apprentices, engagés, and those who lease their services. Those who lease their services are later divided into ouvriers, manual labourers on plantations or in manufactures, and domestiques. Apprentices and engagés are dealt with together in the sixth title of Book One because they are both bound to their masters by indentures; domestics and labourers lease their services.

Before considering the implications of the above, it is necessary to discuss briefly the views of Tucker. He denies that labourers may properly be classed as serviteurs under the D.O. When the terms of D.O. 11-14 (p.39) are considered, it may be seen that his views could cause difficulties. He states that:

222. These articles use the term serviteur.
"Although the Code is not entirely consistent, serviteur is apparently a term which gauges the extent of the master's authority (potestas) over the particular type of servant. Whether or not the servant is a serviteur depends on the degree to which he necessarily becomes part of the master's familia as a result of his contract." 223.

It may be pointed out that in D.O. 1-3 (p.37) the Digest uses serviteur to describe any kind of servant - even a slave. Furthermore, D.O. 3 (p.37) purports to define "serviteur" stating that "serviteurs" properly so called are those who lease or engage themselves for ordinary or hard labour, such serviteurs being domestiques de maison, ouvriers, maineouvriers, and all those who engage to work "aux champs et sur les habitations etc." Thus, the Digest itself is quite clear that a serviteur is one who serves in any capacity: it does accept in D.O. 3 (p.37) that an apprentice is not a serviteur properly so called, but that is all. 224. Tucker puts forward the idea that serviteurs are only those servants who may be classed as part of the master's familia. There is one relevant article in the Digest, D.O. 78 (p.127):

"Le mot de famille employé dans cette section, doit s'entendre de la femme, des enfants et des domestiques de celui à qui le droit d'usage ou d'habitation est accordé."

This article refers only to domestiques not to serviteurs; moreover it refers specifically to the question of use and habitation. Rights of use and habitation were very restricted rights, as Domat, for example, explains: 225. This article is concerned to stress that if one is granted, for example, a right of habitation, one's domestic servants may live with one. 226. In this, the article finds precedent

224. This is no doubt why in D.O. 20 (pp.321-3) discussed supra, notes 203-213, there is a separate provision for apprentices, if it is accepted there that domestiques, taken with D.O. 13 (p.39) should be understood as serviteurs. Ironically, Tucker, Persons, p.290 would have to include (by his own logic) apprentices as part of the familia and hence as serviteurs.
225. See Part 1, Bk. I tit. XI, preamble.
226. See D.O.
in Domat and in Part. 3.31.21. The D.L.V. refers to Part. 7.3.6, here; this is a mistake for 7.33.6, already quoted. Part. 3.31.21 and Domat are texts also dealing with rights of use and habitation; Part. 7.33.6 defines "family". As it stands, this article is quite unexceptional. Tucker quotes D.O. 78 (p.127) only in a footnote; he does, however, quote in his text article 3522 of the 1825 C.L., thus:

"Family. Family in a limited sense, signifies the father, mother and children. In a more extensive sense, it comprehends all the individuals who live under the authority of another, and includes not only the servants [les serviteurs], but also the slaves of the father of family. It is also employed to signify all the relations who descend from a common root."

It seems to be from this article of the C.L. that Tucker has developed the idea that serviteurs in the D.O. referred only to servants who lived with their masters. Though Tucker has to recognise that serviteur is sometimes used in a broad sense in the D.O., he states that "in a more restricted sense, it is used almost interchangeably with domestique. This latter seems to be the sense given it by Pothier." The statement about Pothier is misleading. That the D.O. itself uses serviteur interchangeably with domestique also seems unlikely: there is no evidence that this is so. It has already been argued that in D.O. 20 (pp.321-3) domestique was used when serviteur should have been; but there were obvious reasons why this was so and this usage does not give support to Tucker's statement. The equation of domestique and serviteur allows Tucker to

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227. Part 1, Bk. 19 tit. XI, Sectn. 2, art. 8; it seems likely that the D.O. took the term "domestique" from Domat, who said: "Le droit d'habitation s'étend à toute la famille de celui qui a ce droit. Car il ne peut habiter séparément de sa femme, de ses enfants de ses domestiques. Et il en est de même si ce droit est acquis à la femme. Ce qui s'entend de l'habitation même qui étroit acquise avant le mariage."

228. See supra notes 58-59 and 191. Batiza on this article of the D.O. wrongly refers to Part. 7.23.6 and Tucker wrongly to Part. 7.1.6 (Persons p.285 note 108). Strange that all three should all give different wrong references.


232. See text supra at note 199 and note 199 itself: at most Pothier contrasts serviteur to ouvrier; but he is by no means consistent - he seems to regard ouvriers as a sub-class of serviteurs.

233. See text supra at notes 209-213.
assimilate C.L. 3522 to D.O. 78 (p.127). In fact, C.L. 3522 is the only evidence Tucker has for domestique having the same meaning as serviteur. That this usage of the 1825 C.L. should necessarily be taken to show the intended meaning of the D.O. seems dubious: further, to expect consistency in usage is to be unrealistic. There can be no gainsaying the redactors' use of serviteur in D.O. 3 (p.37) to mean any one who serves in whatever capacity. Tucker finally looks at D.O. 57-60 (p.383). D.O. 58-60 deal with ouvriers, labourers, and Tucker states: "It seems certain that this second category, the

234. It is interesting to note the background to C.L. 3522, paragraph 16. The 1823 Projet recommended the inclusion of titre 23, "De la signification des termes de Droit": pp.416-424. Paragraph 36 of the one article of this title read thus: "Famille. Ce mot appliqué aux personnes dans son sens le plus étendu, signifie toutes celles qui sont soumises à plus puissance d'un autre, et en ce sens il comprend non seulement les domestiques du père de famille, mais même ses esclaves. - Strictement on entend par le mot famille, le père, la mère et les enfants. - Dans un sens, plus étendu, on entend tous les parents qui dépendent d'une souche commune." This became C.L. 3522 (16). Note that domestiques is used in Projet, whereas serviteurs is used in the C.L.; further, the Projet uses strictement whereas the CL. refers to "un sens limité." These changes are interesting, and could affect Tucker's argument; but we need not consider this here. Batiza, "The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey", 47 Tul. L. Rev., pp.1-115 gives as the sources of this provision of the Projet, Part.7.33.6 and D.50.16.195.1-5. (Actually, he gives D.50.16.1-5; this is an obvious mistake in printing.) D.50.16 is the famous title, De Verborum Significatione. Tucker, however, does try in his footnote 129 in Persons, p.289. He states that "In addition, article 1.6. 3... includes among serviteurs 'properly speaking', laborers and workmen; this inclusion was suppressed in 1825." This is misleading. D.O. 3 (p.37) was indeed reformed, and became C.L. 157; this new article made no mention of labourers or workmen. This was not because serviteur was redefined so as to exclude them; rather, the article was phrased in more general terms, and ouvriers (though not mentioned) would still be classed as serviteurs. C.L. 157 may be found quoted infra at note 257.
laborers, is not intended as a class of serviteurs. In the first place, the articles refer only to 'propriétaire' or proprietor throughout, in place of 'maître' or master; this could hardly be the result of inadvertance, since the articles from the Projet of the Year VIII, from which these articles are drawn, refer to the maître and domestique. In the second place, the service of the laborer is defined in terms of that which is done 'on plantations or...in manufactures'. This is a departure from the service of all other servants, who are bound to serve their masters." 236.

Tucker's first point - the use of propriétaire - is quite irrelevant. The D.O. has to use this term because it talks of those who lease their services on plantations or in manufactures: the propriétaire is the owner of such plantations or manufactures. In the Projet An VIII, maître and domestique are indeed used: in 3.13.113 the term "domestiques" is qualified by the phrase "attachés à la culture"; 237 in 3.13.114, domestique and ouvrier are mentioned; 238; and in 3.13.115 once more both domestique and ouvrier are mentioned. 239 The difference is that Projet An VIII, 3.13.114 and 115 apply to all servants, whereas D.O. 59 and 60 (p.383) only to ouvriers. 240 Further, the Projet has phrased the articles more directly than has the French text of the D.O. (and the French is here the original text): thus the D.O. talks of the person "qui a loué" or "qui a engagé" his services leaving the propriétaire of the plantation or manufacture; whereas the Projet talks of the domestique or ouvrier quitting the maître or being dismissed by him. The Projet could not use the term propriétaire because it talks also of domestic servants; the D.O. does not, and follows the usage established in D.O. 58 (p.383). As regards Tucker's second point, all that may be said is that he is correct in so far as what

236. Persons, pp.291-2. The three dots where an excision has been made in the passage Tucker quotes are his. 237. Quoted supra between notes 179-80. 238. Quoted supra between notes 181-82. 239. Quoted supra between notes 184-85. 240. For argument, see text supra at note 185-202. 241. The mistakes in the French caused by the copying of the 1800 Projet for D.O. 58 (p.383) show this. See text supra, at note 180.
differentiated on ouvrier from other servants is the nature of the ouvrier's work: that the nature of the employment of an ouvrier is different from that of a domestique is inevitable and has no bearing on whether or not an ouvrier — if this be the correct term for the personnes discussed in D.O. 58-60 (p.383) 242. — is classed by the D.O. as a serviteur. Thus, these two points of Tucker, though correct in themselves, have no bearing on whether or not an ouvrier should be classed as a serviteur.

We may conclude that Tucker has failed to establish that ouvriers or labourers should be excluded from the general class of serviteurs: thus, contrary to Tucker's opinion, D.O. 11 and 12 (p.39) would apply to workmen. 243. Serviteurs here must be used in the general sense given the term by D.O. 3 (p.37). 244. What maybe of some significance is that the D.O. nowhere defines domestique or ouvrier; in D.O. 57 (p.383) the term "domestique", used in the sense of personal or house servants, is qualified by the phrase "attachés à la personne du maître", while in D.O. 58-60 (p.383) the French text only refers to those who lease themselves. The D.O. recognises the different objects of the contracts of lease as having different consequences; but it does not use domestiques or ouvriers as strict technical terms with a particular, defined meaning (though it has been convenient to use them here with such a meaning for purposes of discussion). 245. That is, in the D.O., domestique and ouvrier (labourer) are essentially used to describe the kind of work, rather than describing a servant in a particular juridical relationship with an

242. The rubric of course states "Du Louage des Domestiques et Ouvriers".
244. In his Persons, pp.292-3, Tucker mentions only D.O. 11 and 12 (p.39); what of D.O. 13 and 14 (p.39) — surely he should state that ouvriers are not covered by these articles, since they too talk of serviteurs? In his note 129, pp.289-90 at p.290, he suggests that, in these articles too, serviteurs had the meaning of domestiques. However, he does not take account of this in pp.290-3. In fact, it cannot be so for D.O. 13 (p.39), without radically changing the law in a rather ridiculous fashion: see supra, text at notes 143-146 and 209-213.
245. The C.L., of course, in its article 3172, gives a definition of domestique; this need not concern us. See note 188 supra.
employer. An engage, for example, could serve as a domestique or as an ouvrier.

The division of servants into engagés and apprentices, as found in the D.O., and the rules on such engagés and apprentices seem reasonable and in line with socio-economic conditions of the Territory, where engagés were used extensively and where apprentices to trades would probably play an important part in production - as they did, for example, in Baltimore in the same period. Apprentices were certainly very much a feature of artisan production before industrialisation. Domestic servants and manual labourers are distinguished one from the other; this is apparently because the former are in a close personal relationship with their masters, while the latter are not. In the introduction to this chapter, it was pointed out that in the seventeenth century the status of personal servants was lowered towards that of manual workers, though their relationship to their masters still retained a closeness which went beyond a merely contractual connection.

In the discussion of the Castilian law, it was shown that in the Partidas servants were considered as part of the family of the señor: such servants were a fairly wide class, according to Part. 7.33.6, going beyond merely personal servants. Such closeness of relationship would be unsuitable for Louisiana as regards manual labourers; but as regards domestic servants, it is difficult to say whether or not they were in a close relationship with their masters, a closeness going beyond the formal contractual tie. The extent to which the notion of wage labour had developed in Louisiana by this period is unclear: it is certain that employment in industrial production was negligible. One may surmise that, because industrial employment had not developed, as regards domestic service, the notion of service had not become completely subjected to the ideals of contract.

246. See on engagés, Deiler, op.cit. note 108 supra, and on apprentices C.G. Steffens, op.cit. note 10 supra at p.107; on the latter see also note 11 supra.
247. See supra, text at notes 2-9.
Should this be correct, it explains the adoption (and adaption) of the distinction found in Pothier (or Guyot) between domestics and manual labourers. Domestic service was regarded as involving a personal bond beyond the mere contractual tie. Yet, because of the development of the ideals of liberal individualism and of the exclusion of the servant from the family, the relationship between master and servant was becoming subject to increasing contractual regulation: this explains the difference from the law as stated by Pothier or as in Guyot's Répertoire. The more "personal" view of domestic service would explain the rejection of the provisions of the C.N. and its Projet which did not distinguish, to any extent, between manual labour and domestic service; indeed, they largely assimilated the latter to the former, rendering personal service much more a division of the rules on contract. The close relationship between the personal servant and his master in Louisiana would explain the adoption of the rule of the C.N. that a servant living with his master acquired his master's domicile. The choice among the sources on the liability of the master for his servants' acts would also seem to reflect the contemporary (more contractual) conceptions of the nature of the bond between master and servant; the master's liability for his apprentices would also seem to reflect the nature of the contract of apprenticeship.

This leads to the conclusion that the redactors of the D.O., while heavily influenced by the civilian tradition, recognised both the personal nature of domestic service, and the very loose tie between a master and his labourers: accordingly, drawing on the sources available to them, they sought to embody this recognition in the propositions of

249. See Guyot, Répertoire, vol. 6, s.v. "Domestique", p.102 where he makes exactly the same distinction as Pothier between personal and other service; this is quoted in note 200 supra.
250. See text supra at notes 85-93.
251. See text supra at notes 203-213.
law laid down in their code. From the terms the redactors of the D.O. used, it is obvious that they only conceived of the employment of persons of low status: this probably reflects the outlook of their society, and follows the civilian tradition.

One problem has still to be dealt with: D.O. 2, 4 and 5 (p.37) all mention "sale" of services. D.O. 2 (p.37) states: "Les serviteurs libres sont en général toutes les personnes qui louent, vendent ou engagent leurs services [etc.]

D.O. 4 (p.37) states that the contract which "quelqu'un s'est engagé à en servir un autre pendant un temps fixé, moyennant une certaine somme d'argent une fois payée" is "équivalent à une vente." D.O. 5 (p.37) states that: "Ceux qui ont vendu ou engagé leurs services pour un certain temps, et moyennant une certaine somme une fois payée, comme aussi les apprentis qui se sont engagés pour un certain temps [etc.]," may be forced to make specific implement of their contracts. What is the significance of this usage? D.O. 4 and D.O. 5, by stating that it is those undertaking to serve for a specific time for a certain sum of money who "sell" their services, show that it is only indentured servants, engagés, who "sell" their servants; apprentices are not considered as selling their services, as the wording of these articles indicates.

That this is probably the correct interpretation is suggested by the 1825 C.L.; on the recommendation of the 1823 Projet, D.O. 3 was reformed and D.O. 4 and 5 suppressed, all to be replaced ultimately by C.L. 157, which reads thus:

"Il y a trois sortes de serviteurs libres dans cet État, savoir:

1. Ceux qui ne font que louer leurs services à la journée, à la semaine, au mois ou à l'année, moyennant de certains gages;

Les règles qui fixent l'étendue et les bornes de ces contrats, sont établies au titre du louage.

2. Ceux qui s'engagent à servir pendant un temps fixé, moyennant une certaine somme d'argent, et qui, pour cette raison, sont considérés, non comme ayant

252. Tucker, Persons, p.290 states thus: "Bound servants and apprentices, for example, are considered to have sold their services for the contracts term...." I cannot agree with his view that apprentices - according to the D.O. - sell their services; he must be mistaken.

253. See 1823 Projet, pp.11-12.
3. Les apprentis, c'est-à-dire, ceux qui s'engagent à servir quelqu'un, à l'effet d'apprendre quelque art, métier ou profession.

Ce qui concerne les engagés, dont les services sont vendus pour le payement de leur passage, est réglé par une loi particulière qui n'est point rappelée par ce titre."

This article is generally only a reformulation of the material of the D.O.; and, as such, it is good evidence that only engagés were considered by the D.O. redactors as selling their services, apprentices not being considered as doing so: the redactors of the 1825 C.L. have obviously thought this to be the meaning of the D.O. For an apprentice to be considered as "selling" his services is quite illogical anyway. As D.O. 1 (p.453) states, sale is a contract by which one party gives a thing for a price in money and the other gives the price to have the thing. An apprentice cannot be considered as "selling" his services, for he is getting no money in return; indeed, as D.O. 7 (pp.37-9) states, often the apprentice paid the master: thus, these articles cannot be referring to an apprentice as "selling" his services. On D.O. 4-5 (p.37), Tucker makes the following remarks:

"The analogy to sale is puzzling and unfortunate. Strictly speaking, the sale of a free man's services in the civil law ought to be a conceptual impossibility....

Even apart from Pothier's later distinction between obligations to do and those to give, a sale of services is problematical; it is difficult to conceive of a man transferring all his interest in his own acts to another, without also selling his body as part of the deal.

There are two possible explanations for this bit of deeming. One is that it lays the theoretical groundwork for the master's right of specific performance (article 1.6.5 (p.36)). The other is historical. Hire at common law was regarded as sale for a time. Even today, the master at common law hires the man, not his services.... And in 1808, the incidents of the "hire" more closely resembled those attached to a civil law sale than to lease. In the translation of common law incidents to civil law

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254. The last paragraph was not proposed in the 1823 Projet, p.12. The act referred to must be the 1806 Act, ch. XI.
form, perhaps that form was chosen which most nearly embodied the alien incidents." 255.

It seems unlikely that the intention behind the use of the term "sale" was to ground the master's right of specific performance; such a right of specific performance was integral to the particular contract entered into by engageés; further, apprentices could be held to specific implement of their contracts, and they were not considered as having "sold" their services (though Tucker mistakenly thinks they were256). The common law influence also suggested by Tucker as perhaps being the reason for the reference to sale in these articles seems unlikely to have been the cause: though it is possible that it was.257. What seems, however, to have most influenced the redactors was the nature of the contract entered into by engageés, and their consequent social position: engageés were not free men anymore. The 1806 Act, ch XI, s. 1 talks of parties "entering into indenture either of apprenticeship or servitude"; rewards were offered for the return of absconding engageés.258. In Quebec, an engage was described as: "un homme tenu d'aller partout et faire ce que son maître lui demande comme un esclave, durant le temps de son engagement".259. Cargoes of immigrants were advertised as arriving in New Orleans so that they could be bound for a sum of money which they would hand over to the captain of the ship which brought them to pay for their passage.260. The description of an engage as having sold himself was accurate and apt. Tucker states that sale of one's services was conceptually impossible for the civil law; but the D.O. was dealing with circumstances in Louisiana in the early nineteenth century. The D.O.

255. Persons, p.290, note 130 thereon.
256. See note 252 supra.
257. Blackstone, Commentaries, vol. 1 ch. XIV, §III, p.429, does after all say: "The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages."
redactors were faced with an institution unknown to the Roman law, but very important in the Territory. They seem likely to have been struck by the obvious analogy of engagement to sale; and they used the term "sale" accordingly in their code to enable them to make a distinction between the indentures of engages and the contracts of domestics and labourers. That the redactors were cautious, however, in their use of sale is indicated by the fact that in D.O. 2 (p.37) they couple sale with engager: "vendent ou engagent;" they do the same in D.O. 5 (p.37): "Ceux qui ont vendu ou engagé". D.O. 4 (p.37) only states that engagement is equivalent to sale. The redactors obviously are using the best verb to hand to indicate the nature of engagement as an indentured servant, a verb appropriate given the social circumstances; but they exercise a certain caution in doing so, since they always couple vendre with engager. There is accordingly no need to posit common law influence to explain this usage.

In conclusion, it may be said that the redactors, in their articles on servants of all kinds, by selecting among the sources available to them (though with appropriate innovation and adaption), provided a set of rules in line with legal tradition but which also reflected the redactors' views of the socio-economic realities. There was adequate account taken of the varying kinds of service in Louisiana, and clear rules were provided. The D.O. conceives of "service" as primarily contractual, but with a residue of older notions of the close personal relationship of servants with their masters within the "family". It is worth reiterating that though many of the individual provisions in the D.O. on this topic were taken from the work of the French redactors or Blackstone, the redactors were not breaking from the past: they were providing more modern rules taken and adapted from the sources to hand-rules which fitted the tradition within which they worked - and, to a

261. The English version of D.O. 2 renders "louent vendent ou engagent" as "let, hire or engage."
262. At a general level, comparison of locatio conductio to sale was common. See D.19.2.2 and Pothier, T.C.L. no. 2, Bug. 4, p.2.
certain extent, the rules in the D.O. (allowing for the colonial institution of *engagement*) could readily be viewed as a development or modernised version of the rules in the *Partidas*. This must be because of the similarity of the notions of service and apprenticeship in Europe before industrialisation and because of the Castilian and French laws' common inheritance from Rome.

Part Two. Employment in the 1866 Quebec Code.

In the C.Q. the only provisions to deal specifically with employment are found in the seventh title of the third book, "Du Louage", "Of lease and hire". The Codification Commissioners indicate that the English rubric mentioned both "lease and hire" because "lease" alone was not equivalent to the French "louage" or Roman "locatio": they added that translations of both the C.N. and C.L. showed that the extra word was needed. As already pointed out, the C.N. contains, in its article 1708, an analysis of *louage* into two types and it follows this analysis in the scheme of its title on *louage*. By the time of the redaction of the C.Q., many academic Roman lawyers had adopted the trichotomy in their analysis of *locatio conductio*. The trichotomy was known to the redactors of the C.Q., since they cite Ortolan's edition of, and commentary on, Justinian's *Institutes*: Ortolan followed the trichotomy in his treatment of *locatio conductio*. It is of interest to see whether or not the contemporary theory of the trichotomy has had any influence on the redactors' analysis of *louage*: and the implications of the influence, or the lack of influence, of the trichotomy on the Quebec redactors will be studied.

263. Fourth Report, p.22.
Employment in the modern sense is regulated in the C.Q. by five articles only of Book Three, Title Seven: three more than in the C.N., but considerably less than in the 1825 C.L., which generally retained (though modified) the provisions of the sixth title of the first book of the D.O. The provisions in the C.L. on *engages* might not have been useful, as such indentured servants played no part in the life of mid-nineteenth century Quebec (at least as far as I can discover) though they had been important at an earlier period. Apprentices, however, were a feature of economic life (indeed, the C.Q. mentions them in some articles) and it would have been of evident utility to regulate their legal existence in the code. This was not done, and the example of Louisiana was not followed. Several reasons why may be suggested. First, the method of working adopted by the Codification Commission was such that the ordering of topics in the C.N. would be followed closely. The C.N. did not include in its first book (On Persons) a title on servants. Second, the Commission followed closely not only the ordering of the C.N., but also its individual articles: there were no articles in the C.N. on apprenticeship. Both of these points arising from the method of working would militate against the inclusion of articles on apprenticeship, though they are perhaps not sufficient in themselves to explain the exclusion of provisions on apprenticeship, since the redactors of the C.Q. did sometimes depart from the form of the C.N. and that code's individual provisions. A third reason for the exclusion of regulation of apprenticeship may be found in the fact that the redactors placed most reliance on Pothier as their guide to the *ancien droit*: he nowhere discusses apprenticeship (which in his day would have been regulated not by private law but by the guilds and thus would form part of public law rather than private).

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266. See Dechêne, *op.cit.*, pp. 50-77.
267. See, e.g., C.Q. 1054, 2262 and 720.
268. See text *supra* at notes 52-57.
Further, the commentators on the C.N. whom the Quebec redactors consulted likewise would contain no discussion of the nature and content of the contract of apprenticeship. Fourth, though not all of title six of the first book of the D.O. concerns apprentices, the very presence of this title in the Book "Des Personnes" might well have discouraged the redactors from following Louisiana's example in regulating apprenticeship in their code, because the notion of a servant as a particular type of legal person might have been quite unacceptable to the redactors who were working at the high point of liberal individualism, the precepts of which the redactors espoused. The redactors could have placed articles on apprenticeship elsewhere in the code; but there is no evidence that they ever considered doing so. Thus, though the four suggestions as to why the redactors may not have included provisions on apprenticeship cannot be said to have necessitated the neglect of apprenticeship, they do seem likely to have reinforced the redactors' attitude in not regulating the indentures and service of apprentices.

The suggested reasons for the exclusion of articles on apprenticeship would help explain the neglect of the other articles of the C.L. (which of course had replaced the D.O.) on servants in its first book. C.L. 170 and 171 (formerly D.O. 13 and 14 (p.39)) would of course be covered adequately elsewhere in the C.Q. The C.L. in its articles 3172 to 3174 both defined domestics and regulated what privileges they had in claims for their wages. The C.Q. regulated such privileges in C.Q. 2006; but the C.L. has not obviously been influential, and the redactors did not take the opportunity to define servants as the C.L. had. Here the redactors were probably guided by the C.N., though their

269. See chapter 7 infra.
270. I have generally talked in terms of the sixth title of the first book of the D.O. as this title is already familiar to the reader; it must be borne in mind, however, that the C.Q. redactors used the 1825 C.L. and that it had reformed, to some extent, the D.O. See supra note 95.
271. On C.L. 3172, see supra, note 188.
section on privileges, as it relates to servants, does differ from that of the latter code. 272.

As regards the redactors' general approach to lease of services, in their Sixth Report, in the section on mandate, they state that the distinction between hire of personal services and mandate, when not gratuitous, is insubstantial. They remark that the distinction is not the result of a price being paid or the nature of the service. They point out that the contract is derived from Roman law in all its fundamental rules, and that the distinction in the Roman law was founded upon social differences among the Romans, and upon the fact that arts and professions were exercised by free people (hence "liberal") while other work was left to slaves. Compensation for exercise of the liberal arts was a (voluntary) honorarium, while that for the illiberal arts was called merces or pretium. They state that such a distinction founded only on shifting conditions of social rank can never become fixed or universal in character. 273. Since this is so - they continue - which contract should be classed as lease of services and which mandate must vary according to the nature of the society: thus, aristocratic societies had regarded mercantile business as disreputable, while it is no longer regarded as such. 274. They point out that inevitably there is great disagreement among jurists as to which professions are properly regulated by mandate and which by lease and hire: thus in Rome painting was

274. Ibid., pp.6-8. The statement of the redactors is worth quoting as it holds some interest: "[T]he must vary with the changing estimate which different societies, according to their various constitutions place upon the honour or dishonour of particular employments, either from their imputed excellence, or from the dignity of those who follow them. That occupation which at one time, in an aristocratic state, is regarded as disreputable, at another period, with the diminution of the aristocratic element, may be looked upon as highly honourable; mercantile business affords a familiar illustration of this."
subject to lease and hire while Pothier states that to be a painter is to be a member of a liberal profession in France; Cujas states that advocates and Coquille that attorneys are governed not by mandate but by lease and hire while others, including Pothier and Merlin, take the opposite view. 275. The redactors state that, for all practical purposes, mandate and lease and hire of services are identical; yet, only one code in Europe (the Austrian) - they continue - has chosen to treat all services paid for as objects not of mandate but of lease and hire; the distinction was considered "as the offspring and relic of a condition of things which has long since passed away...." 276.

Despite these points, the Quebec redactors did not follow the example of the Austrian Code (article 1163), though they recognised the artificiality of the distinction that some occupations were the object of mandate while others were that of lease and hire. On the Austrian Code, they remark that Marcadé repeats the opinion of Troplong that its dispositions were all one would expect from a country that enforces military discipline by blows. 277. (Obviously the redactors did not consult the Austrian code themselves: its provision was only known to them through their use of (probably) Marcadé. 278.) The redactors give no

277. See Marcadé, op. cit., vol. 6, p.519 (on C.N. 1779, II), footnote 1: "Une telle disposition est sans doute quelque chose de pénible à voir dans le Code d'une nation européenne; mais elle y cadre assez bien, au surplus, comme le fait remarquer M. Troplong, avec la discipline militaire à coups de bâton."
278. I deduce this because the reference to the Austrian code is quite exceptional; I am sure they gained this knowledge from Marcadé who cites and discusses the Austrian Code. It is significant that they do not cite Troplong's own comment on the code, but rather Marcadé's repeating of Troplong's comment: see note 277 supra.
explanation in their Sixth Report of why they kept the traditional distinction; in their Fourth Report, however, they state that lease and hire of work resembles mandate and often the two were so similar as to render it difficult to define wherein the difference lies. The Commissioners add that they were tempted to submit articles connecting the two, but desisted because the contracts have continuously been kept separate not only in the Roman law but also in all countries that received Roman law; and - they state - the distinction is so woven into the doctrine and jurisprudence that to disturb it might lead to unforeseen difficulties and inconvenience. They conclude that therefore they have adhered to the rules which obtained under the ancien droit and which were reproduced by the Code Napoléon. 279.

The explanation in the Fourth Report of the redactors' reasons for not assimilating mandate and lease and hire of work is reasonable. Given the redactors' reference to Marcadé (and indeed other jurists who discussed the matter) it is tempting to speculate that there may have been other reasons for rejecting the approach of (for example) the Austrian Code; Marcadé, whose report of Troplong's comment on the Austrian Code the redactors cite (approvingly?), puts forward against the Austrian approach arguments influenced by the Romantic movement, and concludes that it would be better for liberal arts and professions to be the subject of a contract sui generis. 280. All the evidence however, points to

280. Op. cit. vol. 6, p.519. Notable for obvious influence from the Romantic movement are the following remarks of Marcadé on this point: "[L]es œuvres de l'esprit et du coeur ne devraient être, selon nous, ni l'objet d'un mandat ni l'objet d'un louage; car il répugne d'admettre que le zèle de ces missionaires qui vont arracher des peuplades sauvages à la barbarie, que la charité de ces saintes religieuses qui reconstituent aux joies de la mondité... pour soigner dans nos hôpitaux les maladies les plus repoussantes, que le dévouement du médecin, du soldat, de l'avocat et du professeur, que le génie de l'artiste et du savant, avec sa brûlante ardeur, son inspiration et son enthousiasme, que toutes ces saintes et belles choses ne sont que des choses à louer, n'est-il pas aussi par trop bizarre et contraires à toutes les idées reçues de voir un mandat, ... dans tout travail sans prix, de telle sorte que le savetier qui raccammode mes bottes se trouve élevé à la dignité de mandataire le jour où il veut bien, pour un fois en passant, les raccorder gratis? See also p.520 where in respect of poète, artiste, savant, prêtre, soldat, and professeur, he talks of "l'ardent amour du vrai, et du beau, le dévouement à la patrie et à l'humanité, l'enthousiasme du génie, ces nobles et saintes passions des grandes âmes."
the reason behind the redactors' rejection of any change as being legal tradition. The Austrian Code indicated that change was possible and the redactors acknowledged the inadequacies of the traditional civilian distinction between lease of wage labour and mandate and recognised that this distinction was outmoded; the Commissioners, however, because of the influence of tradition, did not consider that the law should be changed. Their legal conservatism maintained the tradition, even though they recognised the need for change. 281.

Before discussing general divisions of louage, and the actual provisions on lease of labour, C.Q. 84, from the third title "Of Domicile" of the first book, must be dealt with. This article states thus:

"The domicile of persons of the age of majority, who serve or work continuously for others, is at the residence of those whom they serve or for whom they work, if they reside in the same house."

This conforms to C.N. 109, from which it is closely copied. The redactors do not indicate that this article settles a dispute which existed in the old law, though they must have been aware of this since they refer to both the Pandectes Françasies and Merlin's Répertoire. The authors of the former work state of C.N. 109 that, "Cet article décide une question autrefois fort controversée. On doutait si la commoration pour une service ou un travail habituel, attribuait le domicile."282. The Pandectes Françaises discuss the two main arrêts on the point; 283. Merlin, whom the redactors also cite, does likewise and he gives as his opinion that the C.N. had decided the point wrongly and that

281. Though the titles on mandate and on lease and hire are adjacent in the code, they are the subject of different reports separated by almost a year. Thus, the Fourth Report (lease and hire) is dated 20th. February, 1863, while the Sixth Report is dated 1st. January, 1864. This does not seem significant for us, however. Both titles were originally drafted in English by Commissioner Day. See Brierley, Codification, p.538 note 45 and McCord, Preface, pp.viii-ix. Marcadé had been studied in connection with title on lease and hire: his views on the matter and on the Austrian Code etc. must have been known.
282. 2 Pan. Fran, p.427.
283. Ibid.
a servant ought not necessarily to have the domicile of his master. The redactors also cite provisions of the Digest title *ad municipalem et de incolis*: D.50.1.6.3 and h.t.22. These Roman texts are only of relevance if servants are equated with freedmen. It is difficult to accept that the Quebec redactors seriously considered these texts; one suspects that they are cited only to give validity to the proposition in the C.Q. by lending it support from the prestige of the *Corpus Iuris Civilis*. The redactors were not legal historians; they sought suitable workable propositions of law: one may suspect that the solving of the dispute in the ancien droit over the domicile of servants was much more important than considering Roman provisions on freedmen which seem to have been cited as an ex post facto justification of the redactors' choice.

The Quebec redactors were here faced with two

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284. Merlin, *Recertoire*, vol. 4 s.v. "domicile" 4 n.1 and 2 pp.10-11. The first arrêt concerned sieur Nicolas Sautereaut, by origin from Burgundy, who was employed as an Intendant by the Marquis de Bonnelle between the years 1724 and 1760 with whom he lived and by whom he was fed and lodged. On arbitration, five avocats decided Santereau had retained his domicile of origin (Burgundy): the arrêt of 13th. August, 1763, confirmed this. A decision of the Châtelet of 6th. May, 1768, judged that a domestic was domiciled with his master. *Nouveau Denisart*, vol. 6 s.v. "domicile", § II, 3 on servants also put the view contrary to that eventually taken by the C.N. The C.Q. redactors do not cite the *Nouveau Denisart*; but they do cite 1 Bour. 90. This is a reference to François Bourjon, *Le Droit Commun de la France* etc. (see chap. 4 note 945 surra). Book 1 of vol. 1 of Bourjon's work, p.90 is to a section on domicile (Title 9 Du Domicile starts p.89); however, in the edition I used, that of 1747, there is no allusion to the domicile of servants; and indeed, the work was written before the two arrêts already mentioned.

285. D.50.1.6.3: Libertini originem patronorum vel domiciliwm sequuntur: item qui ex his nascuntur. I will only quote the proemium of h.t. 22, the subsequent parts not being of particular relevance: Filii libertorum, libertarumque, liberti, paterni et patroni manumissoris domiciliwm aut originem sequuntur.

286. Maleville, 1 Analyse, p.109 does similarly; on C.N. 109 he only makes the following laconic remark: "Conforme aux lois 8 et 22 ff *ad municip.*" He does not allude to the dispute in the ancien droit.
possibilities: they could give a servant who lived with his master the latter's domicile or they could not. The ancien droit was undecided. The C.N. offered one solution (such a servant was domiciled with his master); but this solution was the subject of some criticism. The Quebec redactors chose to follow the C.N., which, in its article 109, could suggest that the relationship between master and servant was other than one of pure contract. Of course, ouvriers working in industrial production would not acquire the domicile of their masters, with whom they would not live. 287. The acquiring of another's domicile is inevitably predicated on some notion of dependency on him: the servant is his master's dependent and hence acquires the latter's domicile. This contradicts the idea that a servant by contract leases his services to his master and in return gains wages: a purely formal arrangement between individuals in which domicile is irrelevant. The redactors believed in the doctrines of freedom and sanctity of contract; but they preferred to follow the C.N. here, though its article could have been interpreted as contrary to current notions of the contractual nature of relations between master and servant. It may be said that domestic servants living with their masters in fact would be economically and socially quite dependent on them.

Title seven of the third book of the C.Q. is entitled "Of lease and hire". Its first article, C.Q. 1600, states thus:

"The contract of lease or hire has for its object either things or work, or both combined." 288.

This is rather different from its equivalent in the C.N., 1708, which states:

"Il y a deux sortes de contrats de louage: Celui des choses, Et Celui d'ouvrage."

The Quebec redactors state that the first three articles of

287. In preindustrial society, workmen and apprentices would frequently have lived with those artisans whom they served. 288. In the French version: "Le contrat de louage a pour objet soit les choses, soit l'ouvrage, ou les choses et l'ouvrage tout à la fois."
this title correspond with the first three of that (title eight) of the C.N. (1708, 1709, 1710), but that they have improved on the wording of C.N. 1708 in their own C.Q. 1600. Indeed, though the organisation of this title of the C.Q. follows that of the C.N., and thus follows the latter's analysis of louage into two, C.Q. 1600 seems to suggest that there is one contract of louage but with three types, depending on the object of the contract: further, in their Report, the redactors have suggested that the division of louage into two found in the C.N. 1708 is inaccurate and that they have "improved" on C.N. 1708. The change in C.Q. 1600 from the wording of C.N. 1708 is of interest; but before considering it further, it is useful to examine the sources referred to by the redactors.

The authorities cited for this article are C.N. 1708, the Digest, Cujas, Pothier and Voet. The first of these has already been quoted. The relevant passage of the Digest is D.19.2.22.1:

"Quotiens autem faciendum aliquid datur, locatio est."

Cujas, as cited, states:

"Locatio conductio est negotium ἀντίστροφος emptioni et venditioni, quia proximum et simile adeo, ut emptionis venditionis et pretii verbo promisce utamur etiam in locazione, conductione et mercede. Et est locatio conductio, conventio nuda faciendi fruendive aliquid certa mercede. Locator qui dat aliquid fruendum vel faciendum. Conductor, qui accipit. Et locatori datur actio locati, conductori utraque directa."

290. Ibid.
291. Paratitla in Libros Quinquaginta Digestorum, seu Pandectarum Imperat. Corisj Justiniani, Paris, 1656, Cum notis Alex. Chassanaei et indice obligationem et actionem, et Epitome in eundem Indicem; 19.2, Locati conducti, (pp.137-8 of this edition). It is interesting to note that Maleville, 3 Analyse, p.372 cites this passage of Cujas and on p.373, cites D.19.2.22.1: this seems another example of the obvious phenomenon that in the C.Q. redactors' reports less obvious or more obscure writers are often only cited if some author whom the redactors regularly use (e.g. Maleville, Pothier, Pan. Fran) refers the redactors to such authors. One may conclude that the redactors did not assiduously read all the writings of the numerous authors they cite. If Maleville cited a passage of Cujas, and this passage seemed interesting, the redactors would read it.
Pothier states:
"Il y a deux espèces de contrats de louage: le louage des choses, et le louage des ouvrages." 292.

And:
"Le contrat de louage est celui qu'on appelle bail à loyer: on l'appelle aussi bail à ferme, lorsque ce sont des fonds de terre ou des droits qui en font l'objet." 293.

The citation of Voet is "Voet, ad Inst. 1, 3, t.25, § 1"; this must be a reference to his Elementa Iuris secundum ordinem Institutionum in usum domesticae exercitationis digesta, 294 which, in relevant part, states:

"Locatio conductio est contractus bonae fidei, consenui constans, de usu vel opera cum mercede commutanda. Licet enim in jure nostro occurrat etiam locatio et conductio operis, unde et operam redemtiores appellantur, et eius quidem vel per aversionem, vel in pedes mensuras e locatio... tamen ipsa conductio seu redemtio operis continet in se locationem operae; dum artifex opus redimens locat operam suam, seu faciendi necessitatem....


Voet here apparently makes a fairly convential division into two types: he would seem to distinguish between lease of the usus of an object and of the opus or operae of a man. He does point out that there may also be locatio et conductio operis by contractors (redemtiores), though he adds that such conductio seu redemtio operis contains in itself a locatio operae: he here echoes D.19.2.22.2. 296 Voet in his

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292. T.C.L., introduction, Bug. 4, p.1. There is in fact no reference to this; but since it is relevant, and known to the redactors, I have included it.
293. T.C.L. no. 1, Bug. 4, p.2. It is to this passage that McCord refers: and though I have only quoted it in part, this part is the only relevant section.
294. I used the second edition, Leyden, 1705. For this being the only work which corresponds with the O.Q. reference, see A.A. Roberts, A Guide to Voet. Including the Life of J. Voet, Pretoria, 1933, pp.15-17.
295. 1705 edn., Bk. 3, tit.25, pp.151-2. In the quotation, the dots replace various references to passages of Roman law, such as D.19.2.22.2.
296. See note above. D.19.2.22.2 is quoted supra between notes 18 and 19.
Commentarius ad Pandectas did first develop the modern trichotomy and analysis of locatio conductio. ²⁹⁷.

None of the passages cited by the redactors contain a description of louage at all resembling that found in C.Q. 1600, though indeed all the passages are inevitably related to the Quebec code's description of louage. As stated, the redactors in their article provide that louage has three alternative objects, the first two of which are obvious and traditional; the third, however, is problematic: "les choses et l'ouvrage tout à la fois." This cannot be the contemporary theory of the trichotomy, though the trichotomy was known to the redactors ²⁹⁸. locatio operis could not readily be described as a combination of lease of things and work. Where the third aspect of louage (lease of things and work combined) in C.Q. 1600 seems to originate is in criticism of the organisation of the French code and its treatment of the material. The title of the French code "Du louage" is divided into four chapters. The first of these contains general provisions on louage; the second deals with louage des choses; the third with louage d'ouvrage et d'industrie; and the fourth with bail à cheptel (the lease of cattle on shares). The Quebec redactors have followed this scheme exactly. C.N. 1708 said there were two types of louage: that of things and that of work. C.N. 1711 said that these two types subdivided into several types, one of which was bail à cheptel. Marcadé criticises the French code. He points out that the code states bail à cheptel to be a subdivision of the other two, and he comments thus:

"Or il [i.e. le code] se met ensuite en contradiction avec cette donnée, puisque, au lieu de placer le bail à cheptel dans l'un des deux chapitres précédents, il le range dans un chapitre particulier et en fait un troisième classe indépendante." ²⁹⁹.

²⁹⁷. Commentarius ad Pandectas, esp. 19.2-33. On this being the origin of the trichotomy, I have accepted the views of Olivier-Martín: see his Louage, pp.467-8.
²⁹⁸. Ortolan, op.cit. note 265 supra, vol. 2, pp.260-261 exhibits the trichotomy most clearly: he accepts the contemporary view without hesitation. The redactors consulted and apparently borrowed from Ortolan for C.Q. 1663: see infra at notes 331-341.
²⁹⁹. Marcadé, op.cit., vol. 6, p.418, Comment II on C.N. 1708-711.
He continues, pointing out that of the two approaches the code adopts to bail à cheptel (first, treating it as a subdivision of the other two; second, treating it as a third class), the second is the more appropriate, because bail à cheptel presents a "nature toute particulière" not only as "tout à la fois louage de choses et louage d'ouvrage" but also as being closely related to the contract of partnership (société). Though the redactors do not cite Marcadé as an authority specifically for C.Q. 1600, they were familiar with his work, and used it extensively: indeed, they cite a passage, next to the one just quoted from, in connection with C.Q. 1602.

It may be concluded that the third aspect of lease adumbrated in C.Q. 1600 - "les choses et l'ouvrage tout à la fois" - refers to the fourth chapter of the title, that on bail à cheptel. The redactors have improved on C.N. 1708, influenced by comments such as those of Marcadé, though none of the authorities cited specifically in connection with C.Q. 1600 (the Digest, Cujas, Voet, Pothier and C.N. 1708) indicate the origin of the description of louage in C.Q. 1600 nor provide a critique of the French code. It is tempting to suggest that Marcadé's phrase "tout à la fois louage des choses et louage d'ouvrage" is the source of C.Q. 1600's "les choses et l'ouvrage tout à la fois"; but this is not necessary for the argument.

The Quebec redactors knew of the trichotomy; nonetheless, they rejected the threefold division of louage and followed the scheme of the French code. Some reasons may be suggested for their actions. First, had the trichotomy been adopted, the provisions of the C.N., and the model provided by its title, could not have been followed; the redactors would also have had to provide a new title on bail à cheptel.

300. Ibid. Marcadé gives as his opinion that bail à cheptel should not be treated as an aspect of louage, properly so called, because of its connection with partnership.
even though the latter was of minimal importance in Quebec. Second, the conservative nature of the actions of the Quebec redactors generally would militate against a radical alteration of the ordering of the material on louage. A division of louage into two was traditional; the Quebec redactors could have seen no real reason for altering that traditional analysis and none of the authorities they cited would have suggested that they should. Thus, the redactors followed the scheme of the Code Napoléon. They altered the general provisions in the first chapter to improve on the descriptions of the various forms of louage; this seems to have been prompted by criticism of the Code Napoléon. They maintained the Code Napoléon's treatment of bail à cheptel as an aspect of louage though this was in some respects unsatisfactory (Pothier, notably, does not treat of bail à cheptel in his Traité on louage).

The first chapter of the title has one further article mentioning louage of work, C. N. 1602, which states that:

"The lease or hire of work is a contract by which one of the parties, called the lessor, obliges himself to do certain work for the other, called the lessee, for a price which the latter obliges himself to pay."

The French text renders "lessor" locateur and "lessee" locataire. This is similar to C. 17.1710 and the articles of both codes clearly refer to both locatio oreris and that operarum (indeed they combine the two). C. 1602 differs from C. N. 1710 basically only in including the phrases

301. On the redactors' knowledge of the trichotomy, see note 298 supra. On bail à cheptel, the redactors point out that there are 32 articles in the C. N., but only three in the C. Q.: this is because - they say - in certain parts of France the leasing of cattle and sheep on shares was very common. Such provinces as Berry, Brittany, Nivernois and Bourbonnais had abundant and minute provisions on it in their Coutumes, and the C. N. has drawn on them. They remark that "In this country, the contract is of little comparative frequency or importance." They rejected the C. N.'s detailed rules as useless and perhaps harmful in Quebec where parties accustomed to make special agreements or conform to local usage in such a bail. Fourth Report, p. 34.
"called the lessor" and "called the lessee." The redactors refer to Cujas and the Digest (both as cited for C.Q. 1600) and to Rousseaud de la Combe and Marcadé. 302. In the relevant passage, Rousseaud de la Combe states that:

"Le locataire appelé en Droit, conductor, est celui qui dat pecuniam; le bailleur appelé en Droit, locator, qui eam recipit...." 303.

Rousseaud's account does not consider that in locatio operis it was generally the locator who paid the money. 304. The C.Q. redactors cite two passages from Marcadé's Explication. The first passage cited 305 gives a lengthy discussion of the various views put forward as to who was locator and who conductor; the second passage cited summarises Marcadé's opinion and arguments. 306. This second passage states thus:

"Le louage pur ou parfait est un contrat par lequel une partie qu'on appelle locateur s'oblige à faire jouir, soit d'une chose, soit de son travail ou de son industrie, une partie qu'on nomme locataire et qui s'oblige à lui payer le prix de cette jouissance."

It goes on to summarise further the first passage. For our purposes, a passage, uncited by the C.Q. redactors, may conveniently be quoted as concisely putting Marcadé's views:

"Nous avons prouvé plus haut (art. 1710-III), contre les jurisconsultes romains, et contre Domat, Cujas, Pothier et M. Troplong, que l'idée d'après laquelle le locateur est, dans le louage d'ouvrages, aussi bien que dans le louage des choses, celui qui reçoit le prix, et le locataire celui qui paye, idée qui est consacrée par notre Code, est en effet la seule qui fût vraiment rationelle, la seule qu'une législation logique dût adopter.

Le louage d'ouvrage ou d'industrie est donc un contrat par lequel une partie, qu'on appelle locateur, s'oblige à faire jouir de son travail une autre partie qui s'oblige à le payer et qu'on appelle locataire." 307.

Marcadé lays great stress on who pays the price as what

302. They refer also to Troplong, whom I have not been able to consult; but see note 308 below.
303. Rousseaud de la Combe (op.cit., ch.4, note 952 supra), p.441 s.v. "louage".
304. See text supra at notes 17-18.
305. Marcadé, op.cit., vol.6, pp.419-424, comment III on C.N. 1708-1711.
306. Ibid., résumé du titre huitième, p.570.
should distinguish the lessor from the lessee. The C.Q. redactors have adopted Marcade's view, and, no matter the nature of the ouvrage, accept that the person who pays is the lessee or locataire. This fudging of one of the distinctions between locatio operarum and that operis (as developed by the trichotomy) highlights the C.N.'s division of louage into two types. The redactors of the C.Q. have adopted Marcade's terminology to avoid the possible confusion over who was locateur and who locataire: a confusion which the C.N. had apparently given rise to, since Troplong had been of the opinion opposite to that of Marcade. As is obvious, this adoption of the opinion of Marcade must have caused some problems for the redactors: his opinion ran contrary to that of many of the writers on the ancien droit - notably Pothier - and contradicted the Roman texts. Indeed, it is notable that Marcade states that Domat, Pothier, Cujas and the Roman jurists disagreed with him, while citing no jurist of the ancien droit in his support. Marcade states that only two other writers on the C.N. discussed the point: Duvergier, who agreed with Marcade, though providing no arguments, and Troplong, who held the contrary view. In following Marcade, the redactors would be open to the charge of changing the law. The redactors, however, cite a passage from Rousseaud de la Combe to justify their view: this passage conforms with Marcade's opinion; but Rousseaud's use of the term bailleur suggests he only had louage des choses in mind, as bailleur is a term normally reserved for one who lets out land to another in a contract of bail à loyer or bail à ferme. All the redactors remark in their Report is that the proper application of the terms "lessor" and "lessee" is explained to avoid confusion.

308. See Marcade, op.cit., vol. 6, pp.421-424, comment III on C.N. 1708-1711. The C.Q. redactors cited Troplong (see note 302 supra); but the fact Marcade cites him allows us to know what Troplong said and to know that the C.Q. redactors rejected his views.

309. See T.C.L. no. 392, Bug. 4, p.133.


311. See Marcade, op.cit., vol. 6, p.419, and Pothier, T.C.L. no. 1, Bug. 4, p.2: it could be used also for bail à cheptel, but not for louage d'ouvrage.

The conclusion must be that here the redactors have innovated, following Marcadé. This innovation is probably sensible; and it certainly does avoid any possible confusion over terms. It does, however, amount to a break with the Roman tradition and the ancien droit, though the citation of Rousseaud would suggest that the redactors might have been trying to conceal their change or thought that there was an alternative tradition. Given that the redactors were working at the period when the theory of the trichotomy was becoming influential, such a definite ascription of the terms to the parties would avoid possible confusion (it may be recalled that the trichotomy placed great emphasis on the conductor operis being he who was paid while the conductor operarum and conductor rei were those who paid). The redactors must have considered that not to make he who pays always the locataire would be likely to cause confusion, especially when there was such disagreement over terminology.

C. N. 1711 has no equivalent in the C. Q. The third chapter of this title is that entitled "Of the Lease and Hire of Work." Its first section contains one article, C. Q. 1666:

"The principal kinds of work which may be leased or hired are:

1. The personal service of workmen, servants and others;
2. The work of carriers, by land and by water, who undertake the conveyance of persons or things;
3. That of builders and others, who undertake works by estimate or contract."

313. Note that Marcadé in disagreeing with Cujas cites a different work of the latter than that cited by the C. Q. The passage of Cujas cited, however, does disagree with the views of Marcadé and C. Q. 1602 in so far as Cujas defines the "locator" as he who hands over something.

314. See text supra at notes 166 and 167.

315. The redactors remark, Fourth Report, p. 22, that the specification of C. N. 1711 has not been adopted. This, of course, has to do with the new description of louage in C. Q. 1600 and with the fact that in C. N. 1711 bail à chentel is stated merely to be a subdivision of lease of things and lease of work. See text supra at notes 297-301.

316. See text supra at notes 273-283 for general comments of redactors. In French, "Du louage d'Ouvrage."
The French text renders "workmen" as "ouvriers" and "servants" as "domestiques". C.Q. 1666 is similar to C.N. 1779, with one difference significant here: the first type of louage d'ouvrage described in the C.N.'s article is "Le louage des gens de travail qui s'engagent au service de quelqu'un." The C.Q. has phrased this form of louage d'ouvrage as apparently incorporating a much wider class of workers than does C.N. 1779; this could be the result of a growth in the number of occupations in which one leased one's services. The redactors unfortunately do not say why they here altered the wording of C.N. 1779: all they do state is that their proposed article corresponds in character to C.N. 1799.317. The wider phrasing of C.Q. 1666 must have some significance; but the problem is whether "and others" ("et autres") should be interpreted broadly or restrictively. Both Faribault318 and Mignault319 are of the opinion that this section must comprehend more than domestics, manual labourers and the like. Mignault points to C.Q. 2260, 2261 and 2262 on prescription, which seem to imply that not only menial tasks are the subject of lease of personal service.320 If he is correct, the Quebec redactors have widened the scope of locatio operarum: Pothier took a much more restricted view. This broadening of the scope of lease of services must be in response to the growth and complexity of economic life in Quebec: it is in line with the redactors' wish to assimilate mandate and lease of work.

Section Two of this chapter is entitled "Of the lease and hire of the personal service of workmen, servants and others", "Du louage du service personnel des ouvriers, domestiques et autres." Its first article, C.Q. 1667,

320. C.Q. 2260 (6) states: "for hire of labour, or for the price of manual, professional or intellectual work and materials furnished." 2261 (3): "For wages of workmen not reputed domestics who are hired for a year or more" 2262(3): "For wages of domestic or farm servants, merchants' clerks and other employees who are hired by the day, week or month, or for less than a year."
321. T.C.L. no. 10, Bug. 4, p.7 quoted supra at note 41.
states thus:

"The contract of lease or hire of personal service
can only be for a limited time, or for a
determinate undertaking.

It may be prolonged by tacit renewal."

C.N. 1780 is similar, but without the second paragraph. 322.
The wording of C.Q. 1667 is also more precise than that of
C.N. 1780; but the further significance (if any) of this
is unclear. The provision on tacit renewal was found in
the ancien droit:

"Il paraît que la tacite reconduction doit aussi
avoir lieu pour les services des serviteurs, des
servants et des ouvriers." 323.

And, of course, tacit renewal would apply under the C.N. 324.
The redactors cite D'Espeissest who stated that: "[L']homme
libre ne peut pas louer ses œuvres à perpétuité...." He
explains:

"Vous avez été achetés par prix; ne devenez point
serfs des hommes, ... parce que ce seroit rendre
inutile la liberté, à moins que le louage ne fut
fait en faveur de la cause pieuse, comme si on s'étoit
loué à servir perpétuellement un hôpital; car alors
celouage est bon." 325.

As regards the C.N., similar statements are made by Maleville
and the Pandectes Françaises. 326. The redactors also cite
Troplong who was of the opinion that a contract of service
for a determinate period, but which would last for the
lifetime of the lessor could be invalid. 327. It is difficult
to know what significance to attach to this reference to

322. Quoted supra between notes 77 and 78.
324. See e.g. Larcadé, op.cit., vol. 6, p.527, comment III
on C.N. 1780-1781.
325. D'Espeissest, op.cit., s.v. "Louage", s.2n.6, p.91 of
tome 1 of 1750 edn. The redactors of course cited Pothier
(as note 323 supra).
190-1. Serres, op.cit., Bk. 3, tit. 25, 1 p.501 states
"on peut même louer ses œuvres, son travail et son
industrie, pour un certain temps, mais non pas à perpétuité
ou à vie: car un tel traité seront nul, comme sentant la
servitude et l'esclavage."
327. Troplong's work was unavailable to me; Larcadé, op.cit.
vol. 6, pp.525-7, comment II on C.N. 1780-81 discusses him
extensively and enables us to know Troplong's opinions. Of
course, this may not be the particular passage to which the
C.Q. redactors refer; even so, it is of relevance.
The redactors also cite provisions from Justinian's Digest dealing with attempts to infringe others' liberty of action as regards marriage and domicile. All that may definitely be said about this provision of the C.Q. was that it follows the ancien droit and improves on the wording of the C.N. in making express the provisions on tacit renewal and in stressing that the term of service was "limited", "limité". (Could this latter be a reaction to Troplong?) All the redactors state in their Report is that they have added to C.N. 1780.

C.Q. 1668 is as follows:

"It is terminated by the death of the party hired or his becoming, without fault, unable to perform the services agreed upon.

It is also terminated by the death of the party hiring, in some cases, according to circumstances."

There is no such article in the equivalent section of the C.N.; the redactors remark that this is a matter which had to be decided and inserted here, the extinction of a contract by the death of one of the parties being an exception to the general rule. There is also no equivalent article in the 1825 C.L. The redactors apparently did consult C.N. 1795, from the next section of the code, which stated:

"Le contrat de louage d'ouvrage est dissous par la mort de l'ouvrier, de l'architecte ou entrepreneur."

Pothier is also referred to; specifically nos. 165-8 and 171-5 of his Traité. Nos. 165-8 concern the effect of force majeure. No. 165 enunciates the general principle that "Lorsqu'un ouvrier ou serviteur a loué ses services à un maître, si par une force majeure ces services n'ont pu être rendus, le maître doit être déchargé du prix desdits services."

The rest of nos. 165 to 168 discuss this point by means of examples, and deal with the rights and liabilities between

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328. Supposing that this is the passage the redactors had in mind: see note 327 supra.
329. D.35.1.71.1 and 2, from the title de condicionibus et demonstrationibus et causis et modis eorum quae in testamento scribuntur.
332. T.C.L. nos. 165-8 and 171-5, Bug. 4, pp.61-2 and 63-64.
master and servant in various circumstances of force majeure. Nos. 171 to 175 deal with the difference between force majeure and fault in the event of the contract between master and servant coming to an end. Should there be fault, the party at fault is liable in damages.\textsuperscript{333} Thus, these passages are relevant as regards the contract ending by force majeure, or one party without fault becoming unable to carry out his bargain. There is no mention of the effect of the death of one of the parties on the contract, and, indeed, in the context of the contract for services, Pothier does not discuss the point. On locatio operis, Pothier does say that the contract would be dissolved if the obligation depended on the personal work and abilities of the conducteur; should it not, the heirs of the conducteur had to carry out the work.\textsuperscript{334} The death of the locateur, however, in locatio operis, according to Pothier, never ended the contract: this is in line with C.N. 1795 (\textit{surra}), also on the contract operis.\textsuperscript{335}

The redactors cite no other writers on the ancien or nouveau droit. They do cite Ortolan's \textit{Explication Historique des Instituts de l'Empereur Justinien}.\textsuperscript{336} Ortolan states thus:

"Pour le louage des services (operarum), le contrat finit par la mort de celui qui a loué son travail, car avec lui pérît aussi la chose louée."

This seems to be the direct source of the Quebec rule on death of the parties. It may be pointed out that no such direct rule is made in Justinian's \textit{Institutes}; the only passage the \textit{Institutes} have on this point states that:

"Mortuo conductore intra tempora conductionis, heres eius eodem iure in conductionem succedit." \textsuperscript{337}

For the contract operarum the conductor would be the master

\textsuperscript{333} On these passages, see further supra at notes 194-199.
\textsuperscript{334} T.C.L. nos. 453-6, Bug. 4, pp.152-4.
\textsuperscript{335} T.C.L. no. 444, Bug. 4, p.149: "La mort du locateur ne résout pas le contrat de louage d'ouvrage." See on the relation of Pothier's views to C.N. 1795, \textit{Fenet sur Pothier}, p.564.
\textsuperscript{336} Vol. 2 p.269. The redactors cite p.271; this could be the result of different editions.
\textsuperscript{337} Inst. 3.21.6. See also D.19.2,19.9 and Voet ad \textit{Pandectas}, 19.2.22 and 27.
or employer; for that **operis**, he would be the person hired.\textsuperscript{338}

The redactors' rule must be correct, and for the reason Crtolan gives, even though they produce no authority from the \textit{ancien droit}. Marcadé, for example, states that:

"Le louage des services finit toujours par la mort du domestique ou de l'ouvrier. Le maître ne saurait être contraint d'accepter leurs héritiers à leur place, et ceux-ci réciprocement ne pourraient pas être contraints par le maître à continuer le travail de leur auteur, le contrat n'ayant été formé de part et de l'autre que pour la personne de cet ouvrier ou de ce domestique. Quant à la mort du maître, son effet ne saurait être indiqué en thèse et d'une manière absolue; car c'est par les circonstances de chaque espèce qu'on verra si le louage n'a été fait qu'en considération du maître, et si la mort des lors doit résoudre le contrat." \textsuperscript{339}

This is the rule of C.Q. 1668; indeed any other rule would be unacceptable. The most interesting aspect of this article is not the content of the rule on the effect of death but the fact that the redactors (presumably) could find no source from the \textit{ancien droit} to support their proposition, and ended by citing a textbook on Roman law. This must reflect the increased interest in the contract for services in the nineteenth century.

There is one further important point in connection with this article. It will be recalled from the discussion of Louisiana that Pothier and Guyot divided servants into two types: personal servants and ouvriers. Masters could dismiss personal servants at will and with impunity; personal servants had not a corresponding right to quit. The rules for ouvriers were different; they could neither be dismissed nor held to their contracts in the way in which personal servants could.\textsuperscript{340} No trace of such a division between personal and other servants appears in the C.Q., which has here followed the C.N. in not distinguishing between servants according to the nature of their work. In the authorities

\begin{itemize}
\item \textsuperscript{338} Cf. Pothier's rule, notes 334 and 335 supra.
\item \textsuperscript{339} Marcadé, \textit{op.cit.}, vol. 6, pp.527-8, comment III on 1780-81.
\item \textsuperscript{340} See text \textit{supra} at notes 193-200.
\end{itemize}
consulted in connection with C.Q. 1668, it is notable that No. 176 of Pothier's Traité is not mentioned: this is the passage that makes explicit the distinction between personal and other servants.\textsuperscript{341} The redactors have clearly rejected this distinction found in the ancien droit. The distinction is founded on the idea that personal servants are in a close relationship with their master: a relationship outwith the ties of formal contract. The redactors have preferred to place all servants in the position of abstract contracting individuals rather than having personal servants as dependents in the power of their master. C.Q. 1668 thus contains a change in the law not pointed out by the redactors.

The next article in this section, C.Q. 1669, states that:

"In any action for wages by domestics or farm servants, in the absence of written proof, the master may offer his oath, as to the conditions of the engagement and as to the fact of payment, accompanied by a detailed statement.

If the oath be not offered by the master it may be deferred to him, and is of a decisory nature, as regards the subjects to which it is limited." \textsuperscript{342}

Though this article is apparently different from C.N. 1781, the principle is the same. The redactors state the provision follows the existing law and is coincident with C.N. 1781.\textsuperscript{343} The redactors cite as authority article 127 of the Coutume de Paris, Pothier, Guyot's Répertoire, and the Nouveau Denisart. Article 127 states that there is a year's prescription period for wages; on this Ferrière states:

"[S]i les serviteurs font leur demande dans l'an contre leurs maîtres, ils ne sont pas reçus à leur serment, au cas que leurs maîtres allegent le payement fait de leurs loyers, mais le serment est déferé aux maîtres...." \textsuperscript{344}

The Nouveau Denisart states that the servant's action against

\textsuperscript{341} T.C.L. no. 176, Bug. 4, p.64, quoted supra at note 198.
\textsuperscript{342} Quoted supra between notes 77 and 78.
\textsuperscript{343} Fourth Report, p.30.
\textsuperscript{344} Corr. et Compl. vol. 2, col. 542, no. 16 on C. de P. art. 127.
his master prescribes after one year; but a servant may still put his master on oath. 345. Guyot's Répertoire states that:

"Boniface rapporte un arrêt qui a jugé que quand il y a contestation entre le maître et le Domestique sur les conditions de l'engagement et le payement des gages, le serment du maître doit faire foi, à moins qu'il n'y ait un écrit. Cette Jurisprudence est aussi celle du châtelet de Paris et le parlement l'a confirmée par arrêt du 14 Decembre 1764." 346.

Pothier is cited; but his passage does not repeat an identical rule. He discusses whether, in a dispute between master and servant over the former's dismissal of the latter, a master should produce proof of his allegations of just cause or if the judge should rely on the master's "déclaration". Pothier states that "la decision doit être laissée à l'arbitrage du juge, qui doit se déterminer par les circonstances, et par la dignité du maître." 347. It is obvious that C.Q. 1669 follows the existing law. Pothier's more cautious statement has not been adopted; the redactors presumably preferred the more certain rule of the other authorities.

The reasoning behind the provision is easy to understand. The Pandectes Françaises explain that:

"En effet, on n'est guère dans l'usage de prendre des quittances des gages que l'on paye à un domestique, et des salaires que l'on donne à un ouvrier. Il est juste, dans ce cas, d'accorder la créance au maître. La règle contraire, ou celle qui exigerait une preuve écrite serait très-embarrassante." 348.

Maleville states as follows:

"On demanda si le domestique ou ouvrier pouvait être reçu à prouver par témoins que le maître avait convenu lui devoir tant, et si malgré l'offre de cette preuve, l'affirmation devait être déférée au maître.

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347. T.C.L. no. 175, Bug. 4, p.64.
On répondit que l'offre de preuve ne devait pas être reçue parce que les ouvriers et domestiques se serviraient de témoins entre eux."

The redactors would approve of the class distinctions and attitudes implicit in these statements: servants were presumed to be much more likely to be dishonest than masters. One point of note is that C.Q. 1669 states specifically that it applies only to actions by domestic and farm servants. That this is so specific must mean that other ouvriers and employees are not subject to these rules. (It may be recalled that C.Q. 1666 mentions generally "workmen, servants and others"). This means that the provision differs from C.N. 1781, which covers all those who lease their work under the contract of louage des Domestiques et Ouvriers. As pointed out, the contract in the C.Q. also seems to be of wider application: more types of work would seem to be covered. Thus, other wage labourers, such as factory hands, would not seem to be governed by C.Q. 1669. The reasons why are likely to be the following. The rules of the C.N. and the ancien droit presuppose that the master and the servant will be on terms of some familiarity: otherwise the master would not know if the servant, for example, had been paid or not. The Quebec code has broadened the scope of the contract; other classes of workers being parties to lease. Factory production had developed in Quebec - though admittedly to a limited extent. The owners of factories would not know all their workers individually; further, a factory will have accounting procedures to deal with wages, and proof of payment or otherwise would be relatively easy. Also, the broadening of the scope of the contract to include other classes of employees could fudge the class distinction implicit in the rule.

Therefore, it may be concluded that C.Q. 1669 contains a reform of the law in line with changing socio-economic conditions in Quebec. By specifically mentioning only

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349. Maleville, 3 Analyse, p.402.
350. See text supra at notes 316-321.
domestics and farm servants, the redactors have deliberately restricted the application of the rule in comparison to C.N. 1781 and the ancien droit; though they do not admit in their Reports that they have restricted the rule.

C.Q. 1670 states that the ordinary rules common to all contracts apply to the lease or hire of personal services, which are also regulated in certain respects in the country districts by a special law and in towns and villages by local by-laws. The redactors refer to provincial statute law. C.Q. 1671 refers to provincial and imperial statutes governing the hiring of seamen. We need not consider these articles further.

These are the only articles specifically on louage of personal service. There is a relevant article on the master's liability for his servants' acts, and this will be considered below; but it is appropriate first to discuss the C.Q.'s rejection of the authority of C.L. 2718-2721 on the dismissal or quitting of servants. The C.Q. has left this aspect of the termination of lease of services virtually unregulated in comparison to the C.L. The C.N. also had not dealt with this point: this must help explain the attitude taken by the C.Q. redactors, especially when they make no references at all to the C.L. as regards the louage of personal servants. C.Q. 1668 dealt with termination by the death of a party or his becoming - without fault - unable to perform the services agreed upon. The contract would normally end on the date agreed; if the contract became unworkable because of the fault of either party, then, C.Q. 1670 would apply, and this article provided that the rules common to contracts would apply (it also referred to special laws and by-laws). Thus, the hire of personal services has been assimilated more to the general law of contract. Mignault remarks that "Le louage des services prend fin pour les mêmes causes que les autres contrats, quand ces causes sont applicables...." By rejecting

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351. Virtually the same as D.O. 57-60 (p.383) discussed above at notes 179-200.
the example here of the C.L., the Quebec redactors have rejected special provisions on the dismissal and quitting of servants: this is in line with their rejection of the distinction made by Pothier and the C.L. between personal servants and workmen. 353. The redactors have attempted to rid the law of those provisions which hinted at the relationship between master and servant as being other than purely contractual. The redactors affirmed the formal equality of the parties in a contract of louage des services, and rendered the contract itself, as much as possible, part of the general law on contract.

The last article we need consider is C.Q. 1054 in the chapter (the third) of the third title of the third book entitled "Of Offences and Quasi-Offences". The article states as follows:

"He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care;

The father, or, after his decease, the mother, is responsible for the damage caused by their minor children;

Tutors are responsible in like manner for their pupils;

Curators or others having the legal custody of insane persons, for the damage done by the latter;

Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed."

"Masters" is rendered "maîtres" and "employers" "commettants" in the French text; "servants" are "domestiques" and "workmen" "ouvriers". C.N. 1384 the equivalent article, is rather different:

"On est responsable, non-seulement du dommage que

353. See supra at notes 340-341.
l'on a causé par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde.

Le père et la mère, après le décès du mari, sont responsables du dommage causé par leurs enfants mineurs habitant avec eux;

Les maîtres et les commettans, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés;

Les instituteurs et les artisans, du dommage causé par leurs élèves et apprentis, pendant le temps qu'ils sont sur leur surveillance.

La responsabilité ci-dessus a lieu, à moins que les père et mère, instituteurs et artisans ne prouvent qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité."

The redactors of the C.Q. cite various authorities. First, they refer to Justinian's Digest (D.47.6.1.1 and h.t. 5 and 6,354.); second to Pothier's Traité des Obligations;355. third to the Nouveau Denisart356.; fourth to Zachariae's commentary on the French code;357. and fifth to Toullier.358.

The rule of the ancien droit was expressed by Pothier thus:

"Non-seulement la personne qui a commis le délit ou le quasi-délit, est obligée à la réparation du tort qu'elle a causé, celles qui ont sous leur puissance cette personne, telles que les pères, mères, tuteurs et précepteurs, sont tenues de cette obligation, lorsque le délit ou quasi-délit a été commis en leur présence, et généralement lorsque pouvant l'empêcher, elles ne l'ont pas fait; mais si elles n'ont pu l'empêcher, elles n'en sont point tenues.... Quand même le délit aurait été commis à leur vu et su....

On rend aussi les maîtres responsables du tort causé par les délits et quasi-délits de leurs serviteurs ou ouvriers qu'ils emploient à quelque service. Ils le sont même dans le cas auquel il

354. The reference to the Digest is curious. McCord reports it thus: "ff. L.1, § 1, Si fam. fur. fec. dic. 6, 7, l. 47, t. 6, L.5." Having given the book and the title, the name of the title is irrelevant. Further, there is no lex. 7 in D.47.6. The reference has the appearance of two separate references to the Digest being run together.
356. Nouveau Denisart, vol. 6 "Délit" § III no. 5, p.152 (This concerns parents and children).
357. K-S. Zachariae, Le Droit Civil Français, translated from the German by G. Lasse, and Ch. Vergé, annotated put in the order of the Code Napoléon, Paris 1856-1860, vol. 4, p.24, note 8. This is a note on those who have minors under their care.
n'aurait pas été en leur pouvoir d'empêcher le délit ou quasi-délit, lorsque les délits ou quasi-délits sont commis par lesdits serviteurs ou ouvriers dans l'exercice des fonctions auxquelles ils sont employés par leurs maîtres, quoique en l'absence de leurs maîtres; ce qui a été établi pour rendre les maîtres attentifs à ne servir que de bons domestiques.

A l'égard des délits ou quasi-délits qu'ils commettent hors de leurs fonctions, les maîtres n'en sont point responsables." 359.

The Nouveau Denisart also pointed out that masters were liable for the wrongs done by their servants in the functions for which they were employed, because the master was supposed to have made a bad choice of servant. 360. This stress in the ancien droit on the master's responsibility arising out of his failure to choose his servants properly is of interest. An ordinance of François I of December, 1540 had forbade the taking into service as domestiques people of bad character. 361. In the C.Q. and C.M., the basis of a master's liability has changed to liability for his servants' actions in the course of their employment. Toullier explains the new liability of the master thus:

"[i]l est considéré comme l'ayant faite lui-même par le ministère de son domestique ou de son préposé, contre lesquels il ne peut par conséquent, avoir de recours...." 362.

We may see that the master is now liable because the servant, acting in the course of his employment, is considered as an extension of the master; under the ancien droit there was a tendency to render the master liable because of his failure to choose good servants. This change in the reasoning behind the rule (though the rule is the same) must reflect a new conception of the relationship between master and servant: the new reasoning places more stress on the employment, whereas the old emphasized the character of the servants. It is difficult to see what significance this

361. Guyot, Répertoire, vol. 6, p.99 s.v. "Domestique".
has here; the expression of the rule as regards masters and servants in the C.Q. is derived from the article of the C.N.

The Quebec redactors have replaced the C.N.'s "préposés" with "ouvriers" (workmen). The meaning of the two is rather different. "Commettant" and "préposé" in C.N. 1384 signify a relationship analogous to the English principal and agent. In C.Q. 1054, "commettants" is rendered "employers" in the English text; and this is appropriate given the use of the term "ouvriers" and "workmen". This would seem to be narrowing the applicability of the article. The importance of this alteration is hard to assess; it is obviously an improvement on the wording of C.N. 1384, in so far as the latter only spoke of domestiques. The fact that the Quebec redactors felt it important to mention ouvriers specifically could indicate the increasing importance of the employment of wage labour in Quebec. Pothier could also have been of influence here in that he also mentions ouvriers as well as domestiques.\footnote{363} A further consideration is that this article comes from a section of the Code almost certainly drafted originally in English by Commissioner Day.\footnote{364} It does not seem likely, however, that this has had any particular effect on the article: Day would not have misunderstood commettants and préposés as meaning "employers" and "workmen". The change must be deliberate. It should probably be stressed that that difference in meaning between the articles of the C.N. and C.Q. is likely to be effectively minimal: both are intending to signify a relationship of control, where one party carries out the instructions of the other.\footnote{365} All that should be understood from this change in the article is that there is more of a

\footnote{363. See text quoted supra at note 359.}

\footnote{364. See McCord, Preface, p.ix; and Brierley, Codification, pp.546 and 578.}

\footnote{365. For a slightly different approach on this, see G.V. Nicholls, The Responsibility for Offences and Quasi-Offences under the Law of Quebec, Toronto, 1938, p.65. For an aid in interpreting "ouvriers", Nicholls refers to art. 2013a. of the Code: this is not possible for us since this is not an original article.}
concentration on, and recognition of the importance of, the ouvrier, workman or wage labourer.

On this article, all the redactors state is that the wording has been changed to obviate certain objections to the French article, while there has been the addition to the cases enumerated of paragraphs relating to tutors and the curators of insane persons. For example, the provision on tutors seems to have been suggested by Zachariae's work. Relevant for us, criticism of C.N. 1308 has resulted in the placing of the paragraph on domestics and workmen at the end of the article; this was because there was some controversy over whether or not the last paragraph of C.N. 1384 referred to maîtres and commettants though they were not mentioned. Should the last paragraph have been so applied, this could have amounted to a change from the ancien droit. The redactors avoided any ambiguity in the Quebec article by altering the sequence of the paragraphs.

Conclusion on Employment in the Quebec Code of 1866.

The influence of the French code on this area of the Quebec law has obviously been strong, and before further discussing the changes wrought in the Quebec law and the redactors' selection and rejection of sources, it is appropriate to summarise briefly the innovations introduced by the redactors into the ancien droit. First, an uncertain point in the ancien droit has been decided by following the French code's provision that servants were domiciled with

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366. First Report, p.16.
367. See note 357 supra. The note in Zachariae's work is of course a contribution of the French translators and editors; it is not a point made by Zachariae himself. That many of the references are not quite relevant for the point we are interested in explains why some of them are not discussed in the text. The Digest passages, for example, deal in the main with a master's liability for thefts carried out by his slaves; the analogy is indeed obvious.
368. See e.g. Toullier, op.cit., vol. 11, no. 283, pp.235-6, and Maleville, 3 Analyse, pp.162-3. Compare the provision of the 1800 Projet and of the D.O.: see text supra at notes 203-204.
369. See Pothier's statement of the ancien droit, quoted supra in text at note 359.
their masters. Second, the scope of *louage de service* personnel seems to have been broadened somewhat. Third, the scope of the master's decisorial oath seems to have been reduced. Fourth, the distinction between domestic and other servants has been abolished. Fifth, though the traditional rule on masters' liability for servants' wrongs seems to have been retained, the basis of the rule seems to have been changed. Sixth, and finally, the redactors have followed Marcadé in deciding that the term *locataire* always describes he who pays.

The C.L. of 1825 distinguished between various types of servants. The C.N. did not, apart from with respect to domicile. The C.Q. makes only two tiny distinctions between classes of servants. First, following the C.N., only servants above the age of majority who reside with their master are considered domiciled with him. Second, only in disputes with domestic and farm servants is the master's oath decisorial. On the first of these, enough has already been said; on the second, the following remarks may be made. That proof should depend on the master's oath presupposes that receipts will not be given, that records and accounts are not kept and that the relationship between master and servant will be close and informal: as such, the master's oath would seem particularly apt for deciding matters involving domestic and farm servants, whose service is likely to be supervised directly by the master. The growth of industry, and the development of a class of urban wage labourers would render desirable restriction of the use of the master's decisorial oath to domestic and farm servants; the process of factory production would divorce servants (factory hands) from their masters, while the increased likelihood of proper accounts being kept would provide alternative modes of proof. Factory hands would not be in a relationship with their masters whereby the masters' oath would be a satisfactory means of settling disputes. Thus,

370. See *supra* at notes 348-353.
the distinction as regards the master's oath between domestic and farm servants and other servants was suitable, and the Quebec code's modification of both the ancien droit and the Code Napoléon was appropriate given Quebec social organisation. It is obvious that there is no longer a major distinction drawn between domestic and other servants: the only one, in fact, is that on domicile. This lack of distinction amounts to a change in the ancien droit as expressed by Pothier and Guyot. 371 This distinction had been based on the notion that personal and domestic servants were closely bound to their masters and dependent on them in a manner which transcended the idea that both master and servant were equal contracting individuals. The Quebec redactors, in this respect, have assimilated personal and domestic servants to ouvriers (manual labourers): the relationship between a master and his domestic has been reduced to being more within the category of formal contract. The strong social bond described by Arieès as existing between master and servant has completely disappeared. 372 A lease of personal services is now regarded by the law solely as a formal contract between abstract individuals.

The reduction - in law - of the relationship between master and servant to one in theory between equal individuals undertaking reciprocal obligations has not fully been carried out. The rule on domicile shows this; there the redactors followed the French code, though they probably need not have done so. The redactors have followed the Code Napoléon's division of louage, though improving on the expression of C.N. 1708 and 1711. The only influence, from the current trichotomy of locatio rei, locatio operarum and locatio operis faciendi, traceable in the C.Q. is in C.Q. 1602's description of locateur and locataire: the description would seem in part to be a reaction against the trichotomy, prompted by the trichotomy's influence in contemporary academic thought. The redactors were tempted

372. See text supra at notes 2-3.
to assimilate lease of services to mandate: this modernisation of the law they rejected because of the weight of legal tradition, despite the fact that they thought there was no tenable distinction between mandate which was not gratuitous and lease of personal services.

Traditionally, some kinds of work were the object of mandate rather than of lease and hire because they were considered to be of such a nature as not properly to be amenable to lease and hire which was identified with menial tasks. Both Pothier and the C.N. clearly limit the application of louage to fairly lowly tasks: domestic service and manual labour. In the discussion of the Quebec articles, it has been suggested that the redactors seem to have supposed a wider application for lease of services. It must be stressed that the exact intended width of application of the articles is unclear. Given, however, that the redactors even considered merging mandate and lease of services, it is obvious that they did not see much point in the distinction between the two; they cannot have believed that since some tasks were more menial and some more elevated, there should be a distinction between the two. Yet, though widening the scope of lease and hire of services they do appear to have maintained to some extent the traditional limitation. Legal tradition prevented a major change recognised as desirable. The extension of the scope of lease and hire of work would probably have been desirable in Quebec at this period: the development of factory production would inevitably have meant the employment of many people other than manual labourers and fairly lowly clerks. Industrial and mercantile enterprises of size could employ people from varied backgrounds in numerous tasks.

From the above discussion, and that of the actual articles, one point, above all, may be extracted: if the historical relationship of master and servant as described in the introduction to this chapter be accurately depicted, the Quebec code represents an increased submission of that relationship to the formal rules of contract. The master and servant are viewed as equal individuals contracting
together, though with certain reservations due to specific circumstances and legal tradition. The redactors' have modernised the law according to their analysis of Quebec's needs; but all the modernisation they considered necessary has not been carried through because of the strength of legal tradition. The sources consulted by the redactors in their work determined the provisions they made and their solutions to the problems posed were drawn from the civilian tradition. Wage labour was regulated by lease: a worker leased out his services. The provisions on employment were few, and the social nature of the relationship between master and servant was not recognised, except perhaps in C.Q. 84 on domicile and C.Q. 1669 on masters' oaths. The redactors accepted the tenets of nineteenth century liberalism: they did not consider that the employee and employer were not on objectively equal levels when it came to bargaining. The mid-nineteenth century was a period of continuous emigration of French Canadians from Quebec to the U.S.A. to find work: there was a shortage of jobs and an abundance of labour. Employers could generally dictate their own terms. Under the ancien régime, a whole body of social practice regulated relations between master and servant, and the law was not over concerned with such relations; in France under the C.N. industrial labour was regulated on policy grounds. In Quebec, the few formal statements of law in the code were all the redactors considered necessary. Both the civilian tradition within which the redactors worked and their acceptance of economic liberalism and the doctrine of the maximum possible freedom of contract would support the minimum regulation of master and servant, and the subjection of the relationship to the general law of contract as much as possible (consider C.Q. 1670). The Quebec code stresses the contractual nature of relations between master and servant: indeed the point of most interest in C.Q. 1054 on the master's liability for his servant's actions seems to be the

373. See chapter two supra at notes 88-89.
justification of the liability on the basis of employment, whereas under the ancien droit the master's duty to choose good servants justified his legal liability. 374.

General Conclusions on Employment in the Two Codes.

In this chapter we have traced the selections made by the two teams of codifiers from the sources available to them; we have attempted to understand the motives for, and reasoning behind, such selections and to discover the relationship of the law and the changes in the law to social life. It remains now to extract some more general information from the preceding discussion of employment in the two codes.

Both Louisiana and Quebec reformed and updated their law; both did so firmly within the confines of the civilian categories of lease and hire, with the exception of the sixth title of the first book of the D.O. This latter title seems to owe its existence to a combination of influence from Blackstone's Commentaries and desire to take account of recent territorial legislation on apprentices and indentured servants. This title permitted the redactors to include more provisions on the relationship between master and servant; but these provisions — despite borrowing from Blackstone — are generally compatible with the civil law as received and adapted. Bound servants were a particular feature of colonial life. The placing of this title is problematic; but the redactors must have felt that it filled a need not met by the French code, while Blackstone provided provisions suitable for borrowing. The reform of the law in both codes was conservative; the changes still maintained the civilian tradition, and indeed both sets of redactors could have gone further in reform. Thus, the contract for labour was important in Quebec; but the redactors maintained lease of work, though tempted to combine lease of work and mandate.

374. See text supra at notes 360-363.
Social changes were nonetheless reflected in the law. We find in the *Siète Partidas*, the main source of private law in Louisiana under Spain, that the servant was considered primarily as part of the family, in a position analogous to that of a son. The same approach to servants may be found in French legal sources; Pocquet de Livonninère notably treats servants as being in the *puissance* of their *maitres*. This treatment by the legal writers broadly reflects social circumstances of preindustrial early modern society. 375. In the D.O., personal and domestic servants are distinguished from other servants; the former being in a relationship with their masters of a rather more familial nature in comparison to the latter. This would seem to reflect Louisianian society of the period to some extent; Louisiana had a mercantile and plantation society involving extensive use of slave labour. In the C.Q., on the other hand, no distinction of significance is drawn between domestic servants and labourers: both are considered as being outwith the family in a relationship with their masters of a primarily contractual nature. One or two anachronistic provisions lingered on (domicile for example); but the change in the social position of servants is obvious.

The relationship of servant to master in the early period had been regulated by norms not dependent on modern notions of contract and correlative obligations. Ariès shows that a servant was dependent on his master in the manner of a child. 376. There did exist, however, a body of civilian texts on lease; texts which were commented on, following the civilian tradition, but which did not adequately distinguish lease of work from lease generally, lease of services seemingly not being of much interest. Ariès tells of the gradual disappearance of the close and strong social bond between master and servant: servants came to be excluded from the family. 377. There seems to have been

375. See supra at notes 1-13.
376. See text at notes 2-6 supra.
377. See text at notes 2-6 supra.
a corresponding tendency in the legal sources to deal with servants under the formal categories of contract. At the same time, the breakdown of the guild system removed one of the other important methods of regulation of the service of artisans and apprentices; and the guild system had never existed in Louisiana or Quebec as a method of regulating the various trades. The main source of legal provisions to regulate employment was the Roman locatio conductio: the civilian sources contained a small body of texts, relating to lease of services, and these texts were used to provide a formal regulation of the contractual relationship between master and servant. The Louisiana redactors used French sources, Blackstone and a territorial act to provide their law. These sources were altered somewhat to fit with social conditions in Louisiana and with the redactors' conception of the nature of employment: the redactors conceived of personal servants still being to some extent within the family, and they chose their sources accordingly; they considered manual labourers as outwith the family and selected appropriate provisions. The redactors rejected the Castilian provisions available to them, which did not deal with servants in a contractual fashion: the provisions on lease of service were vague and unsystematic and did not differentiate it properly from lease of things. The French sources, however, provided a division of lease of service from lease of things and were conceptually more advanced. In Quebec, servants were considered by the redactors to be in a purely contractual relationship with their masters, and the selection of provisions was made accordingly.

The small number of provisions on lease of service has frequently been pointed out; there would seem to be two main reasons for this paucity of provisions. First, the civilian sources had never discussed lease of services to any extent. Second, Quebec and Louisiana both codified

378. On the importance of the guilds in this connection, see supra at notes 52-54.
in the nineteenth century, during the period of the ascendency of support for economic liberalism and individual contractual freedom. The ideals of freedom of contract would suggest that masters and servants be left as much as possible to be free as equal individuals to bargain for conditions of employment. Thus, the paucity of traditional civilian provisions and the prevailing nineteenth century ideology would be mutually supportive. The Quebec redactors certainly never seem to have considered the real inequality between the bargaining individuals in this contract. This was crucial, especially in a society where wage labour was of increasing economic importance. In Louisiana in 1808 the economy was based primarily on mercantile activity and slave labour was extensively used; the lack of regulation of the contract of employment would probably not be particularly important. What is most significant is that the provisions embodied in the two codes depended on the redactors' vision of what was necessary and possible; this vision was that of nineteenth century liberals.

As regards the codes of both Quebec and Louisiana, that contract called locatio conductio operis faciendi has not been discussed: both codes devoted rather more articles to this aspect of lease than they did to lease and hire of services. This form of the contract of lease would be of more importance for "artisan production" than would that for the hire of labour. This stress on the contract operis faciendi might well have been appropriate in Louisiana; it was not in Quebec where industrialisation was supplanting the mercantile economy.

In Louisiana, the D.O. contained a fairly major modernisation of the law: a modernisation which appears to have provided a system of rules suited to the conditions in the territory. In Quebec, too, the law was modernised; this was not done in a radical fashion, however, and, indeed, not as radically as the redactors themselves would have wished. The Quebec redactors were, and considered themselves to be, constrained by legal tradition. The law
in Louisiana before codification was uncertain and outmoded; the redactors used the opportunity provided by codification to borrow wholesale from modern sources and models. The very confusion over the law in force permitted this. The existing law in Quebec was not outmoded and confused in the fashion of that in Louisiana before codification; the sources the Quebec redactors returned to for models and provisions were essentially the same as those used for the Louisiana Digest, fifty years before (though they did indeed make profitable use of commentaries on the French code). In Louisiana, in comparison to Quebec, the law was radically inappropriate, the redactors had less to tie them to the established rules; the redactors accordingly actively sought to embody in the law what they considered to be the needs of their society, though they worked within the tradition of the civil law. In Quebec, the law was not so outmoded as that of Louisiana; there was less need and pressure for modernisation while there was also no confusion over the law actually in force: tradition exercised greater restraint over the Quebec redactors; they did not modernise the law as much as they themselves would have wished.
Chapter Six.
The 1808 Digest of Orleans.
In chapter three there was a provisional discussion of the nature of the 1808 Louisiana code - the Digest of the Civil Laws of Orleans. The study in chapters four and five of the law relating to the family and employment helps now in assessment of the nature of the 1808 Digest and suggests solutions to some of the problems arising out of the conflict over the sources and history of the 1808 redaction. The de la Vergne manuscript has also been the subject of considerable controversy, and the same study of the law on family and employment allows an evaluation of the importance and significance of the volume. The study further allows the making of some remarks on the working method of Brown and Moreau Lislet; it also permits commentary on the reassertion of the "Spanish" (Castilian) law after 1812. We are here concerned to a large extent with the dispute between Professors Pascal and Batiza over the origins of the provisions of the 1808 Digest: the study permits us to suggest solutions to some of the problems they posed. One problem, however, may be stated here to be a false problem: in chapter three it was argued that either surprise that the redactors copied from French sources, or denial that they did would both seem to be the result of applying Austinian notions of legal sovereignty to a Digest whose redactors clearly were influenced by theories of natural law - as will be demonstrated below. The 1808 Digest's provisions on obligations have not been examined in this thesis, except for some of those on the specific contract of louage. Obligations are of major importance in the Digest, and, to aid the following discussion, it is useful to examine some key articles of the Digest relating to obligations, as this will help us assess the Digest. Accordingly, it is useful to devote a brief excursus to the Digest's approach to contract: an approach derived from the French code.

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1. See chapter 3 supra, especially text at notes 134-155.
2. Articles which Professor Franklin would class as "mobile" or "Bew-eggrund" or "täusa" or "presuppositional" texts. See his Existential Force, p.98.
Excursus.

D.O. 34 (p.267) states thus:

"Les conventions légalement formées, tiennent lieu de loi à ceux qui les ont faites.

Elles ne peuvent être revoquées, que de leur consentement mutuel, ou pour les causes que la loi autorise.

Elles doivent être exécutées de bonne foi."

This is an exact copy of that famous article, C.N. 1134. The D.L.V. refers to Domat, who expresses an opinion nearly identical, and to Febrer". The two Febrer texts are not directly in point: the first discusses fianza and the second concerns sale. Domat is in point and could be regarded as a "source" (though secondary to C.N. 1134), while Febrer is not relevant and his provisions do not really admit of direct comparison with D.O. 34 (p.267).

D.O. 34 (p.267) is a fundamental article expressing classic contractual freedom; as such, however, we cannot be certain that it is uniquely French. It is, however, the legal limits to such contractual freedom which are of importance here. We can later explore this point further in relation to sale and lease.

Another text of significance here is D.O. 126 (p.285), which states that:

"La clause pénale est celle par laquelle une personne, pour assurer l'exécution d'une convention, s'engage à quelque chose, en cas d'inexécution."

This must be read along with D.O. 129 (p.285):

"La clause pénale, est la compensation des dommages et intérêts que le créancier souffre de l'inexécution de l'obligation principale...."

and with D.O. 52 (p.269):

"Lorsque la convention porte, que celui qui manquera de l'exécuter, payera une certaine somme à titre de dommages intérêts, il ne peut être alloué à l'autre partie, une somme plus forte ni moindre."

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3. Domat, Pt. 1 Bk. 1, tit. 1 sec. 2 art. 7.
4. Febrer, Primera Parte, ch. 7 § 5 no. 126 and ch. 10 § 1 no. 26.
5. Febrer here significantly states that usury is prohibited, and then demonstrates a way of avoiding the prohibition!
These articles are exact copies of C.N. 1226, 1229 (in relevant part) and 1152 respectively. The French code of 1804 here differs from the customary law of the ancien régime which allowed penalties to be modified by the judge. Hence, we may say that the French code developed the law on penalty clauses along the lines of contractual freedom: "Les conventions...tiennent lieu de droit...."

The C.N. and D.O. here also avoided problems of proof; but contractual freedom seems of prime importance.

As regards D.O. 52 (p.269), the D.L.V. gives no references: this is significant, especially when it is considered that every reference in its relevant section (IV of chap. 3 of tit. 3 of Book 3) is to Pothier, bar two references to Domat. For D.O. 52 there could be no Pothier reference, as this was a provision antithetical to Pothier's view of penalty clauses. For D.O. 126 (p.285) the D.L.V. refers to Part. 5.11.34, Domat, 7 Febrero 9, and Pothier. For D.O. 129, the D.L.V. refers to Part. 5.11.34 and 35.

6. The second paragraph of D.O. 129 (p.285) and that of C.N. 1229 are identical; though not quoted in the text, both state that principal and penalty cannot be demanded together unless the latter is for mere delay.


8. Domat, Pt. 1 Bk. 1. tit. 1 secn. 4, preamble see also arts. 18 and 19 not cited by the D.L.V.

9. Febrero, Primera Parte, ch. 13, §2 no. 29 see also his (uncited) no. 30, pp.179-80.

Febrero as above, and Pothier. Indeed, only this one section of Febrero and these two leyes of the Quinta Partida are cited in the section of the D.L.V. on penalty clauses opposite the articles. Domat, as cited, defines a penalty clause; but he states at article 19 that such a clause's effect is regulated at the discretion of the judge. In essence, what he is saying is in line with D.O. 126 and 129, but possibly not with D.O. 52, when his article 19 (not cited by the D.L.V.) is considered. Pothier as cited is also at one with the D.O. provisions; but again the D.O. provisions must be understood along with D.O. 52, which is antithetical to Pothier's conception of clause pénale. If we next turn to the Castilian provisions, we find the following. The text of Febrero and the two leyes of the Partidas cited by the D.L.V. are reasonably similar to the provisions in the D.O.; but we cannot stop here. Once more, the D.L.V. references do not give a true picture of the Castilian law. Part. 5.11.40. shows that the law was radically different from that in the D.O. The Partidas' provisions also lack the sophistication of those of the C.N. and D.O. Ley 40 states, in essence, that usurious penalties are invalid, and lays down how usury in penalty clauses is shown. Usury, of course, much exercised the ingenuity of the Canonists of the Mediaeval period. That this method of reducing or forbidding excessive penalties was still operative in the Castilian law just prior to the redaction of the D.O., and was not merely a superseded provision of the Partidas, is shown by Asso and Manuel. The 1806 edition of their Instituciones states usurious penalties are not allowed, nor those that comprehend all a man's property nor those that are double the amount of the condition or bond.

12. On the interleaf opposite p. 276 in the D.L.V., other sources on penal clauses are referred to: we need not concern ourselves with them.
13. E.g., the unquoted final paragraph of D.O. 129 (see note 6 supra) corresponds to certain statements in the two leyes.
14. See Fliniaux, op. cit. note 7 supra, passim.
These prohibitions are analogous to Pothier's view that excessive penalties should be modified by the judge; such prohibitions also limit contractual freedom and prevent the agreement of the parties from making the law between them. No such restriction is found in the D.O., nor in the C.N., which the former is closely copying here. Febrero in his work for notaries did demonstrate how the laws on usury could be circumvented;¹⁶ but this does not affect the point. It would be ridiculous to suggest that the law on penalty clauses in the D.O. is closely copied from the C.N. because the latter represented the Castilian law as avoided by Castilian notaries.¹⁷ The D.O. redactors obviously chose to copy the provisions of the C.N., for reasons which will be discussed below, after we have examined two contracts in the D.O. and the Castilian law.

The contracts it is proposed to look briefly at here are two which in the Roman law were bonae fidei consensual contracts: sale and lease. (Lease has been discussed already, but only as regards lease of labour:¹⁸ it is still useful to make some remarks here.) It is not proposed in the context of these brief remarks to follow up the D.L.V. references, as this is unnecessary: it is sufficient to examine the approach of Asso and Manuel, which is very different from that in the D.O.

In their title XIII, De la Compra y Venta,¹⁹ Asso and Manuel quote from Part. 5.5.1.²⁰ the definition of sale and then state:

"De esta definicion se sigue: I Que la compra, y venta se perfecciona con el consentimiento de ambas partes. II Que se pueda vender y comprar todo lo que está comercio, ó no se halla prohibido. III Que el precio deba ser cierto, justo, y en dinero contado.

¹⁶ Febrero, Primera Parte, ch. 10 § 1 no. 26.
¹⁷ Nor - I think - could the D.O. provisions plausibly be represented as here abolishing Castilian "legal scaffolding." See Watson, Society, pp.87-96.
¹⁸ See chapter 5 supra.
¹⁹ Vol. 2 pp.87 et seq., (Bk. 2).
²⁰ The D.L.V. cites this also at D.O. 1 (p.453), defining sale.
This is unexceptionable and would correspond with the provisions in the D.O., apart from the provision that the *precio* be *justo*. Section 3 of this title is on "lesión enorme", and it explains what is meant by *justo precio*: we will return to this after mentioning lease. In their title XIV, on *Arrendamiento*, Asso and Manuel again state that the "precio ha de ser justo, cierto, y en dinero contado." Further, sons of a family had restricted powers of buying and selling appropriate to the extensive *patria potestad* of the Castilian law.

Asso and Manuel state in the third section, on *lesión enorme*, of the thirteenth title of their second book, that because price should be just any purchaser or seller can have the contract overturned for enorm lesion, if the object is sold for less than half its value or for more than one and a half times its value, provided action is taken within four years. A minor can rescind for lesion if the price is excessive but under the above limits. If the party is an adult and price is between half the just price and the just price (or similarly for the upper figure) there can be no rescission, even if there has been deception (*enganó*) in the price, provided always there has been no fraud (*dolo*). Similar provisions are found in the Castilian sources, such as the *Partidas* and the *Nueva Recopilación*. Note that these rules on lesion apply to any object sold.

The French customary law also had rules on lesion. These rules, however, applied only to immoveables, the period for rescission being ten years, and only to sale. It was much debated whether purchasers could rescind for lesion,

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23. Ibid., vol. 2, pp. 111-119 (Bk. 2).
24. Ibid., vol. 2, p. 112.
25. Ibid., vol. 2, p. 88. See also chapter four, supra, at notes 137-157.
26. Ibid., as cited note 24 supra.
27. Part. 5.5.56 and Rec. Cast. 5.11.1.
though sellers definitely could seek such rescission. 29.

These rules on "lésion d'outre moitié" (lesion en mas de
menos de la mitad de justo precio) were suppressed during
the Revolutionary period by the loi of 14 fructidor, an
3. After a prolonged and heated debate, rules on lesion in
sale were reintroduced in the Code Civil, 30. and are to be
found in C.N. 1674 to 1685. These rules did not reintroduce
the ancien droit in toto, but considerably modified it.

Such rules on enorm lesion were common in Europe, having
developed out of the late Roman (probably Justinianic)
laesio enormis, the origin and development of which, during
the Reception need not be dealt with here. Suffice it to
say that the Roman laesio enormis applied only to sale of
immoveables and only in favour of the seller. 31.

The sixth title of the third book of the D.O. deals
with sale; the second section of the fifth chapter of this
title is devoted to rescission of sale on the grounds of
lesion: D.O. 109 (p.365) to D.O. 117 (p.367). This section
is a virtually exact copy of the corresponding section of
the Proj. An VIII; it does differ, however, in some respects
from the corresponding provisions of the C.N. Thus, with
some minor differences, Proj. An VIII.3.9.98-106 corresponds
to D.O. 109-117 (pp.365-7). 32. The differences here between
the Proj. An VIII and the D.O. are trivial, being mainly
minor differences in expression; the exception to this is
D.O. 114 (p.367) which includes slaves among the class of
possessions to which lesion does not apply. For all relevant
purposes, we may say the two sets of provisions are the same.

The D.O. and Proj. An VIII both differ from the C.N. in

29. See Maleville, 3 Analyse, p.363. The Roman law had only
allowed the seller to recover for laesio enormis.
30. See Maleville, 3 Analyse, pp.354-359.
31. See C.4.44.2 and 8. See Buckland, Textbook, p.486. A
good account of the extended application of laesio enormis
by later civilians is by R.W.M. Dias: "Laesio enormis: the
Roman-Dutch Story", pp.46-63 of Studies in the Roman Law of
Sale, dedicated to the Memory of Francois de Zulueta, edited
32. As Batiza points out: see his Sources, appendix C,
p.111.
the following respects (inter alia). Both provide a four year period for rescission, the C.N. one of two years. Both state that lesion, to be relevant, has to be "d'outre moitié", the C.N. that it should be more than seven-twelfths. We need not deal with the other minor differences, nor with the rules relating to minors, who are a rather special case. All three codes agree that lesion applies only to immoveables; and that the rules operate only in favour of the seller: "La rescission pour d'outre moitié n'a pas lieu en faveur de l'acheteur" state the D.O. and Proj. An VIII. The D.O. and Proj. An VIII follow the ancien droit of northern France except in so far as they reduce the period for rescission from ten to four years and settle the question - previously much debated - as to whether or not a purchaser could rescind for lesion.

The difference between the French laws and the D.O. and the Castilian laws is obvious: the former restrict rescission to the seller and only on sale of an immoveable, the latter's provisions were much wider. It could indeed be stated that the provisions of the Proj. An VIII are closer to the Castilian law than are those of the C.N. Despite copious references in the D.L.V. this would not support the argument that the D.O. copied the Proj. An VIII because it was closer to Castilian law: the D.O. and Proj. An VIII provisions are firmly and obviously based on the ancien droit of France. The D.O. has adopted that law's restricted notion of enorm lesion and rejected the broad notion of the Castilian law, which had an important concept of justo precio: so important indeed that it was extended to

34. D.O. 109 (pp.365-7); Proj. An VIII, 3.9.98; C.N. 1674.
37. See Maleville, 3 Analyse, p.363.
38. Asso y Manuel, vol. 2, p.94, state thus: "Del tercer ax̗oma se sigue: I Que sera cierto el precio de la cosa, si se deixa â arbitrio de un tercer, y este lo señalese, á cuya decision se debe estar, si no que fuese desproportionado, en cuyo caso se debe enmedar por juicio de hombres buenos."
Arrendamiento, (laesio enormis did not apply to locatio conductio), and special rules existed as to settling the "just price" of wages. The D.L.V. also cites Domat and Pothier, and indeed the provisions of these two French authors are much closer to the D.O. provisions than are those of the Castilian sources cited. The fact that this section is copied virtually word for word from the 1800 Projet of the C.N. is, however, incontrovertible.

It is now necessary to complete this rather lengthy excursus, and to consider the origins of the Digest, assessing the work of Professors Batiza and Pascal. From the foregoing examination of certain aspects of contract law, it is clear that these D.O. provisions are of French, and specifically codified French, origin: whether or not they are closer to the C.N. or the Projet An VIII does not really matter, as what is important is that the law in the D.O. is clearly different from the Castilian law. The redactors cannot be assumed to have copied these codified French provisions thinking in their ignorance that they represented the Castilian law: what the Castilian law was could have easily been gathered from, say, Febrero. One must conclude that the French provisions were intentionally copied, and two reasons may be suggested. First, the C.N. and its Projet offered a neat concise selection of texts in a form readily borrowed. Second, it was argued in chapter two that the period up to and past the 1808 codification was one of a movement from a controlled economy to a free market: doctrines of economic liberalism were current and espoused enthusiastically by the United States merchants. The particular areas of the law of contract studied in this excursus were chosen because they highlighted questions of freedom of contract and inviolability of contract (pacta sunt servanda). The Castilian provisions on penalty clauses restricted freedom.

of contract, while the provisions on lesion violated the notion of *pacta sunt servanda*. The C.N. and its Projet's articles on both these areas were much more in favour of the current economic liberalism; this must have had some influence in their selection. Because in these areas the D.O. has followed the French provisions, D.O. 34 (p.267) becomes an effective and guiding principle on contracts in the D.O.

To say that the D.O. redactors selected these provisions purely because of economic doctrine is undoubtedly too simple; the fact that, in general, they were closely copying the two French codes must have been influential, and the prestige of the French codification probably influenced them, too. To determine the historical causes behind these choices of provisions would demand an exhaustive analysis of the law of contract generally, and of the socio-economic background: an analysis outwith the scope of this work. Nonetheless, it can - I think - confidently be asserted that questions of economic liberalism were important, and must be taken to have influenced the D.O. redactors; just as such questions influenced the redactors of the C.Q. later in the century, when they came to draw up their own provisions on contract.

1. The Digest of 1808: "French" or "Spanish"?

The views of Professors Pascal and Batiza on the origins and sources of the 1808 Digest have regularly been referred to throughout this work: it is now possible to assess their theories. In some respects, the work of both Professors is - I would argue - unhistorical in approach. Professor Pascal founds his view that the Digest is essentially "Spanish-Roman" on an assertion, as he has not provided (as yet) any research to uphold his thesis. Chapters four and five above show that, certainly as regards the law relating to the family and to employment, Professor Pascal's

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41. See text *supra* at notes 2-3 where quoted.
42. *First Report*, p.12, remark on art. 13.
thesis may not be upheld. Professor Batiza has analysed the individual articles of the code and has concluded that the code is basically of French origin. The work of each Professor will be discussed in turn.

As Professor Baade has succinctly pointed out, 43. Professor Pascal's thesis is as follows: first, he argues that "Spanish" and not French law was formally in effect in Louisiana when part of the Spanish Empire; second, he states that redactors of the Digest were instructed to restate the law by which the Territory was then governed; and third, he claims that they did so, so that borrowings were made from the French code of 1804 only because they were a convenient expression of the substance of the "Spanish" law as in effect in Orleans. In chapter three, we discussed the background to the 1808 codification, the instructions to the redactors and the attitude of civilian systems to transplants or receptions of foreign law. Chapter four showed that the systems of puissance maritale and puissance paternelle in the Digest did not express the Castilian law: especially as regards puissance maritale, the conceptual system and actual provisions of the Digest were antithetical to the Castilian law. As regards the labour of servants, apprentices and engagees discussed in chapter five, the position is perhaps more complex; but it may quite categorically be stated that these provisions did not amount to an attempt to express the substance of the Castilian law in French (or Blackstonian) terms. Professor Pascal's thesis cannot be upheld. There was some attempt to adopt rules from the Castilian law for the Digest (the "ganancial" community, the division into pupillage and minority); but this does not help Professor Pascal: the conceptual scheme was thoroughly French, as were the bulk

43. Marriage Contracts, p.83. He states: "Professor Pascal does not, however, base his thesis on legal history."
of the provisions, 44, and the adoption of some rules of Castilian law is hardly surprising. 45. (D.O. 2 to 14 (pp. 37-9) cause problems; but these problems relate to the form of the code, which will be discussed below.)

Professor Pascal stated that:

"The writer's experience, supplemented by information from some of his colleagues, leads him to affirm that many of the institutions and rules of the Digest of 1808 will prove to be Spanish-Roman, even if in French dress, or French (especially pre-codification French) as well as Spanish-Roman. Particularly to be mentioned are the non-obligations areas of the law, such as filiation, paternal authority, minority with its divisions into impuberty and puberty and the corresponding tutorship of impubes and curatorship of puberes, the rules of lesion applicable to minors, the division of things, riparian rights, and, in general, the law of succession." (Emphasis added) 46.

In this research, not all of these topics have been covered; but I hope it is clear that as regards paternal authority Professor Pascal's assertion is not borne out. As regards the law on minority, as I have indicated, there is some truth in his remarks; but over all his basic assertion cannot be maintained. The Digest redactors drew freely on many sources, and were some Castilian provisions not introduced, this would have been surprising. Further as emphasised in the quotation, Pascal particularly mentioned "non-obligations". This is significant. There is little point in counting up the articles of the code of 1808 dealing with obligations; but most scholars would agree that in the 1808 Digest obligations constitute a very important and substantial part of the law, as indeed they do in the French code. The provisions on obligations in the code (bar the specific provisions on louage des services) have not been subjected to the same investigation as

44. See Baade, Marriage Contracts, passim, and see discussion supra in chapter 4 at notes 250-301, where the views of Batiza in his Textual Evidence are taken into account.
45. See infra, at notes 46-47; 56-58; and 70-89.
devoted to the articles on *puissance maritale* and *puissance paternelle*; but the excursus above shows that certain key articles of the D.O., adopted from the work of the French redactors, provided a new orientation for the law on obligations away from that of the Castilian law.

If the above argument is accepted as correct, then Professor Pascal's thesis should be rejected. The 1808 Digest cannot be described as embodying the substance of the Castilian law though expressed in the terms of the French code and its Projet. That some provisions of the D.O. are taken from the Castilian law does not affect the matter: such provisions were not adopted necessarily because the previous law was Castilian, but because the redactors for some reason preferred them to the rules discovered in the other authorities they consulted. 47.

Professor Batiza in a vast work has attempted to trace all the sources of the provisions of the 1808 Digest. It is appropriate here to form some conclusions on his study. 48. By his own criteria, Professor Batiza has made an occasional mistake; but this is probably inevitable in a work of such enormous scope and is not particularly important here. 49. What is argued here is that Professor Batiza's work may be misleading. What he has done is as follows. He has taken each provision of the Digest and searched for and located its source. On the basis of these sources he concludes that the Digest is composed, in varying percentages, of provisions drawn from various sources. In so far as he has traced the individual sources of individual articles, Batiza's work is generally unexceptional. There are, however, some problems connected with his work. The Digest

47. Such reason could even be that they preferred not to disrupt the *status quo* without this supporting Pascal.
48. His arguments are now scattered through several journal articles but have not changed from those in Sources, though here we may refer to various articles.
49. As Batiza himself has recognised - see Textual Evidence, pp. 82-3, note 25. Note that - as frequently pointed out - the two works Batiza there refers to were unavailable to me. This is unimportant, since I have been able to look up all the sources myself, and it does not matter here if I have occasionally quoted an attribution he has now changed.
is a sophisticated document: Batiza's form of analysis does not explicate all the intricacies of its composition.

The most vexed aspect of Professor Batiza's work is the reliance on similarity of wording as indicating the "source" of an article. Such a form of testing has to be used cautiously; but, generally, Batiza must be correct. It is useful to quote an important passage from Professor Batiza's most recently published article on the Digest:

"This writer's position, drawn from the tracing of the sources of the 1808 Code to three different languages, is that clues provided by the wording of a provision are the surest means of identifying a source. Any suggestion that dichotomies exist between the language and the substance of a provision is untenable since it is clear that, in adopting identical or nearly identical language, the rule or principle therein incorporated is simultaneously received. In fact, it is rather the acceptance of the rule or principle which determines the adoption of the language in the first place." 50.

The first sentence of this quoted passage is probably correct: given that the redactors have left no indication of from where they adopted or adapted various provisions, comparison of the Digest with various authorities known to be or likely to be available to the redactors is an important method of establishing influence. I would suggest, however, that the statement in the second sentence of the passage is not acceptable. This is indeed readily demonstrated. D.O. 57-60 (p.383) copied the wording of the Proj. An VIII: the mistakes made in the French of D.O. 58 enable us to be certain of this.51. Yet the classification of servants contained in these articles is not that of the Proj. An VIII, but is influenced by (probably) Pothier. The wording of the articles is copied to a greater or lesser extent from the 1800 Proj.et, while the rule is different. There can be a dichotomy between language and substance. Professor Batiza points out that the articles are not identical to those of the Proj. An VIII;52 but the test on

50. Textual Evidence, p.84.
51. See chapter 5 supra at notes 179-200.
52. He classes D.O. 57 as "v", 58 as "a.v. (last part)", 59 as "a.v. (in part)" and 60 as "a.i."
the basis of the words is not able to indicate that the
rule is derived from the ancien droit. Batiza is correct
in saying the wording is copied in varying degrees from
the Proj. An VIII; but in so far as his work fails to
indicate that the rules differ from those of the said Projet,
it is misleading and cannot indicate the complexity of the
redaction of the code. As said, Professor Batiza's work
is valuable and generally correct in indicating the source
of the wording (and usually the rule) of the Digest's
article; but such tests must be used cautiously. Thus, the
sole test of similarity of wording originally allowed him
to cite Gaius' Institutes as a source; this is impossible. 53.
Similarity of wording as the sole criterion is potentially
unhistorical, if incautiously used.

Professor Batiza's work is potentially misleading in a
further respect. Certain articles are more important than
others: 54; thus, Batiza gives an article referring to another
area of the Digest the same weight as one laying down an
important rule on, for example, contract. To the extent that
he may identify the "source" of an article of no
significance, Professor Batiza is correct; but in so far
as he adds up the individual sources to state that, for
example, the French code of 1804 is the source of 709
provisions, he is misleading if it is to be concluded that
this represents a necessary correspondence of rules between
the two codes. In fairness to Professor Batiza, it must be
said that he does not draw such a conclusion: he merely
claims to be tracing the individual sources of individual
articles and does not explicitly state that there may be an
exact correspondence of rules between the two codes; though
such is a tempting inference from his work, especially when
he denies that there may be a dichotomy between language
and substance. Groups of articles cohere to form concepts,
legal institutions in the MacCormick sense, 55; and these
53. See Sources, p. 12, p. 34, appendix A, and pp. 37, 38 and
39, appendix B.
54. Franklin makes the same point: see Existentia! Force,
p. 98.
Law Quarterly Review, 90, pp. 102-129 passim.
concepts (e.g. that of puissance maritale) are of vital importance. Batiza's work does not take cognisance of this. What is excluded may be of vital importance, in that, if all the articles of the C.N. on a particular topic are borrowed for the D.O., bar one, and the exclusion of that article alters the meaning of the articles as a whole, then, although each individual article originates in the C.N., it cannot be stated that the law in the D.O. is identical to that in the C.N.: Batiza's analysis does not recognise this. Again, Batiza does not claim that his identification of the sources of individual articles on any particular topic as being drawn from the C.N. means that the law is identical; but the inference is easy to draw and, unless the exact meaning of Batiza's work and its limitations are recognised, the unwary may be misled.

In conclusion, one may say that Professor Batiza's work is potentially ambiguous and misleading. The form of analysis to which he has subjected the code is unsophisticated. Comparison of wording to establish sources may mislead and, without due care, may be unhistorical in result.

The above discussion of the hypotheses of Professor Pascal and the research of Professor Batiza helps focus attention on what Associate Justice Tate has recently called "The splendid mystery of the Civil Code of Louisiana." Though what is at issue in this thesis is not so much the sources of the 1808 redaction as the reasons behind the redactors' choice of concepts and rules, inevitably we have had to take into account the work of Professors Pascal and Batiza and the above assessment of their work is based on the study of the D.O. in this thesis. Can such study help suggest solutions to the "splendid mystery"? As regards puissance maritale, puissance paternelle and employment (to use the term loosely) the question may possibly be

answered in the affirmative; but even so, caution is necessary. We may state that the concepts of puissance maritale and puissance paternelle are essentially founded in the northern French droit coutumier, especially as they appear in the French code and its Projet, and differ from those of the Castilian law. This cannot be gainsaid; the position is, however, more complex than might at first appear. There has been, on the part of the redactors, a considerable process of selection among sources. In some codal articles it is possible to trace the influence of more than one "source": and although the over-all conception of one area is, say, northern French in origin, within that concept individual rules or codal articles may be drawn from elsewhere. The redactors quite happily would include articles drawn from any authority if they found them suitable. In any area of the law in the D.O., there may be various layers of influence. Thus, the articles on louage des services, and the analysis into two of louage in the Digest originate in the Projet of 1800 and the Code Napoléon; but Pothier has exercised some influence too. Title VI of Book One of the Digest is rather more problematic. Blackstone has clearly exercised some influence, but, as shown in chapter 5, it would be wrong to claim these articles have a peculiarly English origin, or introduce common law principles into the Digest. Blackstone provided easily borrowed texts on an area of the law similar all over Europe. The other aspects of the Title were concerned with a recent territorial Act and with taking account of particular circumstances in Louisiana (consider engagés).

It must be taken as correct that, in the areas of law examined in chapters four and five, and in obligations generally, the Digest owes more to the French Civil Code and its Projet, and to the ancien droit, than to the Castilian law. This, of course, leaves undetected many of the areas of the Code which, according to Pascal, exhibit signs of Castilian origin. It is worth pointing out, 57. See text supra at notes 45-46.
however, that paternal power, which he claims as "Spanish-Roman", has been demonstrated to be of French origin: and hence caution must be observed before accepting his other claims. There has been no attempt here to examine these other areas of the Digest, as it is indeed not for me to attempt to prove or to refute Professor Pascal's thesis as regards these areas of the law; and I would maintain that the demonstration that important areas of family law and of the law of obligations are not of Castilian or "Spanish Roman" origin allows us to be certain that over-all the Digest is not the expression of the pre-existing Castilian law through French texts.

The debate over whether the Digest is French or Castilian is not of primary importance here, as we are mainly concerned with seeking a pattern among the selection of provisions and concepts which may help contribute to an understanding of legal development: thus, for us, whether or not the law of property is influenced by Castilian law is, in itself, not of great importance; though, were it so to have been influenced, the reasons why would be of great interest. The study of aspects of family law and of the law of employment is sufficient to ground our conclusions. As has been maintained in chapters one and three, the process of codification appears to be one which lends itself to borrowing, selection and adaption: there is nothing whatsoever inconsistent in the D.O. redactors utilising the French law and Castilian law: they were not legal positivists, but believed in the supremacy of natural law. The use of certain Castilian provisions along with French provisions does not mean that the redactors were consecrating antinomies in the Digest: the provisions

59. To adopt the terminology used by Professor Franklin: see his Existential Force, p.75. A reading of Professor Franklin's article would suggest that he categorises all the "Spanish" law as "mediaeval" or "feudal", in opposition to the "bourgeois" Code Napoléon: this will be discussed further infra in connection with the D.L.V.
would be selected to be compatible. (Consider the exclusion of aspects of the French law both pre-code and codified, and of certain aspects of the Partidas. 60.) Further, even though some rules may be attributed to the Castilian law, the exclusion of other rules is of vital importance. Thus, the statutory community of the Digest may be influenced by the sociedad de gananciales; but the whole thrust of the rules on matrimonial property is "French". 61.

We may sum up by saying that rules and concepts in the Digest may be traced to the French ancien droit, the C.N., the Proj. An VIII or the Partidas; but Moreau Lislet and Brown, while closely following the style of the Proj. An VIII and C.N., have produced something new: the Digest is not a slavish copying of the C.N. or its Projet - it is in many ways unique, being built up from varying sources and with some original invention. This does not mean that the laws selected were necessarily the most suitable. For example, it would appear that the laws relating to the seashore selected in 1808 were quite unsuitable. 62. (Of course, in 1808, this is indeed unlikely to have been such a great problem as in the present day, as there had then been no great commercial development of the seashore.)

It should be pointed out that these rules are not taken from the C.N., the equivalent provisions of which possibly would have been more suitable (but see below), but 63. from Roman law, more specifically from Justinian's Institutes.

60. Consider the significance of the exclusion of C.N. 224 from the D.O., or the fact that the D.O.'s rules on puissance du mari are the same as some individual rules of the Castilian law but are contradicted by the rules as a whole of the latter.
61. As argued supra in chapter 4, at notes 250-301, I accept Baade, Marriage Contracts in preference to Batiza, Textual Evidence.
63. Inst.2.1.1, 3 and 5. Franklin, "Some Observations on the Influence of French Law on the Early Civil Codes of Louisiana", pp.833-845 of Le Droit Civil Français, Livre-Souvenir des Journées du Droit Civil Français, Sirey, Paris, Montréal, 1956 states at p.843 that these rules were taken from the French law: as regards the specific rules he is wrong.
The relevant articles are D.O. 3, 4 and 5 (p.95); opposite them, the D.L.V. cites Part. 3.28.3 and 4 and Domat.\(^6\). The Partidas state a rule similar to that of the D.O. and the Institutes, providing that seashore is one of those things which "pertenescen á todas las criaturas que viven en este mundo...." (Part.3.28.3). The Institutes use the term res communis. D.O. 4 (p.95) states that the seashore is the land covered by the highest tide of the winter season, which is the same as Institutes 2.1.3; whereas Part.3.28.4 states that "Et todo aquel logar es llamado ribera de la mar quanto se cubre del agua della quando mas cresce en todo el año, quier en tiempo de invierno ó de verano." In Louisiana, the highest tides are during the summer; yet the redactors selected the provision of the Roman law, more suitable for the non-tidal Mediterranean, in preference to the Partidas provision, potentially more suitable for Louisiana in allowing the highest tide at any time of the year to be the standard. Why the redactors selected the Roman provision can only be a matter of speculation, as with why they rejected the Partidas and the Code Napoléon. It may be said as regards the redactors not following the Code Napoléon here that the first chapter of the first title of the second book of the D.O. has no equivalent in the C.N. The French code's provisions on public domain are somewhat confused and have attracted much criticism;\(^6\) the arrangement of the D.O. is apparently superior, and the problems with the French articles may well have caused the redactors to reject their rules.\(^6\) It should be noted that the D.L.V.

\(^6\) Domat, Prel. Bk. tit. 3, seccn. 1, art. 1 and 2. The D.L.V. in fact refers to Book 1, Prel. tit., 3, seccn. 2 loix 1 and 2, which is an obvious error. Domat does not define seashore, though he mentions it: he cites the Institutes.\(^6\) See Planiol, Traité Élémentaire de Droit Civil, vol. 1 Part 2, nos. 3061-3063 (Louisiana State Law Institute Translation, 1959).\(^6\) Planiol, op.cit. note 65 supra, vol. 1 Part 2, no. 3060 points out that the old jurists were not interest in public domain, but rather in royal domain. (See also his nos. 3059 et seq passim for much useful information.) Rother, Traité du Domaine de Propriété, no. 21, Bug. 9, pp.109-110 mentions the sea and its shore as res communes; but that is all he says on the topic.
does not cite the Institutes against any article, but that in the interleaf opposite p. 94, Institutes, 1. titles 1 and 2 are mentioned along with title 1.8. of the Digest. Whyever the redactors selected the Roman rules here, it most certainly was not because they were most suitable, nor because they expressed the law before codification. Though to give a definite answer to the question why the Roman rule was adopted here would require an analysis of the whole of the relevant section of the D.O., it may be said that the redactors apparently changed the law for no reason other than to obtain a concise rule: a rule which was not useful.

In general, the Digest is a free mixture of concepts and provisions drawn from varying sources: and statements such as that the Digest is predominantly of French origin (or otherwise) are so general as not to have much meaning or significance. The Digest is a complex mixture of provisions taken from many and varied sources, though obviously most heavily influenced by the work of the French redactors in the C.N. and Proj. An VIII. This leads on to a final point. Associate Justice Tate poses another problem. He points out that it is now clear that the redactors used both the French code and its 1800 Projet and remarks that "no explanation has been found for the contemporaneous use of the earlier draft along with final code [sic] adopted by the French." 67. This is really a false problem. Considering that the 1808 redactors were forming their own code and plundering all the legal materials available to them for borrowable provisions, since both the C.N. and its Projet were available to them, there is no reason why they should not have used both, and many reasons why they should use both. To use both the C.N. and its draft increased the redactors' pool of borrowable provisions. The redactors were not attempting to adopt the C.N. in its entirety. (The redactors also seem to have had a preference for the 1800 Projet because of their natural law orientation. 68.)

66a. The citation of Domat opposite the article would serve.
68. See following section.
2. Natural Law Influence on the Digest.

In many ways, codes would appear to be positive law par excellence, and this might well lead to the conclusion that they were necessarily not the result of natural law influence; but this would be wrong.

Arnaud, in Essai d'Analyse Structurale du Code Civil Français, 69. points to an important difference between the Code Napoléon of 1804 and its 1800 Projet, namely that the former has excluded the Preliminary Book of the latter. 70. As indicated in chapter three supra, 71. this preliminary book was excluded from the final code at least partly because of its didactic nature. Arnaud points out that this opposition given to definition and regulation points to an opposition "qui existe entre science juridique et législation." He then states that this opposition had various consequences: first, the disappearance of the Preliminary Book of the Proj. An VIII and its replacement with a title of six articles; the use of the future tense in the drafting of the code. "Mais le sens de ces transformations est plus important que le résultat," he comments. 73. He states that under the cover of a change of style and of language, there has taken place a move from a system of jusnaturalistique moderne to a system de conception positiviste. He argues that it should be recognised that the Code Napoléon "dans sa rédaction définitive, s'écarte beaucoup du jusnaturalisme qui inspirait le Projet de l'An VIII." 74. The 1804 Code rigorously separated law and morality, and natural law and positive law, thus adopting a form of legal positivism. Arnaud argues that some of the effects of this legal positivism lead to the suppression of doctrine and to the growth of jurisprudence, both effects being essentially those of legal positivism: he here specially considers the

70. At p. 44.
71. See chapter 3 supra at notes 202-204.
73. Ibid.
74. Ibid.
provisions on certainty of rule, the necessity of its promulgation, the subjection of the judge to the loi, and the prohibition of interpretation of the law.\textsuperscript{75} Arnaud has highlighted a most important matter: the exclusion of the Preliminary Book points to a move from natural law theories towards positive law theories. It would seem that in Austria, in that country’s long history of attempts at codification, there was similarly a shift from the eighteenth century natural law to the notion of strict law (strenges Recht) founded on the Kantian critique of Natural Law, allowing a disjunction of legal order and moral order,\textsuperscript{76} in the 1811 Allgemeines Bürgerliches Gesetzbuch.

How and why this shift from natural law to positive law took place need not concern us; that it took place in the final redaction of the Code Napoléon is what matters here. The redactors of the 1808 Digest possessed copies of both the completed Code Napoléon and its 1800 Projet, and they followed either or both in drawing up their code. They included a Preliminary Book based on the 1800 Projet, and rejected the C.N.’s brief Preliminary Title; and it is here crucial to discover why.

As indicated in chapter three, this title had a didactic nature, and Franklin has suggested that this would help explain its reception in Louisiana: a territory with no law schools and inadequate legal training.\textsuperscript{77} There is undoubtedly some element of truth in this. Secondly, the redactors have an obvious tendency to favour the style and arrangement of the Projet de l’An VIII over that of the C.N. Thus, they have adopted the Projet’s manner of numbering articles by Book, Title and article and rejected the more convenient continuous system of numbering of articles used in the C.N. In the research here, we have come across a number of occasions where they favoured the approach of the Projet.

\textsuperscript{75} Ibid.
\textsuperscript{77} “Observations”, supra, note 63, passim but esp. p.841.
First, in the definitions of marriage in chapter one of title IV of Book One (D.O. 1-3 (p.25)), they copied the arrangement of the Projet (there being no C.N. equivalents), although the Act of 1807 provided the legal material. 78.

Second, the articles on *louage des services* were closer to those of the Projet than those of the C.N. 79. Third, the section on rescission of contract on the grounds of lesion is closer to the Projet than the C.N. in both arrangement and actual provisions. 80. Hence it is probably fair to say that there is a recognisable pattern of favouring the Projet. (Examples could be multiplied.)

The third possible reason for the adoption of the Projet's preliminary book must be the one suggested by Arnaud: this book embodied notions of natural law as against the (potential) positivism of the C.N.'s short preliminary title. Franklin 81. has rightly stressed the importance of D.O. 21 (p.7). This article states as follows:

> "Dans les matières civiles, le Juge, à défaut de loi précise, est obligé de procéder conformément à l'équité; pour décider suivant l'équité, il faut recourir à la loi naturelle et à la raison, ou aux usages reçus, dans le silence de la loi primitive ["positive"]." 82.

The Projet's Preliminary Book VIII, Prel. Bk.5.11 states:

> "Dans les matières civiles, le juge, à défaut de loi précise, est un ministre d'équité. L'équité est le retour à la loi naturelle, ou aux usages reçus dans le silence de la loi positive."

The D.O. article is obviously based on that of the Projet. Indeed the D.O. article strengthens the Projet's appeal to natural law by the reference to "reason", the *mot sacré* of the eighteenth century enlightenment. The D.L.V. here refers to Domat, 83. another natural lawyer, who, as cited, also provides for appeal to universal natural law in the absence of express

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78. See chapter 4 *supra*.
79. See chapter 5 *supra*.
80. See *supra*, this chapter, at notes 32-37.
82. "Primitive" is surely a mistake for "positive". The English text uses "positive".
83. Domat, Prel. Bk. tit. 1, secn. 1 art. 23.
written law. Undoubtedly, Domat here influenced the Projet.

Drawing on Arnaud's analysis of the shift between the Projet de l'an VIII and the Code Civil de l'an XII, it is fair to conclude that the copying of this title, and of article 21 (p.7) in particular, evidence a predisposition of the 1808 redactors towards "jusnaturalisme moderne", the secular natural law of the eighteenth century. The Code Napoléon ignored this question of lacunae, and merely included a provision (article 4) penalising the judge who refused to judge by claiming that the law was silent, obscure or insufficient. One can understand why the school of exegesis developed in France. The Code Napoléon of course had not completely moved away from natural law; it had a hybrid character. 84. In copying the style of Projet in giving definitions of marriage, as adverted to above, 85. the 1808 redactors again demonstrated their predilection for natural law, where first principles, from which conclusions followed more geometrico, were important. Such definitions would be unnecessary in a more positivistic code.

Thus, one can conclude that, over all, the 1808 redactors were heavily influenced by the current theories of natural law: they were not legal positivists. This of course refers us back to the previous section and to the arguments put forward in chapter three. Some scholars have expressed surprise that, when the law formally in force was Castilian in origin, the Digest should be so strongly based on the French codes. 86. Some have flatly refused to believe that it could be based on the French 1804 Code and its 1800 Projet. 87. These attitudes are based on the misconception that the redactors were Austinian positivists. They were natural lawyers, as their

84. Arnaud, op.cit., p.45.
85. See text supra at notes 77-78.
87. One thinks especially of Professor Pascal's views.
time suggests and the internal evidence of the Digest confirms. Further, the Louisiana system at the time of redaction was civilian, with the internationalism which that implies. The common base of all civilian systems in Roman law allowed easy transmission of rules as the basic concepts were nearly always similar. Further, the recognition of Roman law as ratio scripta during the period of secular natural law also facilitated reception and transmission. During the nineteenth century, the 1804 French code was very influential: it is not too great an exaggeration to state that it was often received as if it were ratio scripta and this despite the strictures of Savigny and the historical school of jurisprudence. Given the orientation of the redactors towards natural law, given the international outlook of the civil law, given the prestige of the French code, it is surely not a matter of surprise that the redactors should have plundered the French code for material and used it as their model. Further, the acceptance of the doctrines of natural law by the redactors and their international outlook explains why the sources of the Digest are diverse: the redactors did not consider themselves bound by any notion of a "national" law.

3. The de la Vergne manuscript.

In this study, we have paid close attention to the citations of authorities made by the de la Vergne volume. The examination of these authorities permits the assessment


of the nature of the de la Vergne volume and its references. We may also make some suggestions as to the purpose served by the compilation of the manuscript.

There already is a fairly extensive literature on the de la Vergne manuscript, and a great deal of debate over its importance and significance.\(^90\) We will be able to assess the various arguments put forward as to the nature and purpose of the volume. To aid the following discussion, it is useful to describe the D.L.V. and the other copies of the Digest with similar annotations.

The de la Vergne volume is a copy of the 1808 Digest (of which there was only one edition) bound with interleaves. Opposite the English text, the interleaves contain general manuscript references to Roman, Spanish and French legal authorities; opposite the French text are manuscript references to French, Spanish and Roman law arranged according to the articles of the Digest; these latter are the references we studied closely, though the former were also referred to where relevant. The volume is entitled thus:

"Loix de l'Etat de la Louisiane, avec des notes qui réferent aux Loix civiles et Espagnoles qui y ont rapport. 1814."

On the leaves following the title is written a long passage entitled "Avant-Propos." The first three paragraphs of the Avant-Propos are worth quoting:

"Le but de cet ouvrage est de faire connaitre par des nottes écrites sur des pages en blanc attachées au Digeste des Loix de cet Etat, quels sont les textes des loix civiles et Espagnoles, qui y ont quelque rapport.

À cet effet, on trouvera à côté du texte anglais, une liste générale de tous les titres des loix Romaines et Espagnoles, qui sont relatifs aux matières traitées dans chaque chapitre du Digeste, et à côté du texte français et article par article, la citation des principales loix des divers codes, d'où sont tirées les dispositions de notre statut local.

On ne s'est pas borné en citant les loix qui ont quelque rapport avec les divers articles du Digeste, de marquer seulement celles qui contiennent des dispositions semblables; mais on y a ajouté celles qui, sur la même matièrè, offrent des differences dans ce qu'elles prescrivent ou qui contiennent des exceptions au principe général qui y est annoncé." (Accents as in original.) 91.

The paragraphs following these describe the sources of the "loix Espagnoles" and their order of precedence and do so accurately. 92. The final paragraph of the Avant-Propos states that: "À l'égard des dispositions du droit Romain elles ne peuvent être citées comme Loix en Espagne, mais seulement comme raison écrite."

The Avant-Propos is followed by an "Explication des abréviations", divided into two sections: one headed "Loix", the other "Auteurs". Among the auteurs Pothier is mentioned, though Domat is not. Domat is referred to in the fourth paragraph of the Avant-Propos where it is stated he is used for easy reference to the Roman laws. At the very end of the Digeste, the de la Vergne manuscript has a comprehensive alphabetical index.

The outer leather binding of the volume is imprinted "L. Moreau Lislet"; and the tradition of the de la Vergne family ascribes the work to him, though the manuscript has not been written by him. 93.

Several similar works have been found in Louisiana. The  

91. I have used the 1971 photographic reprint by Claitor: I may have missed some accents because of the reproduction. I shall cite the Avant-Propos by paragraph.  
92. Cf. these paragraphs with Rec. Ind. 2.1.2 and see chapter 3 supra, at notes 66-68. Rec. Ind. 2.1.2 is quoted at note 67.  
93. Dainow, op.cit. note 90 supra gives a good physical description.
law school of Loyola University possesses two volumes "substantially similar to the de la Vergne", \(^{94}\) one of which attributes the notes to Moreau Lislet in its manuscript title page; \(^{95}\) neither is as complete as the D.L.V. itself. \(^{96}\) Tulane University School of Law possesses a volume also similar to the D.L.V. \(^{97}\) The Southern Methodist University School of Law possesses a copy of the Digest with marginal annotations: these annotations are apparently unlike those of the D.L.V., and their significance (if any) is unknown. \(^{98}\) The Louisiana State University Library possesses a copy of the Digest, without annotated interlaves, but with marginal annotations. \(^{99}\) This book bears the name of Moreau Lislet in manuscript on the title page, though it is not his signature. \(^{100}\) All the marginal references in this volume apparently appear in the D.L.V., though the latter's references are much more numerous. \(^{101}\) The Louisiana State University copy's marginal annotations contain corrections; they are also in a hand different from that of the D.L.V. \(^{102}\) Apparently, the hand is that of Moreau Lislet himself. \(^{103}\) Professor Pascal suggests this copy is earlier than the D.L.V. \(^{104}\) Another manuscript copy of the annotations has been found in the Tulane University Law School Library. \(^{105}\) This manuscript belonged to Henry Raphael Denis, a lawyer and contemporary of Moreau Lislet. \(^{106}\) (I will here refer to it as the "Denis Manuscript".) The annotations appear to be in Denis's hand. \(^{107}\) The Denis manuscript can be dated to after 1820, as its pages bear a watermark with that date. \(^{108}\) It contains an Avant-Propos attributed to

\(^{94}\) I quote Darby and McDonald, \textit{op.cit.}, note 90 \textit{supra} at p.1211: I have not seen these other works.

\(^{95}\) See preface to Claitor's 1971 reprint of the D.L.V., second page.

\(^{96}\) \textit{Ibid.}

\(^{97}\) Darby and McDonald, \textit{op.cit.}, p.1211.

\(^{98}\) \textit{Ibid.} p.1211 note 5.


\(^{100}\) \textit{Ibid.} p.25 and note 3 thereon.


\(^{103}\) Professor Pascal and Mr. L. de la Vergne compared the L.S.U. manuscript and the D.L.V. with Moreau Lislet's olographic will. See \textit{Recent Discovery}, p.26.

\(^{104}\) \textit{Recent Discovery}, p.26.

\(^{105}\) By Darby and McDonald, see their work, p.1211.

\(^{106}\) Darby and McDonald, \textit{op.cit.}, p.1211.

\(^{107}\) \textit{Ibid.} p.1211.

\(^{108}\) \textit{Ibid.} p.1211.
Moreau Lislet identical to that of the D.L.V. The Denis manuscript differs in some important respects from the D.L.V. First, the manuscript is not bound with a copy of the 1808 Digest. Second, apart from for the first five chapters of the first title of the third book, only the annotations opposite the French text of the D.L.V. are found in the Denis manuscript; for the said five chapters the annotations opposite the English text of the D.L.V. are also found in the Denis manuscript. Third, the manuscript is inscribed thus:

"Renvoy aux Principales loix des divers codes d'ou sont tirees les dispositions du digeste de la Loi civile qui est en force dans l'état de la Louisiane." Darby and McDonald surmise that this title is taken from the second paragraph of the Avant-Propos (see above). The second paragraph refers to "les dispositions de notre statut local", while the Denis manuscript has rendered this as "digeste de la Loi Civile etc." The interpretation of "notre statut local" has been disputed; Darby and McDonald argue that the title of the Denis manuscript shows which interpretation is correct.

If we turn to consideration of the various views put forward on the D.L.V., we find there are two separate problems. First, there is the nature of the D.L.V. references: are they to "sources" of the articles? Second, what was the purpose of compiling the manuscript notes? Professor Pascal claims that the references are to the "sources" of the 1808 Digest, and it is appropriate to consider his views first. The discussion of his views will enable us to come to a conclusion as to the nature of the D.L.V.

Pascal's general thesis on the sources of the Digest

109. Ibid. p.1212.
110. Ibid. p.1211.
111. Ibid. p.1211.
112. Ibid. p.1212.
113. Ibid. p.1212.
114. See infra.
has already been discussed. 115. He uses the D.L.V. to support his thesis by arguing that: first, the D.L.V. was compiled by Moreau Lislet; second most of the references are to "Spanish" and Roman legal texts; third, the Avant-Propos indicates that the references are to the "sources" of the Digest; and fourth, there are no references to the C.N. or its Projet. He concludes that the D.L.V. helps prove his thesis that the 1808 Digest is the expression of "Spanish-Roman" law in French form. Though the last writing in which he expressed this view was in 1972, it is clear his views are unchanged. 116.

Professor Pascal's first point - that Moreau Lislet compiled the D.L.V. references - should probably be accepted. All the versions of the manuscript notes have some association with Moreau Lislet. There is no evidence to suggest who might have been the compiler other than Moreau Lislet; so it should be accepted that he in fact did so.

Second, Pascal stresses that most of the references are to Spanish and Roman texts. This ignores Pothier who is cited almost continuously. Of course, Pascal is correct, the citation of Castilian authority is very great; but, as I hope it will now be clear, the Castilian law as a whole cited in the D.L.V. as regards puissance du mari and puissance paternelle differs radically from the law on these matters as a whole in the Digest. There is occasional correspondence, but this appears to be generally fortuitous; and only occurs in isolated articles. Thus, the D.L.V. quite definitely, as regards the Castilian citations on these matters, does not reveal the substantive source of the Digest law. The citations to Pothier are a different matter: he does appear to have been influential as regards, for example, aspects of louage. The aspects of law

examined in chapters four and five are sufficient to show that the D.L.V. references to Castilian law are generally to analogous provisions, not to sources. *Locatio operarum* in the Castilian law is similar to that in the C.N. and D.O. This is due to their common Roman inheritance. The bipartite division, and general treatment, of *louage* in the D.O., however, are derived from the C.N. The important texts on contract we have examined suggest the same. The D.L.V. Castilian references are not to the substantive sources of the Digest. Some of the D.L.V.'s references are to substantive sources - consider some of the references to Pothier and to Louisiana Acts - but taken as a whole, the Digest does not cite the substantive sources of the Digest, as there would have to be references to the C.N. and its *Projet*.

The above also refers to Professor Pascal's fourth point. There are no references to the C.N. or its *Projet* not because they were not sources of substantive law in the Digest, but because whatever else the D.L.V. may be, its references most certainly are generally not to the substantive and conceptual sources of the Digest, though it does refer to some such. As regards matters not touched on in this thesis, they could originate in Castilian law, although this seems improbable; but on the basis of the D.L.V. it cannot be assumed that they do so originate, even if there is correspondence in some articles or ideas.

Professor Pascal's third argument relates to the *Avant-Propos*. Now the D.L.V. as a work of sources must stand and fall on whether the citations are to sources, and it is clear that, in general, the citations are not to sources, with some exceptions, such as those to the 1807 Act, ch. 17 and the 1806 Act, ch. 11. In other words, the argument of Pascal does not hold up. The Castilian references are not to sources, with the exception of certain isolated articles. That some references do reveal sources is irrelevant. The *Avant-Propos*, however, states that the purpose of the manuscript is to make known by notes written on the blank
pages attached to the Digest of the laws the texts of civil and Spanish laws which have quelque rapport with them. 117. The references opposite the English text are stated to be to the Roman and Spanish laws "qui sont relatifs aux matières" treated of in each chapter of the Digest. The references opposite the French text, article by article, are said to be to the principal laws "des divers codes d'ou sont tirées les dispositions de notre statut local." 118. The third paragraph states that not only these laws which provide similarly to the 1808 Digest have been cited, but also those which have contrary provisions or which contain exceptions to the general principle. 119.

There is no explicit statement that the references are to "sources". 120. The references are stated in the first paragraph to be to laws which have some relation to the Digest (and this indeed is true, as appears from chapters four and five above). The general references opposite the English text are again stated to be to laws relating to the Digest, and this is indeed correct. The third paragraph cannot be faulted in describing the de la Vergne volume: many citations are to similar laws, to contrary laws, and to works expanding on the topic mentioned in the concise Digest article.

We will leave aside for the moment Professor Pascal's interpretation of the Avant-Propos's statement about the references opposite the French text, and examine his interpretation of the Avant-Propos's statement about the references opposite the English text. He states:

"Those opposite the English text, on the other hand, as the avant-propos states clearly, give 'a general list of the Roman and Spanish laws which relate to the matters treated in each chapter of the Digest,' whether 'similar' or 'present[ing] differences or... containing exceptions to the general principle.'" 121.

117. First paragraph, supra, at note 91.
118. Second paragraph, supra, at note 91.
119. Third paragraph, supra, at note 91.
120. As Sweeney points out, Tournament, pp.596-7.
121. Reply, p.607.
This is most interesting. He has also said elsewhere that the references opposite the English text are to "corresponding civil laws not used as sources." In the passage I have quoted, Professor Pascal himself quotes passages from an English translation of the Avant-Propos; he purports to show that the references opposite the English text are not to "sources" but only to "similar", "different" or "exceptional" rules. Professor Pascal's selection of quotations is, however, very misleading. The description of the references opposite the English text is taken from the second paragraph of the Avant-Propos in describing them as these "which relate to the matters treated in each chapter of the Digest". "Similar", "semblable", "differences" and "exceptions" come from the third paragraph of the Avant-Propos. There is no reason to apply these comments of the third paragraph only to the references opposite the English text. It is possible that Professor Pascal connects "ont quelque rapport" in the third paragraph with "sont relatifs" in the second (the references opposite the French text being described as to principal laws of the various codes from which sont tirées etc.). If this was the reason, it would have been more appropriate to connect the third paragraph with the first; and the first paragraph surely governs all of the second. Further, the third paragraph states "les loix qui ont quelque rapport avec les divers articles du Digeste" (emphasis mine) while, in the second paragraph, the provisions cited opposite the English text are said to be "relatifs aux matières traités dans chaque chapitre du Digeste" (emphasis mine). Were similarity of expression (i.e. "relate", "some relation") Professor Pascal's reason for construing the third paragraph with only part of the second in this fashion, an argument could be put forward that the third paragraph's statements referred only to that part of the second paragraph dealing with the

122. "Book Note", 1972, note 90 supra, p.496.
123. See Avant-Propos as quoted at note 91 supra.
citations opposite the French text, as both the third paragraph and this part of the second refer to articles of the Digest, while the references opposite the English text are stated to refer to chaque chapitre of the Digest. This last argument should not be relied on as indicating the intended meaning of the third paragraph of the Avant-Propos; it is put forward merely to indicate that Professor Pascal's interpretation obscures the obvious meaning of this aspect of the Avant-Propos. 124.

In the general description in the first paragraph, "ont quelque rapport" is used to describe the significance of all the citations for the Digest, those opposite both the English and French texts. This general statement must govern the interpretation of the second and third paragraphs which follow, and the third paragraph must refer to both sets of citations. This is, in fact, the natural and obvious meaning of the third paragraph. The third paragraph then contains an accurate description of the references in the de la Vergne manuscript: some are to provisions similar to those of the Digest; some are to provisions containing differences from those of the Digest; and some are to provisions containing exceptions to those of the Digest. Pascal's construction of this third paragraph to refer only to the citations opposite the English text of the Digest must be rejected.

Pascal argues that the second paragraph of the Avant-Propos means that the references opposite the French text are to the sources of the articles. The second paragraph itself states that the citations opposite the French text are to the principal laws of the various codes from which are drawn the dispositions of "notre statut local". The meaning of "notre statut local" has been disputed. In their translations, both Dainow 125. and Franklin 126. offer

124. The above discussion of the Avant-Propos might seem confusing; consultation of the quotation at note 91 ought to render affairs more simple.
the meaning "our local statute": that is, it refers to
the 1808 Digest. If Darby and McDonald are correct,\textsuperscript{127} then the title of the "Denis manuscript" supports this
interpretation. Sweeney has argued that, on the contrary, the phrase should be taken as meaning "or local status" or "state of affairs" or something akin to this.\textsuperscript{128} In a later work, Franklin argues against this interpretation, and his arguments have some force.\textsuperscript{129} Nevertheless, why did Moreau write "notre statut local" and not "Digeste", if "Digeste" was intended?

The problems of translation and signification are manifold, and there is probably little point in resolving this dispute. It is fair to say, however, that if Sweeney were correct, and the Avant-Propos were referring to the previous state of affairs, the section of the second paragraph at dispute ought to have read "d'où étaient tirées les dispositions etc." Instead, the present tense is used: "are drawn" not "were drawn". Hence, if we, for the moment, accept Sweeney's suggestion, then the passage means something like "from where are drawn the provisions of our local status" as presently existing.\textsuperscript{130} That present "state of affairs" in 1814 includes the 1808 Digest: in other words, Sweeney's suggestion comes to mean something similar to the meaning attributed to the phrase by his opponents. Sweeney explains the sentence under consideration thus:

\begin{quote}
127. \textit{Op. cit.} p. 1212. Darcy and McDonald argue that the title of the "Denis manuscript" is taken from the last sentence of the second paragraph of the Avant-Propos, with the replacement of "notre statut local" by "Digeste de la loi..." For this to be relevant: 1. their statement that the title is taken from that sentence has to be accepted; 2. that Denis meant the title to have the same meaning as that sentence; and 3. that Denis correctly understood the meaning of the phrase.
129. \textit{Existential Force}, pp. 80-93. Franklin's view will be discussed further below.
130. The underlined phrase has no equivalent in the Avant-Propos; but its meaning is implicit.
\end{quote}
"...on the blank pages across from the French text, and "article by article" [are] those provisions of civil and Spanish law which formerly applied in the Territory, and governed 'the local state of affairs'...." 131.

"Formerly", as underlined, has absolutely no equivalent word or phrase in the Avant-Propos, for, as I have pointed out, the sentence is phrased in the present. Hence the two meanings are not competing: the variance of views only originates in Sweeney's making the sentence relate to the past, which it does not. 132.

There is further evidence to suggest that "notre statut local" should probably be taken as referring to the Digest. In some early Louisiana cases, the Digest was referred to as a statute. 133. The usage was known and acceptable. If it should be wondered why "our local statute" was used here in the Avant-Propos rather than "Digest", it may be suggested that the writer did so for the sake of variety: in the same paragraph, "Digest" and "codes" have already been mentioned.

If the above arguments are correct, then we may go on to consider the meaning attributed to this passage by Pascal. He argues that the passage means that opposite the French text are the "sources" of the articles. 134. From the research detailed in chapters four and five we know that, in some instances, this is true, in some it is not true, and that in general, the references to Castilian law are not to "sources"; they are references to equivalent provisions of the Castilian law. Further, as we saw in chapter four, on occasion, an article in the Digest matched a provision of the Leyes de Toro, and thus, the D.L.V. reference might seem to be to a source: however, the

131. Tournament, p.601. I have included "are" to make the passage readable when extracted from context: it does not change the meaning.
132. Franklin concludes too, that both phrases mean the same: see Existential Force, pp.80-93.
133. See e.g. Dewes v. Morgan 1 Mart. (O.S.) 1 at 2 (1809); Sennet v. Sennet's Legatees 3 Mart. (O.S.) 411 at 416 (1814)
134. See Reply, pp.606-7. Note that in his quotation from the Avant-Propos he includes "the substance of" and there is no equivalent actually in the Avant-Propos: see Batiza, Rejoinder, pp.648-9.
provisions of the Leves de Toro on marital authority as a whole were radically different from the equivalent provisions in the Digest. Thus the references are occasionally to sources (one thinks of the 1807 Act on celebration of marriages), sometimes are to similar provisions and sometimes to contradictory provisions. How does this fit in with the passage under consideration? The passage states that the references are to the laws of the various codes from which are drawn "notre statut local". Now this is indeed true, they are. The Digest does contain provisions from the Castilian and civil laws. The passage does not say that the articles are drawn from the laws cited opposite them (though sometimes they are), merely that the citations opposite the articles are to the laws of legal systems from which the dispositions of the Digest or "notre statut local" are drawn. (This, of course, leaves unanswered the question of why the Code Napoléon and its projet are not cited, as they also ought to be included as part of the "divers codes". An answer to this is obvious, as will be shown below.) Further, since Professor Pascal's construction of the third paragraph of the Avant-Propos must be rejected, the third paragraph applies here and the citation opposite the French articles are allowed to be to exceptional and contradictory provisions. The problem thus resolves itself, and Professor Pascal's construction of the Avant-Propos must be dismissed. Hence, the third part of Pascal's thesis can be discounted.

To recap: Professor Pascal's argument on the D.L.V. reduces to four parts. The first, that it was compiled by Moreau Lislet, is probably correct. The second, that the majority of references are to "Spanish" and Roman sources, is correct but irrelevant. The third, that the Avant-Propos states that the references are to the "sources" of the Digest has been shown to be wrong. The fourth, that there being no references to the French Code or its projet shows that they are not sources, can be dismissed,
since the D.L.V. apparently is not, in essence, a compilation of source references. His thesis that the D.L.V. proves that the Digest is in essence of Castilian origin may be dismissed. The matter of the lack of references to the C.N. or its projet will be dismissed below.

Professor Pascal is the only scholar who has argued that the citations found in the D.L.V. are in fact to the "sources" of the Digest's articles; though, as will be seen, others have adopted to some extent, aspects of his interpretation of the meaning of the Avant-Propos: an interpretation here argued against. For Pascal, the purpose or function of the de la Vergne notes is to make known the "sources" of the Digest. Others, rejecting the contention that the references are to "sources" have to suggest alternative purposes or functions for the compilation of these manuscript citations.

It will be recalled that Dean Sweeney interpreted "notre statut local" as "our local status" or "state of affairs", as existing before the redaction of the Digest. Reasons for rejecting this interpretation have been given. Professor Batiza at one point appears also to have accepted this interpretation; though there is reason to believe that Batiza would no longer agree with Sweeney here.

Dean Sweeney has put forward an interesting suggestion as to the purpose of the compilation of the references in the de la Vergne manuscript. He suggests that the de la Vergne volume was intended to provide a cross-index to the Castilian law, so that lawyers could readily ascertain which provisions of the Castilian law had been superseded.

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136. Supra at notes 128-132.
137. See Rejoinder, p.648 cf. Sources, p.9, note 34.
138. See his Textual Evidence, p.81, note 22, where he states of the references in the D.L.V. "that their main purpose was to divert attention from the concealed actual sources of the 1808 Code - principally, the French Projet and Code, and to a lesser degree, Blackstone." This is similar to the views of Baade and Franklin: see infra.
139. Tournament, p.601.
This thesis is attractive; but there are three problems. First, Dean Sweeney's interpretation of "notre statut local" has been shown to be wrong: the references are not the laws previously in force. Second, the style of the references opposite the French text would militate against the possibility of the use of the D.L.V. as suggested. The lawyer who looked up an isolated provision of Castilian law as cited in connection with a Digest article would not necessarily gain a true impression of that law as a whole. The citation of the Leyes de Toro on marital authority shows this clearly: to refer to an isolated ley would not give a true idea of the scope and nature of the provisions as a whole. Third, Dean Sweeney's suggestion does not take into account that the period of compilation of the D.L.V. was the period of revival of the Castilian law. Sweeney's hypothesis as to the intended function of the D.L.V. must be rejected.

Professor Franklin puts forward an explanation of the function of the D.L.V.: he accepts that as a matter of fact the references are not to "sources". 140 It will be recalled that in 1806 the Louisiana territorial legislature passed an act, vetoed by Claiborne, to provide for authoritative sources of law. 141 Franklin points out the de la Vergne manuscript cites the same Castilian works as the vetoed 1806 Act. He argues that there was a struggle not only between the civil law and the common law but between the "mediaeval Spanish Romanist feudal law" and the bourgeois French law. The 1806 Act was intended to secure the victory of the "feudal" forces, while the 1808 Digest won on behalf of the bourgeois French forces, supported by Jefferson. The de la Vergne volume was intended to be a way of transcending the 1808 bourgeois Digest through the importation of the "Spanish feudal" law by

140. See generally Existential Force, passim, and Important Document.
141. See chapter 3 supra at note 147, and Franklin, Existential Force, pp.69-75.
means of the doctrine of natural law. 142. That is the de
la Vergne manuscript posits a system of dual contradictory
laws one negating each other, unified through the phrase
"some relation". Moreau Lislet masked the feudal tendencies
of the de la Vergne manuscript through the use of the term
"some relation" and by setting up the Spanish feudal law as
natural law.

Professor Franklin's discussion is perhaps rather more
complex than the above brief exegesis can convey; but the
nub of his argument is expressed. Professor Franklin's
view of the purpose of the de la Vergne manuscript must be
dismissed. His view relies on there being a structural
rivalry, expressed in the 1806 Act, between the bourgeois
French law and the feudal Spanish law, with the Spanish law
supporting the system of slavery and the bourgeois French law
rejecting it. This is unconvincing, as pointed out in
chapter two. 143. There is no evidence, in the period leading
up to the promulgation of the Digest, of disunity in the
civil law camp. There was general confusion in Louisiana
over the laws in force: hence the passing of the 1806 Act,
vetoed not because it was "mediaeval feudal Spanish", but
because it hindered the reception of the common law
hoped for by the U.S. administration. 144.

It may be said further that Franklin's use of the term
"feudal" is unsatisfactory. To some extent, he equates
feudalism with slavery: this is surely incorrect. There is
nothing inherently "feudal" about slavery. The feudal mode
of production, in Marxist terms, is not a slave-based mode
of production. Slavery may exist within feudalism, but
this is irrelevant. Similarly, slavery may easily exist
in a bourgeois mode of production, if bolstered by a
sufficient ideology: and it did so in Louisiana. 145.

142. See Existential Force, pp.73-78; at p.78, Franklin
states: "...the aim of [the de la Vergne manuscript] is to
overcome by legal method the bourgeois Digest of 1808 by
means of the system of legal materials set out in the
manuscript. Thus the defeat of the projet of 1806 would
be negated.

143. See chapter 2 supra at notes 39-45.

144. See e.g. Dargo, op.cit., pp.128-137.

145. See further on these points, Orlando Patterson, "On
Slavery and Slave Formations" 117 New Left Review 1979
pp.31-67.
although some of the Castilian materials (notably, the Fuero Real and Partidas) were promulgated in a feudal society, once abstracted from that society, they no longer consecrate feudal relationships. That is, Louisianian society was not "feudal"; the "feudal" provisions of the Partidas could not be applied. Again, not all the Castilian authorities supposed or encapsulated a feudal system of social relations; that they originated in a feudal society is therefore not of importance. The de la Vergne manuscript referred to Domat, Pothier and territorial Acts of Louisiana. Professor Franklin's view of the D.L.V. does not take adequate account of this. He does allude to Pothier and Domat, pointing out that they influenced the redaction of the French code; but he only comments that they were jurists from before the French Revolution: he thus implies that they too were "feudal". 146. It may also be pointed out that the de la Vergne references are not to "feudal" aspects of the Castilian law. The references to the Castilian law are not to aspects of that law which are in any essential way more feudal than the Digest: they are merely different. True that aspects of the Castilian law on contract were based on the "non-bourgeois" concept of "just price", but this does not affect the argument. Because the de la Vergne references have to follow the arrangement and articles of the 1808 Digest, there can only be references to topics covered in the Digest, which thus structures the references to Castilian law.

Professor Franklin claims Jefferson as a supporter of the bourgeois French code and an opponent of the "penchant hispanophile". 147. This is unconvincing. Jefferson favoured the introduction of the common law. He argued in the Ratture case for the French law as the law in force before adoption of the Digest; but this was not because he supported the French law, but because in this

146. Existential Force, p.74. It should be recalled that the fourth paragraph of the Avant-Propos stated that Domat was used as a guide to the Roman law.
particular instance it favoured his viewpoint.\textsuperscript{148}

It is true that there was from 1812 onwards an attempt to reassert the Castilian law in the courts. This has been discussed in chapter three and will be returned to, below. Here it is sufficient to say that this attempted re-assertion need not be interpreted as designed to supplant the Digest and to restore the "feudal Spanish" law because of opposition to the "bourgeois" Digest on the grounds of slavery. It may be more satisfactorily explained in a different manner as will be shown below. Further, Moreau Lislet compiled the references in the de la Vergne manuscript: he can hardly be associated with an attempt to impose the "feudal Spanish" law as a system of natural law superseding the Digest, especially when his part in the redaction of the 1825 code is considered. (The 1825 Code, it will be recalled, attempted to stop the use of Castilian authorities.)\textsuperscript{149}

The final point to be made is that for the de la Vergne manuscript to consecrate an activist legal system introducing "feudal" law to supersede the Digest, the D.L.V. would have needed wide-spread circulation in order to be effective. There is no evidence of this. Several copies of its references are known: but this is insufficient evidence. This is a problem with which Professor Franklin does not deal. It could be suggested that the D.L.V. and 1806 Act are merely outward signifiers of an inward structural rivalry, and thus merely evidence the struggle between "bourgeois" and "feudal" forces. There is, however, no evidence of such an inner structural rivalry apart from the de la Vergne manuscript and the 1806 Act as interpreted by Professor Franklin. All the other evidence suggests that Louisiana was a society safely esconced within bourgeois ideology and social relations. There was no structural...

\textsuperscript{148} See Dargo, \textit{op.cit.}, pp.74-101 esp. at pp.86-7; see also Brown, \textit{Law and Government}, pp.182-5.
\textsuperscript{149} See chapter three supra at notes 214-220.
rivalry. It may be a truism that any society has contradictory elements; but if there were such in Louisiana, they were hardly of any importance or of relevance here.

Professor Franklin's view that the function of the D.L.V. was to replace the "bourgeois" Digest with a system of "feudal" Spanish law imported as natural law must be dismissed. There is no evidence to support his view.

Professor Baade has suggested that the borrowing of provisions from the French code and projet for the 1808 Digest could not publicly be acknowledged; he suggests that the de la Vergne manuscript was intended to provide by its source notes a "positive law alibi" for the 1808 Digest. He states that Moreau Lislet prepared the de la Vergne volume for publication in 1814. Professor Batiza has recently seemingly adopted the same or a similar view, when he states that the notes in the de la Vergne volume were intended "to divert attention from the concealed actual sources of the 1808 Code - principally, the French Projet and Code, and to a lesser degree, Blackstone." Professor Baade's view should probably be rejected. The Avant-Propos is indeed equivocal; but it does not specifically state that the citations are to the sources of the articles. Indeed, that the citations generally are not to the sources of the articles would have been immediately obvious to any lawyer who examined the passages cited. The de la Vergne volume would not have succeeded in persuading those who examined it that the Digest's provisions were taken from the Castilian law formally applicable in Louisiana before the enactment of the 1808 Digest. Further, Professor Baade's view relies on the citations having been prepared for publication: there is no evidence of this.

Having thus described the de la Vergne volume, and

150. Marriage Contracts, p. 84.
discussed the views put forward on it, and having found them all in some respects wanting, it is now appropriate to consider the nature and purpose of the volume. In the passages describing other people's views, a great many comments have been made both on the nature of the references and on the Avant-Propos. Several conclusions flow from these, and we will deal with them next.

The Avant-Propos is indeed equivocal in its statements; whatever may have Moreau Lislet's intention in writing it, he has not made that intention particularly clear. In the critique offered above of Pascal's views, it was emphasised that the Avant-Propos can successfully be interpreted to fit the actual nature of the references as being to "sources", similar laws, contradictory laws and exceptions. In the absence of any evidence to the contrary, it is fair to construe the de la Vergne volume as a whole, and to use the references to illumine the meaning of the Avant-Propos. The only way we can avoid doing this is if we accept the views of either Franklin or Baade, and, as argued above, there is insufficient evidence to support the views of either of them. If we consider developments in Louisiana law in the early State period, that is, in the period in which the de la Vergne volume's manuscript notes were produced, we may see that knowledge of Castilian law was widespread,\(^{152}\), so that any competent lawyer would have known that the D.L.V. did not refer to sources, whether or not it did so to provide a "positive law alibi".

We are left with the following conclusions. The de la Vergne volume's citations did not provide a guide to the sources used in the redaction of the Digest. Sometimes, of course, the citations do refer to the sources of a provision. The references in the main, however, are to equivalent provisions of the Castilian and pre-Code French laws, which provisions are generally expounded at greater length in these doctrinal (and other) writings than in the Digest. There are no references to the Code Napoléon or its Projet, obvious sources, although the Avant-Propos states that the references are to the various codes (in a

\(^{152}\). As an examination of the first series of Martin's Reports shows.
loose sense) from where the provisions of the Louisiana law are drawn. There are references to territorial Acts, parts of which have formed the "substantive source" of some (and a not inconsiderable number) of articles. The volume was composed around 1814, and several copies were made of it. The volume would not serve as a guide to the pre-Digest law. This last point will be expanded on below. All these statements are drawn from the evidence of the volume itself, and leave the purpose or function (as distinct from nature) of the volume as mysterious as ever. The Avant-Propos does state that the purpose (le but) of the work was to make known which texts of the Spanish and Roman laws relate (or whatever) to the Digest, but it does not say why this should be done. Having shown, if the above arguments are correct, that the views so far put forward must be disregarded, it behoves us now to discover (if possible) why the de la Vergne volume was composed.

Before considering this, it is important to point out why the de la Vergne references would not serve as a guide to the pre-Digest Castilian law, as Pascal suggests they would,153 and Sweeney comes near to suggesting they would154 (if I understand both correctly, in this respect). The reason for this is simple, and will have become obvious in the examination of substantive law in chapters four and five. The de la Vergne references follow the order of the 1808 Digest. Thus, any particular reference (as distinct from the general chapter by chapter references) must be opposite a Digest article. As will have been seen, as regards the treatment of puissance maritale, the sections of the Digest follow the treatment in the French codes. This treatment is based on the northern French concept of puissance maritale. Now, this concept is antithetical to the Castilian concept of puissance maritale (to use the term loosely). This has the result that, because of the

different approach and concept, the Digest deals with this aspect of husband and wife relationships in a way very different from the Castilian law, and, indeed, provides rules that have no equivalent in the Castilian law. Hence the references in the Digest, because they are based around the French concept, give references to the Castilian law which are misleading, if these references are all that is examined. There are some Digest articles for which there are no Castilian provisions, and there are some aspects of the Castilian law that cannot appear in the de la Vergne volume because there are no French and Digest equivalents. Further, the Castilian law cannot be understood merely through the "statutory" provisions of the Nueva Recopilación or the Siete Partidas. The Castilian juristic writings are of great importance. The Leyes de Toro have very important provisions on the capacity of married women: the only Castilian writer cited as providing an explanation and exposition of the relevant leyes is Febrero. Though Febrero was only a notary and his Libreria was written for notaries, his work was much used in Mexico and Spanish North America, presumably because it was convenient; but one looks in vain for the citation of important jurists such as Gomez or Llamas y Molina who authoritatively commented on the Leyes. 155. The de la Vergne references, unless supplemented, do not necessarily give an accurate picture of the Castilian law. The citations opposite the French text, since they are only to specific Castilian provisions, most certainly do not give an adequate account. This is, as pointed out, inevitable given certain important conceptual differences between the Castilian law and the law in the Digest. The areas of séparation de biens and séparation de corps show this clearly, as do the articles on puissance maritale.

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155. In the chapter citations on husband and wife opposite the English text the only Castilian writer cited is Febrero. In the Avant-Propos, Gomez is cited, but only his Variae Resolutiones, not his Commentarius ad Legea Tauri.
If we now return to the purpose behind the compilation of the de la Vergne volume: what hypotheses may be suggested? Since the de la Vergne volume itself is enigmatic, it is appropriate to examine its historical context. It may be recalled that in the early State period, there was a series of Louisiana court decisions, conventionally regarded as starting with Hayes v. Berwick, which re-asserted the "Spanish" law to some extent to the detriment of the 1808 Digest, and which culminated in the famous case of Cottin v. Cottin. We have already looked briefly at these cases in another connection, and will return to them again later. These cases tell us something important about the matter on hand: namely, that over the period during which the de la Vergne manuscript was written, the Castilian law came into prominence once more. For matters outwith the areas covered in the Digest, there had always been a tendency to rely on the Castilian law (although one will find other laws cited); but during the period 1812-1817, and thereafter, the Digest came to be interpreted in the light of the Castilian law. The reasons why need not concern us at the moment. During the same period, we also find the de la Vergne manuscript notes appearing, and their various copies. Although this is a speculative point, it is plausible to infer that there is some connection.

If this is correct, the reason for the compilation of the manuscript notes by Moreau Lislet becomes obvious: Castilian provisions equivalent to the Digest articles were of a practical interest to Louisiana lawyers. It became of practical importance to see if there were a way of winning a case for one's client through the citation of Castilian authority in point. By arguing that a particular provision should be interpreted in the light of a Castilian

156. 2 Mart. (O.S.) 138 (1812).
157. 5 Mart. (O.S.) 93 (1817).
158. See supra, chapter 3 at notes 208-227.
159. See infra, no. 5 of this chapter, at notes 175-240.
160. See infra, no. 5 of this chapter, at notes 175-240.
authority, a lawyer could win an otherwise potentially hopeless case: this appears to have been the position in Cottin. Why the Louisiana courts accepted this will be considered below. The utility of a series of cross-references to the Castilian law would be obvious, and Moreau Lislet was an able enough lawyer both to realise this and to carry out the task. One may surmise that his colleagues also would appreciate the benefits of a series of cross references such as those in the D.L.V. and have copies made for themselves or indeed copy the references themselves, as Denis seems to have done. Further, a code such as the Digest requires interpretation, and included among the de la Vergne references are references to Domat and Pothier; both of whom discussed, at great length, legal provisions very similar to those in the Digest. The passages of Domat and Pothier would suggest arguments and help interpret the Digest. The references to the territorial Acts had a similar function. Not all the provisions of the 1807 Act on the celebration of marriages, nor all the provisions of the 1806 Act on apprentices and engaged were included in the Digest. The de la Vergne volume's references conveniently directed the lawyer's attention to these important Acts. Hence, it seems plausible to suggest that the function of the de la Vergne manuscript notes was to aid the practising lawyer in interpreting the Digest and providing authority for arguments in court. Moreau Lislet was a busy advocate, and such a compilation would be invaluable to him. (It will be recalled that it was he who, along with another, translated parts of the Siete Partidas.)

This explains the nature of the references: to Castilian, French and Roman law, and to territorial Acts. If the purpose of the volume were to reveal the "actual

161. See infra, section 5 of this chapter.
164. See chapter 3 supra at notes 221-222. The other was Henry Carleton.
Castilian sources", some of the references would be irrelevant; other references would be irrelevant if the purpose were to pretend that the sources were Castilian and to provide a "positive law alibi" - likewise were the purpose to introduce the Castilian law as natural law. This explains the content of the Avant-Propos. It should be said that the Avant-Propos is, to some extent, still mysterious; but the explanation offered does not contradict the Avant-Propos statements, does not pervert their meaning, and is in line with what is said therein. This argument explains why the Avant-Propos discusses at length the sources of the Castilian law: it allows the lawyer to sort out the precedence of the varying authorities. Further, we can now explain why there are no references to the Code Napoléon and its Projet. Such references were unnecessary, as the articles of the French code and its 1800 projet would not help interpret the Digest. The absence of references to the C.N. and its projet is only mysterious if it is thought that the purpose of the notes was to reveal "sources"; once it is accepted that the purpose is to provide references to provisions to interpret the law, the mystery disappears. It would be obvious to any Louisiana lawyer that the Digest was to a considerable extent copied from the work of the French redactors: the two texts needed merely to be put side by side. There evidently were copies of the French code in Louisiana, and there can have been no mystery as to the origins of much of the Digest. If we consider that the Avant-Propos states that opposite the French text are references to the "divers codes d'où sont tirées les dispositions de notre statut local", the reason why references to the C.N. were not included must be that no one doubted that the French code was a source. This is of course an argument e silentio, but nonetheless valid for that. If it is accepted, as argued here, that the de la Vergne volume provides references to aid interpretation, references to the French redaction would be otiose, as all that would be found would be articles which were identical, or nearly so, to the Digest, which articles would hardly aid interpretation. Further, it must be recalled, that Jeremiah Brown was able
to write thus in 1806:

"It is a matter of public notoriety that our St. Domingo Lycurgus is avowedly copying his new code from that of Bonaparte, to the infinite delight of the whole party by whom he is employed." 165.

The St. Domingo Lycurgus is, of course, Moreau Lislet. Were Brown's pamphlet widely disseminated many must have known of the provenance of the Digest's articles. Indeed, if he were correct in stating that it was a matter of public knowledge that Moreau Lislet was copying the French code for the Digest because Moreau Lislet made no secret of the fact that this was what he was doing, we can be certain that the Louisiana legal profession knew the origin of the bulk of the articles of their Digest. This makes unacceptable the suggestion that the D.L.V. was intended to conceal the origins of the articles of the Digest.

A further point arises. It is clear that Blackstone has had some influence, as regards both parent and child and apprenticeship. Why is he not mentioned? That the de la Vergne volume is intended to aid interpretation, must be the answer. It was pointed out in chapter five that the provisions on apprentices influenced by Blackstone were fairly universal; in other respects his wording was used but the real foundation of the law was the 1806 Act. 166. To have referred to Blackstone would not really have aided interpretation of the law; to refer to the 1806 Act would, and hence it is referred to. As regards the parent and child provisions, Blackstone's texts were grafted into a thoroughly French conception of paternal power. To have referred to Blackstone would not have aided interpretation or understanding of that power. Further, even if Blackstone be regarded as a "source", the de la Vergne volume does not refer to sources, but to provisions aiding interpretation and argument in court. The Castilian law was referred to because of its importance in the courts; Blackstone would, 165. A Short Letter to a Member of Congress Concerning the Territory of Orleans, Washington, D.C., 1806, p.21, found quoted in Dargo, op.cit., note 80 on p.231. 166. See note 163 supra.
in these circumstances, have no importance.

In conclusion, we can state that the de la Vergne volume provided lawyers with cross-references to Castilian and French law, and to relevant territorial Acts; these references had the practical function of aiding interpretation of the law. This conclusion is satisfactory in terms of the legal history of the period of compilation of the D.L.V.; it describes the nature of the references; and it is in line with the Avant-Propos. It explains why there are no references to the Code Napoléon and its projet. It does not force us to believe that Moreau Lislet lied in the Avant-Propos, as would the suggestion that the D.L.V. was intended to conceal the origins of the Digest's articles; nor does it make him the unconscious agent of hidden structural forces. Were Moreau Lislet deliberately attempting to conceal the origins of the Digest, he would have appeared ridiculous to his contemporaries, who, as the law reports show, had a good knowledge of the Castilian law; while we have evidence that originally the copying of the French code for the Digest was well known and that Moreau Lislet openly admitted that much of the Digest was taken from the French code.167. Moreau Lislet would be well able to construct such a series of cross references as he must have been aware of the provisions of the Castilian law and the droit coutumier in order to have used them in the redaction of the Digest, which he had undertaken with James Brown. Should the above be accepted, it provides a solution to the problems of the purpose and nature of the de la Vergne manuscript notes.


In chapter three the following hypothesis was put forward as to the working method of James Brown and Louis Moreau Lislet in their redaction of the Digest: it was suggested that either the 1800 Projet or the 1804 Code Napoléon (or both together) was adopted and served for the Digest as a model from which exclusions were made or to which inclusions were made as the redactors thought fit. In so far as this

167. See text at note 165 supra.
hypothesis is capable of verification, it must be accepted as being correct; and - I am sure - few would disagree with it.\textsuperscript{168} Pascal's thesis that the French code was adopted as a model because of its resemblance to the "Spanish Roman" law must now be rejected.\textsuperscript{169} Can any more specific conclusions be drawn?

First, it must be accepted that the adoption of the French code or its projet as a model was a deliberate action taken because of the excellence of the French code and its usefulness as a model; the French code was not adopted as a model because it was thought largely to follow the Castilian law. This can readily be deduced from the fact that the redactors obviously compared the C.N.'s provisions with those of the Castilian law. Thus, the redactors sometimes departed from their model to follow some Castilian provision (such as the division of nonage into pupillage and minority); for them to do this, they must have compared critically the French code with the Castilian law and must have been aware of the differences. The acceptance of the C.N. or its projet was critical; they were not followed unthinkingly. This is not to deny that the C.N. was used as a model because it allowed the preservation of the civil law by facilitating a quick redaction of a code, without causing too great a rupture with the past.

Second, the redactors, while following either the C.N. or its Projet, examined along with each French article corresponding provisions in other sources available to them. Hence, they appear to have collated with the French codal articles provisions found in territorial Acts, in various treatises of Pothier, in Domat's \textit{Droit Civil} and \textit{Droit Public}, in Febrero's \textit{Libreria de Escribanos}, in the \textit{Nueva Reconilaci\'{o}n}, in the \textit{Leyes de Toro}, in the \textit{Siete Partidas} and even in Blackstone. This may be deduced from the fact that the French codes have been departed from or have subtly been altered in favour of provisions taken from these source. Thus, it is fair to posit that the redactors carefully selected provisions they thought suitable, for whatever.

\textsuperscript{168} See chapter 3 supra at notes 266-281.
\textsuperscript{169} See Reply, pp.605-607.
reason and by whatever criteria they set themselves. As has frequently been pointed out, the adoption of the French redactions as a model did impose a certain dynamic or structure on the code, which dynamic and structure necessarily affected the provisions chosen. Nevertheless, within that structure, the redactors were free to depart from the provisions of the French law; they merely had to include provisions on certain topics which the logic of the French codes required to be covered.

Third, from this use of many sources, we may deduce there was a selection among them, and it is thus possible and correct to suppose there were reasons behind each particular selection: reasons which may be deduced from comparison of competing potential provisions. This is, of course, what has been done in chapters four and five.

The above three points are of course closely related, and such separation of them is perhaps artificial; but it is, however, justifiable for the purpose of exposition. The above deductions, were of course the hypothesis behind the present study, and the arguments behind their adoption as a hypothesis were put in chapter One. It could be argued then that this study has been self-fulfilling or circular, in that the method here necessarily dictated the result; but this would be wrong. First, the results justify the method: it has been fruitful in shedding light on the reasons behind the adoption of certain provisions and the process of legal development in general. Second, the method was deduced from certain principles related to the task on hand: it was not based in a self-fulfilling way entirely on what was known of the Digest. Third, the hypothesis on the method of working of the redactors, when shown to be plausible and confirmed by what can be gathered from the internal evidence of the Digest, may be supported by outside evidence from other codes. That is, although it would have been wrong to suppose that the redactors of the Digest would have worked in the same way as the redactors of another civil code, if we can establish that the Digest redactors appear to have worked in a certain way, and if then we can point to another set of redactors of a civil code who worked in a similar way or the same way, then we have particularly
strong evidence to support our hypothesis and our interpretation of the evidence. In the Reports of the Quebec codifiers we have such support. In chapter three,\textsuperscript{170} drawing on the excellent study of Brierley,\textsuperscript{171} the Preface of McCord\textsuperscript{172} and the Reports of the Commissioners for Codification in Lower Canada,\textsuperscript{173} we set out the working method adopted in the redaction of the Quebec Code. That working method was based round the French code, with a critical examination of the French code in the light of other potential sources. This working method is indeed similar to that here suggested as having been used in the redaction of the 1808 Digest. Since this is so, we can say that the suggestion based on what evidence there is, put forward here, is probably correct. The 1808 redactors drew up their code on the basis of a critical examination of the French code in comparison with other sources and with an alteration of the French codal articles where thought necessary because of preference for provisions discovered in other sources. Conversely, where the French codal articles were left unaltered, we may assume they were preferred to the provisions of the other potential sources. Thus the assumptions on the working method of the redactors - assumptions necessary for this study - must be taken to be correct. This working method would be speedy, while permitting a critical assessment of the law, within the general framework of the French code.\textsuperscript{174}

5. Reaction of the Courts to the 1808 Digest.

In chapter three there was a discussion of the attitude of the courts to the 1808 Digest in connection with dispute between Pascal and Batiza over whether the 1808 redaction was a "digest" or a "code".\textsuperscript{175} It is now appropriate to expand on this topic and to assess the use made of the Digest in the courts. This does not purport to be an

\textsuperscript{170} See chapter 3 supra at notes 416-435.
\textsuperscript{171} Brierley, Codification, pp.542-573: see chapter 3 at note 416.
\textsuperscript{172} McCord, Preface, pp.v-ix.
\textsuperscript{173} See quotations, chapter 3 at notes 423 and 424.
\textsuperscript{174} Batiza, Textual Evidence, pp.105-6 must be correct about drafting technique. Baade, Marriage Contracts, pp.83-84 stresses the speed of the technique; I would disagree with his arguments as to why the French code was followed: see infra, no6.
\textsuperscript{175} See chapter 3 at notes 208-227.
exhaustive study of the courts' attitudes to the Digest; 176. but the study here is sufficient to raise some important points.

Elizabeth Brown has studied to some extent the Louisiana courts' attitudes, and her study is useful. 177. Dargo's arguments on the courts' attitudes to the Digest have been recounted earlier; 178. but it is useful to repeat that he argues from certain cases that the courts treated the Digest as a compilation of the previous law, and that this is evidence both for the sources of the Digest and for the Digest not being an amendment of or derogation from the Castilian law. The accuracy of his facts, and the nature of his arguments from a historical point of view have already been commented on. A point to make is that Dargo bases his arguments on only two cases: Hayes v. Berwick 179. and Cottin v. Cottin. 180. Brown in discussing the relationship of the Digest to the Spanish laws, likewise discusses only these two. 181. As a sample of the general treatment of the Digest, these two cases are clearly insufficient. Cottin especially was an exceptional case, changing the law to such an extent that it encouraged the legislature to appoint Moreau Lislet and Carleton to translate the Partidas. 182. For a proper historical picture of the courts' attitudes, as distinct from tracing the mere growth of one legal principle, it is necessary to examine other cases; ones which, unlike Cottin, were not introducing new law in a revolutionary fashion. In his LL.M. thesis on the interpretation of the Louisiána codes, T.W. Tucker has devoted rather more attention to the courts' attitudes to the Digest. 183. Tucker's discussion is of rather a different nature from the one following; it is also fairly brief. 184.

176. An exhaustive study of the courts' methods of reasoning of the authorities relied on, and the treatment of the Digest and law generally would obviously be of immeasurable help in elucidating Louisiana's legal history.
177. See her Conflict, pp.59-75.
178. See chapter 3 at notes 208-227.
179. 2 Mart. (O.S.) 138 (1812).
180. 5 Mart. (O.S.) 93 (1817). See Dargo, op.cit. p.158.
181. Conflict, pp.61-63.
182. See chapter 3 supra at notes 221-223; Dargo, op.cit. pp.159-160; and Tucker, LCC Interpretation, pp.115-117.
183. LCC Interpretation, pp.109-115.
He does make some important points which will be acknowledged where relevant. He does not appear, however, to argue the major point on the courts' treatment of the Digest as an ordinary statute, though he does recognise that they did so. Further, he does not examine a sufficient number of cases to trace the development and changes of patterns of treatment of the Digest by the courts: he is more concerned to trace the courts' development of the Cottin doctrine and does not point out the contradictory tendencies.

The following matters fall to be considered: first, the courts' construction of the Digest and whether or not the construction varied or changed over the years; second, the nature of the authorities cited; third, whether or not there was an assertion of "Spanish" law from the earliest cases or only from later; and fourth, should there have been such a reassertion of "Spanish" law, the reasons for such a happening. It is convenient to discuss these matters by discussing the cases, and pointing out what may be gleaned from them before reaching conclusions. Again, it should be stressed that this study is not exhaustive, but it is sufficient to assess the traditional views on Hayes and Cottin and the courts' attitude to the Digest.

The first case to be considered is Dewes v. Morgan of 1809. This case concerned the recovery of the price of a slave who died, and the plaintiff's action was based on D.O. 80 (p.359). Brown, for the plaintiff, stated that "In this instance, the statute follows the law of this country as it stood before its passage", and he goes on to cite copiously from the Partidas, the Curia Philippica and the Pandects. (Brown's statement acknowledges that the Digest (statute) was conceived of as, in many other "instances", not following the previous law.) Hennen, counsel for the defendant, quoted Domat, Justinian, the...
Partidas and Gregorio Lopez. The judge, Lewis J., found for the plaintiff; but what is significant here is that he construed D.O. 80 (p.359) in the light of D.O. 71 (p.359), operating the Digest as a coherent system of rules in typical civilian fashion for construing a civil code.

In Caisergues v. Dularreau, 1809, D.O. 32 (p.409) was interpreted in the light of Castilian authority, cited by both counsel. This, it should be pointed out, is a fair method of interpretation, and in no sense was the codal article displaced or circumvented.

An interesting case is Miner v. The Bank of Louisiana, 1809, which concerned the honouring of a bill drawn on a bank. The case concerned the law in 1805, when the note was issued. Moreau, for the defendant, made the following interesting statement:

"The principles of the civil and Spanish laws which regulated this territory in the year 1805, when the note was issued, are in unison with those of the common law of England."

He nonetheless went on to cite Part.3.18.114 and Pothier, and the other defence counsel, Mazureau, cited the Curia Philippica, which was also cited by Duncan for the plaintiff, who nevertheless cited Pothier and a plethora of English cases. What is interesting in commercial cases is that often English cases are copiously cited, although civilian learning is adduced too; and indeed civilian authority often governed the courts' decision. Such a case is Stackhouse et al. v. Foley's Syndics, where, although very many English cases were cited, the court stated "The ordinance of Bilbao must determine this case." However, as with Miner (supra), it was sometimes (and often enough to be worth pointing out) remarked in commercial matters that

190. Ibid. at p.4.
191. 1 Mart. (O.S.) 7 (1809). This is the second case reported.
192. 1 Mart. (O.S.) 12 (1809). This is the third case reported.
193. Ibid. at p.14.
194. Ibid. at pp.14 and 15 respectively.
195. Ibid. p.18.
196. Ibid. p.19.
197. 1 Mart. (O.S.) 228 (1811).
the English law follows the civilian. Commercial cases such as Stackhouse and Miner are not really relevant here, as the Digest did not cover commercial matters: nonetheless what these cases tell us is that all kinds of authorities were used. In no sense could the common law be said to be in force in Louisiana; but in these cases judges and counsel were willing to attempt to assimilate the civil law to the common, the latter law being the one in which many of them, especially the judges, were trained. Courts and counsel were eclectic in citation of authority. Tucker states that in commercial law "the Ordinance of Bilbao controlled"; he does not point out that in commercial cases English authority was cited regularly, nor that commercial law did not come within the orbit of the Digest. It should in fairness be pointed out that he is merely attempting to demonstrate the regularity and frequency of the citation of Spanish authority. He does later point out that "even English treatises and cases" were cited; though perhaps he does not adequately indicate how extensive was the use of English authority.

An interesting case is Territory v. Nugent, 1810, which concerned libel. This case at first was argued and decided purely on the basis of English common law. The same case came later before Martin, J., who in his decision, discussed the English and U.S. authorities. He then stated that the absence of any case overruling the principle in England or the U.S.A. would be conclusive, especially when it was considered that the French and Spanish laws

198. See e.g. Peretz v. Peretz et al. 1 Mart. (O.S.) 219 at 220: "The Spanish authority cited by the plaintiff's counsel, fully supports him. The rule is the same in the courts of equity in the United States and in the court of Chancery in England, in which the practice is according to the rules of the civil law."
199. s. Interpretation, p. 111.
200. Ibid. p. 111.
201. 1 Mart. (O.S.) 102 (1810).
202. 1 Mart. (O.S.) 108 (1810).
conformed to the common law of England. He then merely cited some French and Spanish authorities. Here, the reference to the civil law appears as an afterthought.

In 1812 came the case of *Hayes v. Berwick*, of which no more need be said than to remark that the court used the Digest as an explanation of the law in 1805, before its adoption, and, of course, the court included the French law with the Spanish as the law in force in 1805.

In *Le Breton v. Nouchet*, 1813, Livingston, counsel for the appellant, stated that Louisiana is "still peculiarly governed" by the laws of Spain. He argued that a particular Castilian law should be applied. He was opposed by Moreau as counsel for the other side. Livingston lost the appeal.

An important case is *Morse v. Williamson and Patton's Syndics*, 1814. Here the court recognised that the provisions of the Digest under consideration conflicted with the Castilian authorities. After mentioning these authorities, the court stated:

"But all these laws we conceive to be virtually repealed and abrogated, in all cases where the same things have been provided for in a different manner, by the legislature of the late territory, or of the state.

The case must, then, be determined principally on that clause of the Civil Code which gives...[etc]."

Here is a position similar to Cottin; yet the court decided differently, applying the code, and regarding the "Spanish"...
Another significant case is *Sennet v Sennet's Legatees*, 1814. This case concerned the inheritance rights of natural children. Porter, counsel for the plaintiff, argued on the basis of the Digest. Counsel for the defendant, Brent, put forward the following interesting argument:

"Upon another ground: suppose the statute [i.e. the Digest] to be absurd, inexplicable and contradictory, the previous law of the land, the Spanish law, clearly gave this power to the testator; its books breathe no other principle: and if the statute should be considered by the court as contradictory, or not sufficiently plain or explanatory, it is the previous existing law of the state, like the common law of England, unaltered by statute, which must govern and direct, and this in favour of the appelless." 211.

What is remarkable about this is that he argues: first, the Digest being apparently contradictory, Spanish law should apply, and second, that this is so because the Digest should be interpreted in the manner in which the English common law would interpret a statute. That is, Brent argues for common law canons of statutory interpretation for the Digest. The court rejected this argument of Brent and, applying the Digest, found for the plaintiff. 212.

The next case we should consider is *Rogers v Beiller*, 1815. The relevant part turned on the interpretation of the Digest in the light of an ordinance. The judgment of Martin, J. is instructive, in showing his attitude to the Digest, and therefore a lengthy quotation is justified:

"In 1808, the Civil Code was published. This act purports to be a digest of the law theretofore in force: a declaratory act. The person who, according to it, is to attend to the estate of an intestate, in the absence of the next of kin, is called a curator, the expression of the civil law corresponding to that of the English or American law, administrator.

We conclude, that neither the act of the legislative council, nor the Civil Code, have repealed the ordinance under consideration."
A general provision does not repeal a particular one by implication. If a particular thing be given or limited in the preceding part of a statute, this shall not be altered or taken away by subsequent general words of the same statute (6 Bacon's Abr. 231 verbo Statute; Stanton v. University of Oxford, 1 Jones, 26.) In this case, the provision was not in the same statute, but it was in one in pari materia, and all such are to be taken as if they were one. (Douglas, 30.)

Unless the ordinance cannot exist with the Civil Code, it must be holden repealed. Now, the duties it imposes are not more at war with the provisions of the Civil Code, than with the act of the legislative council. We conclude it is not repealed."

More quotations could be taken from the judgment; but this is sufficient for our purposes. Analysis of Martin's statement has the following results. First, he takes it as certain that the 1808 redaction is a digest, in a restrictive sense, of the previous law: a mere declaratory act. Second, since this is so, it proves that the Ordinance is unrepealed. It will be recalled that the Digest purports to amend the law, as well as stating some of the previous law. Third, Martin equates the Digest with an English statute. Fourth, relying on English authority, he argues as to how it should be interpreted in the manner of an English statute, and concludes that the ordinance should be construed along with the Digest, as, both being statutes (in the English sense) and in pari materia, they should be regarded as one statute.

This reasoning has little connection with civil law; but every connection with common law. Indeed, Martin's reasoning appears nonsensical given the nature of the Digest, and of pre-Digest royal ordinances. What has happened is that Martin has introduced common law cannons of statutory interpretation, and the restrictiveness of these cannons is notorious. It is these cannons which enable him to sidestep the Digest provisions.

The next relevant case we need refer to is Cottin v.

Cottin, the arguments of which are well known. Therein are made statements on the Digest as being a declaration of the laws previously in force, which laws are untouched wherever the alterations or amendments in the Digest do not reach them, and are only repealed if contrary to or incompatible with the Digest.

Can any pattern be seen in these cases which would explicate the four matters considered here? Because this study has not been exhaustive, the results are not definitive; but I would suggest that there is enough evidence to warrant the drawing of the following tentative conclusions. First, the early case of Dewee would suggest that originally the courts were prepared to interpret the Digest as a sufficient statement of the law, one which could be construed by reference to its provisions as a totality; and the case of Caisergues does not contradict this, because interpretation, using previous law, of a brief article is justified, as it is still the article which governs the law, not the prior law governing the article, there being no attempt to defeat the Digest provisions.

Second, if the above is correct, the case of Hayes perhaps connotes a change; but this is problematic. In Hayes, it will be recalled, the Digest was used as giving a statement of the law in 1805; in effect the Digest displaced the pre-Digest law and not vice versa. Hayes' importance for historians is the statement that the Digest did not amend the law, not that it could be displaced by the old Castilian law. Nonetheless, by this argument on the origins of the Digest, the court gave scope for that displacement.

Third, if Hayes did presage a change, that the change should take place was not certain, as is shown by the case of Morse; here the court rejected an interpretation of the Digest through the medium of the Castilian law. The arguments were virtually as in the later case of Cottin; but the court rejected the interpretation later accepted in 215. 5 Mart. (O.S.) 93 (1817).
Cottin, and decided that the previous law was abrogated.

The important case of Morse does not appear in this respect to have attracted the notice of Louisiana's legal historians.\textsuperscript{216} This is unfortunate because this case clearly demonstrates that the jurisprudence of the Louisiana courts, in the period from 1812 to 1817, was not all tending towards the Cottin view: there was precedent contradictory to Cottin. Cottin was not as inevitable as it has been suggested in the past.\textsuperscript{217}

Sennet is important, as there counsel argued for the Digest to be interpreted as an English statute: a method of interpretation which would permit the revival of the Castilian law. The court rejected this argument; but, in the fourth phase, in the case of Rogers, we find the court, in the person of Martin J., following this line of reasoning. The Digest is construed as an English statute, the principle being that statutes are interpreted as restrictively as possible; it is construed along with an ordinance, looked upon as a statute of equal value to the Digest. Now, if the Digest is construed in the manner of a statute in English law, then the necessary corollary is that the pre-Digest law is of a nature equivalent to the English common law. Thus, the position is reached that the Castilian law is in force except in so far as it is not inconsistent with the Digest - the latter being interpreted as restrictively as possible. This attitude culminated in Cottin, despite the protest of Livingston.\textsuperscript{218}

If the above be correct, then we may detect a pattern of change in interpretation of the Digest and in the courts' attitude to the Digest. At first, the courts applied the Digest as if it were a whole, entire in itself; so, understandably, they interpreted its brief statements by using other texts: a common method of interpreting civil

\textsuperscript{216} Tucker, \textit{LCC Interpretation}, ignores this important case, jumping straight from Hayes to Cottin; so does Brown in \textit{Conflict}. (See notes \textsuperscript{181} and \textsuperscript{183} supra.) Louisiana legal historians seem to have concentrated over much on the interpretation which predominated.

\textsuperscript{217} Consider the views, e.g., of Pascal and Dargo.

\textsuperscript{218} See chapter 3 supra at note 11.
codes. The case of Hayas shows that it next became possible to argue that the Digest was merely a statement of the law before codification: this case, however, did not displace the Digest by the law prior to its promulgation. Morse shows that in 1814 the court could still recognise that the Digest was something new and different from the Castilian law, which was stated to have been abrogated by the Digest provisions. Counsel's argument in Sennet and Martin's judgment in Rogers show that the Digest next could be recognised as statute in English fashion, and the Castilian law as an immutable common law. Cottin shows that now the Castilian law could be revived to replace the Digest where possible. It would appear then, that in the period from 1812 to 1817, the Castilian law was reasserted by the argument that the Digest was a statute in the English style and that the Castilian law was a common law in the English style. The Act of 1808 promulgating the code had repealed, by s.2, all laws contrary to or irreconcilable with the Digest. This provided a "loophole" that the lawyers and courts could utilise to reassert the Castilian law, especially through their restrictive interpretation of the Digest by common law methods.

If the above is accepted then we may provide a solution to the first and third of the problems posed towards the beginning of this subsection. The construction of the Digest varied over the years, and the change in method of construction permitted the later reassertion of the Castilian law as law in force.

Before we consider the fourth problem, that of why this was done, as distinct from how, it is appropriate to deal with the second, on the nature of the legal authorities cited. There is little point in giving any kind of arithmetical count of citations; and for our purposes the following impressionistic survey is sufficient. There is

219. As the commentaries on the C.N. show. A neat example is Fenet sur Pothier where Pothier's texts were placed under the C.N. articles by Fenet to aid interpretation of the latter: see pp.i-iii. Batiza, Textual Evidence, p.79 note 14 seems erroneously to believe Fenet wished to indicate sources.
220. See chap. 3 supra, at notes 184 and 204-207.
no need to mention instances of the extensive citation of Castilian authority: it pervades all the early court reports. As indicated, early English cases are often cited. Pothier is often cited, by both bench and bar.\(^{221}\) Denisart,\(^{222}\) Pigeau's *Procedure du Châtelet*,\(^{223}\) Domat,\(^{224}\) the *Coutume de Paris*,\(^{225}\) Ferrière.\(^{226}\) Of the droit nouveau in France, the *Code Napoléon* itself is cited,\(^{227}\) as are Maleville's *Analyse*\(^{228}\) and the *Pandectes Françaises*.\(^{229}\) The *Corpus Iuris Civilis* is also cited.\(^{230}\) More obscure references are those to Voet's *Commentarius ad Pandectas*\(^{231}\), Bartolus,\(^{232}\) Huberus,\(^{233}\) Struvius,\(^{234}\) and Gothofredus.\(^{235}\) Lord Kames's *Principles of Equity* are found cited once.\(^{236}\) These examples show the breadth of learning adduced in cases as authority for the arguing of points. Citations of Febreto, the Nueva Recopilación, Gomez, the *Curia Philippica*, and the *Partidas* are common place. When counsel such as Moreau Lislet and Edward Livingston appeared opposing each other, the authority cited would be great in number and very varied.

\(^{221}\) See e. g., *Miner v. Bank of Louisiana* 1 Mart. (O. S.) 12 (1809); *D'Argy v. Godefroi* 1 Mart. (O. S.) 76 (1809); *Macarty v. Barnières* 1 Mart. (O. S.) 149 (1810); and *Beauregard, Executor v. Piernas and Wife* 1 Mart. (O. S.) 280 (1811).

\(^{222}\) See e. g., judgement of Martin J., in *Denis v. Leclerc* 1 Mart. (O. S.) 297 at 310-11 and 313 (1811); *Hayes v. Berwick* 2 Mart. (O. S.) 138 (1812).

\(^{223}\) See Martin J. in *Denis v. Leclerc*, note 222 supra at 309-310; and *Hayes v. Berwick*, note 222 supra.

\(^{224}\) See, e. g., *Dewes v. Morgan* 1 Mart. (O. S.) 1 (1809) at 3; *Marr v. Lartigue* 2 Mart. (O. S.) 88 (1811).

\(^{225}\) See e. g., *Marr v. Lartigue*, note 224 supra.

\(^{226}\) See *Marr v. Lartigue*, note 224 supra, and *Hayes v. Berwick* note 222 supra.

\(^{227}\) *Smith v. Kemper* 4 Mart. (O. S.) 409 (1816).

\(^{228}\) *Smith v. Kemper*, note 227 supra.

\(^{229}\) *Chretien v. Tuerd* 2 Mart. (N. S.) 299 (1824).

\(^{230}\) See *Dewes v. Morgan*, note 224 supra and *Marr v. Lartigue*, note 224.

\(^{231}\) See *Seguin v. Debon*, 3 Mart. (O. S.) 5 (1813).

\(^{232}\) *Denis v. Leclerc*, note 222 supra at 300.

\(^{233}\) *Marr v. Lartigue*, note 224 supra; *Le Breton v. Nouchet* 3 Mart. (O. S.) 59 (1813).

\(^{234}\) *Marr v. Lartigue*, note 224 supra.

\(^{235}\) *Duplantier v. Pigman* 3 Mart. (O. S.) 236 (1814) at 238.

\(^{236}\) *Clark's Executors v. Cochran* 3 Mart. (O. S.) 353 (1814) at 354.
in origin, as both could obviously draw on a vast range of civilian learning.\textsuperscript{237} Tucker also points to the enormous scope of the authority cited.\textsuperscript{238} The above brief account does not do justice to the extent of the civilian learning displayed by some counsel in court; but it is sufficient to indicate how wide was the citation of authority: it also supports the statement made by the redactors of the 1825 Code in their 1823 \textit{Projet} about the problems caused by wading through a mass of obscure civilian learning.\textsuperscript{239}

Why did the Louisiana bench and bar thus reassert the Castilian law by interpreting the Digest in the fashion of an English statute? The answer to this question is inevitably speculative, but four factors seem to have brought about this result. First, many lawyers, both at the bar and on the bench, were trained in the common law. They would be accustomed to common law methods of statutory interpretation, and this could well have influenced their treatment of the Digest. Second, the procedure in court was based on counsel arguing the points between them, with the judge acting as referee and coming to a decision based on the arguments. Given the attraction of common law methods of interpretation, this form of procedure made the citation of legal authority of paramount importance where points of law were at issue. Third, given this stress on authority, and the common law influenced interpretation of the Digest, Castilian law became an attractive source of legal authority, and thus tended to be revived. Fourth, the procedure being contentious, and lawyers wishing to win for their clients, the revival of the Castilian law permitted the search of many varied sources for authority. The circumvention of the Digest permitted the examination of the Castilian law itself and of the civil law, both in

\textsuperscript{237} See e.g. \textit{Marr v. Lartigue}, note 224 \textit{supra}; \textit{Denis v. Leclerc}, note 222 \textit{supra}; and \textit{Orleans Navigation Co. v. Mayor etc. of New Orleans} 2 Mart. (O.S.) 9 (1811) and 2 Mart. (O.S.) 214 (1812).

\textsuperscript{238} See \textit{LCC Interpretation}, pp.111-112.

\textsuperscript{239} 1823 \textit{Projet}, p.XCII, quoted \textit{supra} in chapter 3 at note 151.
the Corpus Iuris and the modern commentators thereon. Thus, we find even commentators on the French droit coutumier and on the French code being cited in court as authority. Lawyers had great scope in searching for authority—a scope which they seem to have utilised to the full. If one considers the amount of legal sources which the circumvention of the Digest permitted lawyers to use, it is obvious that, with diligent research, a lawyer could come up with authority for virtually any proposition of law, while working within the Castilian framework. That is, the revival of Castilian law and the downgrading of the Digest, influenced by conceptions drawn from the common law, permitted lawyers to act in an opportunistic fashion in finding and quoting authority. Professor Franklin has stated that:

"As there was tremendous land speculation in Louisiana in the period under consideration certain Anglo-American common lawyers supported the penchant hispanophile because of the incognoscebility of the feudal Spanish Romanist materials." 240.

Although I obviously would not agree with the terminology, Professor Franklin has raised an important point, relevant to the present discussion, and in line with the arguments above. The revival of Castilian law, and all that it brought in its train, allowed opportunistic lawyers access to a vast pool of diverse and varying Castilian and other civilian authority which could be cited in court before a bench whose occupants were often not familiar with civilian legal systems and their methodology.

Thus, it is permissable to conclude that the revival of Castilian law in the period from 1812 to 1817 was due to opportunist lawyers exploiting a loophole in the 1808 Act promulgating the Digest, and was facilitated by the habituation of the legal profession to the common law's methods of statutory interpretation—thus permitting the downgrading of the Digest. As already indicated, this point is speculative; but the important aspect is that

arguments based on Hayes and Cottin as to the nature of the Digest and its sources are untenable, if their full historical context is examined. The apparent downgrading of the Digest and revival of the Castilian law evidenced by Cottin was a real downgrading and a real revival: it is no evidence as to the nature of the Digest nor as to its source origins. What actually was happening in the Louisiana courts and why is a subject deserving of greater study – a study outwith the scope of this work – but the above brief sketch indicates roughly what was happening and the conclusions (although speculative) are reasonable given the present state of knowledge.

6. Conclusions on the 1808 Digest.

The historical background of the 1808 Digest is now familiar. The work of Dargo explains and sets out the political and legal motives for codification: preservation of the civil law from the threat of the importation of common law, and settling the confusion over the authorities relevant, while reducing the law to an easily used, comprehensive code. The pressure of these two motives acting together resulted in the redaction of the 1808 Digest. The law was overhauled, reformed and rendered into accessible languages. It must be remembered that the confusion over the laws in force was a real confusion producing much uncertainty. Thus, we must conclude that the 1808 redaction of the Digest was the result of a desire to end confusion over the laws, reduce the laws to an accessible and easily consulted form by abolishing the necessity for reference to a mass of juristic material and of a desire to preserve the civil law from common law encroachments. It should be noted that commercial law was not codified, and there was no equivalent to the French Code de Commerce. This is a point that will be considered infra after discussion of the Quebec codification.

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242. See chapter 3 supra, at notes 130-170.
The two codifiers, Moreau Lislet and Brown, based the Digest on either the French Code Civil of 1804 or its 1800 Projet, or both. Which was used and why need not concern us here. Their acceptance of either or both of these two redactions was a critical one. They modified the codes in the light of each other and in the light of other material available to them. The redactors appear to have carefully selected provisions from either the Code Civil or its Projet or from the Partidas, Febrero, Pothier and other similar material. This thesis has been concerned to explore the reasons why; but the complexity of the work of selection indicates the care put into the selection of provisions and justifies the assumption that the selection was based on reasons, rather than arbitrary whim, even if the two redactors have left us no account of why they chose the provisions they did. Suffice it to say that they borrowed extensively from many varied and competing potential sources, and for the reasons as explicated in chapters four and five supra.

The 1808 Digest is not a codification of the Castilian law which through the mechanism of the Recopilación de las Indias was technically in force prior to redaction of the Digest. The redactors clearly did not interpret their instructions to mean that they should codify the Castilian law. The reasons why have been explored to some extent in chapter three; but it is worthwhile to devote some brief attention to the matter. First, the relevant Act stated that the civil law presently in force should form the basis of the code. This could be ambiguous, but clearly for the redactors, influenced by natural law, the civil law referred to the modern usage of Romanist legal systems. In their task of modernising the law they clearly preferred to use the French code, a very modern statement of law both accessible and amenable to borrowing. In the course of

243. See supra at notes 69-89.
244. See chapter 3 supra at notes 240-241.
the nineteenth century the Code Civil was received in many countries both in Europe and South America— and it even had some influence in Japan. In using the Code Civil of France as a basic source, the redactors were acting within both their mandate and the civilian tradition. They went on to use Pothier, Domat, the Corpus Iuris and Castilian laws and juristic commentaries, all to compile their own modern civil code according to the criteria they set themselves. And this they did admirably. The Digest of 1808, although the vast bulk of its provisions are borrowed from elsewhere, is unique. The transplanted law has been put together to form a law which, though based on other laws, forms together a new system of laws. Professor Hans Baade has recently put forward a new theory as to the reasons for the copying of the French code. He suggests that the "living law" of the territory was French and that this explains the close copying from the French code. The particular research on which this conclusion has been based has already been discussed in this thesis in connection with matrimonial property. There it was accepted that he must be correct in that the revival of French legal folkways after 1803 would certainly facilitate the adoption of a matrimonial property law of a French "contractual" type. Certainly, it has been pointed out in chapter three that there does generally seem to have been a revival of French law after 1803; but this would seem to be part of the general confusion over the laws in force in the early Territorial period in Louisiana. Professor Baade's thesis, however, must be rejected in so far as it attempts to provide a general explanation for the copying of the French code and its projet. He suggests that the "French Code Civil of 1804 had to serve as the basic text and was generally acceptable to the extent it

245. See references in note 88 supra.
248. See chapter four supra, at notes 256-301.
249. See chapter three supra, at notes 156-171.
reflected or harmoniously advanced the 'living law' of the Territory, the Custom of Paris," 250. As pointed out, to claim that the Custom of Paris was the "living law" of the Territory is to exaggerate: there had been a revival of French law, but only as part of the general confusion over the laws in force in the Territory. There seems no evidence to suggest that the redactors generally were attempting to embody in their code the "living law". Blackstone was copied for provisions on the concept of puissance paternelle; his Commentaries cannot really be described as "living law" for the Territory. The redactors were concerned to provide a civil code in a short period, and used the French code as a model. They used the French code in a critical fashion: they did not copy it unthinkingly. They changed some of its articles, and introduced provisions taken from other sources they consulted for various reasons. They do not seem generally to have been concerned with embodying the "living law". As regards Professor Baader's theory, it must be correct in so far as that "living law" of marriage contracts was French may well have encouraged the redactors to copy French provisions; but there is no evidence that the redactors generally were concerned to embody the "living law" in their code. 251.

The 1808 Digest was replaced in 1825 by a new code; though many Digest articles were included in the new code. The period of 1812 to 1817 saw a movement for revival of the Castilian law and circumvention of the Digest. This

250. Marriage Contracts, p. 84.
251. Professor Baader's thesis is most attractive and ingenious, and, as said here, does help explain why the redactors adopted the French "contractual" model of matrimonial property. Generally, the redactors may indeed have wished to follow the law they knew as being applied; but this would require proof. It is difficult to accept that, as regards seashore, Justinian's Institutes were the "living law". It seems much more likely that the redactors deliberately updated and modernised the law: knowing that the Castilian laws were formally in force, the redactors used the materials to hand to provide a civil code relatively quickly in order to prevent reception of the common law. The common civilian foundation in Roman law would make the change relatively easy.
movement resulted in the compilation of the de la Vergne manuscript notes and the translation of the *Partidas* into English. The movement for the re-assertion of the Castilian law does not reflect on the nature of the Digest, but rather on the activities of the Louisiana bar and the inability of many of its members to grasp how the code could have been used. Further, the movement reflects on the opportunist nature of the attorneys in their task of winning cases for their clients by exploiting the loophole in the Act promulgating the Digest and by restricting the application of the Digest as far as they could. The Castilian law would still have governed civil matters outwith the scope of the Digest: commercial law for example, in which the courts often applied the Ordinance of Bilbao.

The 1808 Digest then, the result of confusion over the laws and fears of the introduction of Anglo-American common law, is a modern civil code introducing innovations and updating the law; it drew on many sources but essentially is based on the French code or its projet. The unharmonious conflicting sources were unified into one coherent whole and the Louisiana law was rejuvenated and modernised; both these results were achieved through extensive transplantation within the civilian tradition.
Chapter Seven

The Civil Code of Lower Canada.
It will be recalled that in chapter three it was pointed out that the Codification Commission was instructed to draw up the code on the basis of the law actually in force, and that what was actually the law in force, was, apparently, no easy task to discover.\(^1\). Arising out of the research in chapters four and five, there are some matters concerning the actions of the codifiers which merit discussion, and this section is accordingly devoted to them. Fortunately, in comparison to the 1808 Digest, the matters of controversy are relatively few; this Chapter will accordingly be appreciably shorter than the preceding, being merely devoted to the actions and task of the codifiers.

Walton summed up the work of redaction thus:

"Our civil code, then, codifies the old French law of Quebec, as modified by statutes, and also codifies, but only as to its broad principles, the commercial law of the province, which is derived from English as well as from French sources."\(^2\).

Brierly stresses that the bulk of the code is derived from the host of legal writings of ancien régime France.\(^3\). Both these opinions are indeed correct; but both potentially may be misleading, in that they tend diminish the importance of the redactors in innovating in the law. The redactors were indeed conservative in their work; they did not boldly innovate; but nonetheless their very actions in selecting among provisions, given considerable uncertainty in some areas of the law, had (potentially) the effect of reforming the law. The rationalising of the law into a code also had a necessary modernising effect.\(^4\). As well as the above, the redactors did suggest amendments and improvements, which were, in themselves, hardly negligible, as will be shown below.

One author who has not adopted the common view of

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1. See chap. 3 at notes 423-4 and Brierley Codification, pp.547-554.
4. See chapter 1 supra, at notes 50-53.
the 1866 Code as being of an essentially conservative nature is Munro, since he was of the opinion that: "it is probably well within the bounds of truth to suggest that more Roman Law found its way into the contemporary legal system by way of the Code Napoléon than through any other single channel, or, possibly, through all other channels combined." 5. By this he means that it was through copying the Code Napoléon that the redactors of the Quebec Code introduced Roman law. 6. The accuracy of his view has already been contested in chapter three, and there is no need to re-iterate the arguments here. 7. Despite Munro's strictures, most authors would obviously agree with the traditional view of the extreme conservatism of the Quebec codification. This view enabled a supreme court judge, in contrasting the Quebec Code with the French, to state that:

"Au contraire, ici, nous n'avons pas subi cette influence de 1789, et c'est aux véritables sources du droit national français que nous avons un droit civil français plus historique que les Français eux-mêmes" 8.

This statement is misleading. There may well have been no Revolution in 1789 in Quebec, but the idea of the Revolution and of the new society based upon it were not without effect even in the distant quelques arpents de neige. Limpens also stresses that the Quebec code resembles the ancien droit of the northern France rather than the C.N.:

"The Quebec Code of 1866 is certainly not a direct offspring of the Code Napoleon; it is above all - and the fact is worthy of attention - a codification founded on the Custom of Paris. Nevertheless one is bound to note, in addition to certain striking borrowings, a great similarity of drafting in the matters common to both codes." 9.

5. Munro, New World, p.148.
6. There exists an article by C.P. Sherman, "Roman Law in the Quebec Civil Code", 25 Boston Univ. Law Rev. pp.196-228 (1945). This article consists of comparison of the C.Q.'s articles with Roman texts to discover where they correspond; it is quite unsatisfactory.
7. See chapter 3 supra at notes 327-334.
This statement is misleading; and, even with the major qualification in the last sentence, it must be taken to be so misleading as to be wrong. The codified law of Quebec has a radically different appearance from that of France of the ancien régime; it bears the unmistakeable stamp of the French code. Thus, though the law of obligations in the Quebec code, as regards many individual provisions and as regards the divisions in the law, appears to bear a closer relationship to Pothier than to the Code Napoléon; it is undoubtedly the case that the whole thrust of the law of obligations is towards the easy and secure transference of both moveable and immovable property and sanctity of contract; in this, the law of obligations is closer to the "modern law" of the French code than the ancien droit as found, for example, in Pothier.

The work of the codifiers in Quebec is best approached by examining two matters: first, what the codifiers declared they were doing and how they saw their task; and, second, what they actually did. The first encompasses examining the statements they made as to why they selected certain topics, and how they saw their selections in relation to their society, while the second necessitates an examination of the sources the redactors used and the selection they made. Both of these are, of course, the subjects of chapters four and five; but here it will be possible both to draw on the experience of those two chapters, and to develop more clearly the work of the redactors by using their Reports in which they made many statements of policy.

1. How the Codification Commission saw its task.

The Codification Commission started their Second Report with a long comment on the task set them. The instructions of the legislature have been discussed in

10. See First Report, pp.6-8.
chapter 3, as has the working method of the redactors, and there is little point in discussing them again here. The Commission's comment does have some relevance for us, however, because in it they point out that "on an infinity of points there is uncertainty and difference of opinion." They go on to state that this is because authors disagree, while there is no legislation, and the courts do not concur. This is instructive, as it shows the extent to which the Commission recognised that it had to choose between conflicting views and select among sources in order to determine the law, much less suggest amendments to the law. The redactors have left some statements on how they selected the law in force and why they suggested amendments, and we shall examine such here.

A statement of primary importance comes at the end of the First Report of the Codification Commission: though this statement is phrased to refer only to that Report, there should be no doubt that it may be generalised to refer to the whole of work of the Commission. This statement has already been quoted; it does justify the general approach adopted here towards the Quebec codification in so far as it indicates that the redactors were well aware that they were involved in a continual process of choosing between competing provisions. They had to choose between competing statements of law in force and also between competing potential reforms. This declaration of the codifiers does not say what criteria they used to judge which provision was "the most convenient and beneficial". McCord does tell us that the Commissioners chose amendments which would harmonise the law with their society and adapt the law to the changes society has undergone.

This matter may be pursued further by examining those

12. First Report, p.32.
13. Chapter 3 supra, at note 424.
statements made by the codifiers in the Reports where they mentioned they were exercising a choice. Secondly, it may be answered by inference from the choice made when all the potential provisions examined by the codifiers are analysed. The two methods of answering should really be combined, as we have combined them in our analysis of the code's provisions on family and employment. Nonetheless, it is useful here to broaden the scope of our understanding by examining some of the codifiers' policy statements as to why they chose a certain provision.

It is useful to direct our attention first to the codifiers' treatment of contract. It will be recalled that in chapter two it was argued that codification took place in Quebec in the period of greatest influence of nineteenth century economic liberalism. If we look briefly at the codifiers' actions in the area of contract law, we find that they adopted the doctrines of economic liberalism and tried to introduce them into the law.

C.N. 113416 has no direct equivalent in the Quebec code. C.Q. 1022 is indeed analogous, but lacks the fine imperative statement found in the French code; however, as pointed out in discussing Louisiana, the content of the law of contract should be examined to give meaning to such declarations of principle.

As with Louisiana, it is relevant to examine the Commission's attitude to penalties and stipulated damages. It will be recalled that C.N. 1229 (D.O.129 (p.285)) assimilated penalty clauses to stipulated damages. This the Quebec redactors decided not to do, and in their Report on this section of the code, they said as follows:

"The articles...embrace the subject of obligations with a penal clause. They make no departure from the rules established in the articles of the French code, numbered from 1226 to 1233, except in the omission of the article 1229, declaring the penalty to be compensation for damages suffered from the inexecution of the obligation. The Commissioners

16. See chapter 6 supra between notes 2 and 3.
think this declaration by which stipulated damages and penalties are assimilated without qualification, is a confounding of things which are in many respects different, and governed by different rules, and they have therefore rejected it." 17.

This is a reasonable analysis. If we examine the relevant articles on stipulated damages in the Quebec code, 18. we find that the Quebec codifiers have adopted the rule of the Code Napoléon that stipulated damages cannot be reduced by the courts. The redactors argue that, the French code having removed the right of the courts to diminish stipulated damages, it is desirable to alter the law of Quebec to the same as that in France, and they state thus:

"The evils which arise from regarding certain clauses in contracts as merely comminatory, and therefore not to be enforced, are obvious, and of daily occurrence. Under the jurisprudence which had grown up in France, the courts constantly modified or disregarded clear stipulations in contracts, for the purpose of substituting to the declared will of the parties, an uncertain equity in the settlement of their rights. In this country perhaps the interference has not been carried to the same length; but it is equally objectionable in principle; and although sustained by the authority of Dumoulin and Pothier, does not seem to have been derived from the Justinian code, or to have been justified by any positive legislation in France." 19.

The law was changed so that stipulated damages could not be varied by the court. Morin was not in favour of this change in the law; but the majority view was accepted for the code. From the above quotation, it may be seen that notions of both freedom and sanctity of contract were what motivated the two redactors in favour of change. Perhaps ease of proof was also influential; but this does not appear in their Report. There is unfortunately no indication of why Commissioner Morin objected to the proposed change; his reasons would have been of great interest. If we return to penalty clauses proper (C.Q. 1131 to 1137), we find that the Commissioners, Morin once

18. C.Q. 1070-1078.
more dissenting, had recommended the prohibition of the reduction of such clauses by the courts; and for the same reason as they recommended the prohibition of the reduction of stipulated damages. The recommended new article became C.Q. 1135.

The ancien droit's rules on lesion had been restricted by the French code. The Commissioners followed the Code Napoléon in restricting the rescission of contracts on the ground of lesion, and even extended this restriction. Thus, the Commissioners recommended that minors may not be restored for lesion if all the relevant solemnities provided by law for the alienation of their property have been carried out: in this the rule of C.N. 1314 was adopted. As regards adults, the Commissioners recommended that they never be able to rescind contracts on the grounds of lesion: this amendment was adopted and became C.Q. 1012. This went beyond article 1313 of the French code. The Commissioners made the following instructive remarks. Their action, they said, "may be easily shewn to be more consistent with the circumstances and the state of society in this country than the old rule." The Commissioners state:

"there seems to be no sound reason upon which in this country, where real property is transferred so easily and made an object of daily speculation, a person in the full exercise of his rights should be relieved from imprudence in this description of contract more than in any other. The rule violates that integrity of contracts upon which the Commissioners throughout the title have been anxious to insist and they have no hesitation in recommending the adoption of the article suggested by them in amendment of the present law." 23.

Here the Commissioners have provided rules embodying the notion of Pacta sunt servanda because of their belief in economic liberalism. Thus, in the section on rescission of sale for lesion, the C.N. has articles 1674 to 1685 inclusive, whereas the C.Q. has only one article, 1561,

23. First Report, p. 12 (my emphasis).
which merely refers to the section of the D.O. presently under discussion.

The Quebec redactors obviously sought to change the law to favour economic liberalism by imposing rules which favoured freedom and sanctity of contract. They thought this was necessary given the nature of economic life in Quebec. Hence, the redactors' statement on contract shows that in this area of the law the redactors strived to shape the law to fit socio-economic "reality". They recognised that land was now as marketable a commodity as any moveable and that there could be no longer a "just price". (This change possibly also reflects the fact that for the merchant classes of Quebec, but not of course for the peasant farmers, land no longer necessarily represented wealth: it might be a means to acquire wealth through speculation, but in the developing industrial economy of north America wealth was measured in money rather than land, and money did not depend on land.) Further, the redactors were also adopting the economic and legal theories of their time.24.

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24. See First Report, p.18: "it is certain that the doctrine of judicial interference with the plain meaning of contracts is regarded with disfavor by modern jurists."

It is interesting to note the reversal of the Quebec law here recommended by the new Draft Civil Code. Book 5, title 1, chapter one contains an article (37) reintroducing a broad notion of lesion: "Lesion vitiates consent when it results from the exploitation of one of the parties by the other, and brings about a serious disproportion between the prestations of the contract. - Serious disproportion creates a presumption of exploitation." See Report on The Quebec Civil Code, Civil Code Revision Office, pubd. 1978, Editeur officiel Quebec, vol. 1 Draft Civil Code, p.337. Vol.2, tome 2 Commentaries, pp.604-605 discusses this article. P.605 states: "Recognition of lesion is part of a tendency in modern legislation to protect one party against exploitation by another." See also introduction to Book 5, pp.551 et. seq. of vol. 2 tome 2. At p.551 it is stated: "From an economic standpoint, and on the basis of juridical morality, it was the State's duty to intervene in order to maintain equity in the juridical relations between its citizens, or even to re-establish equity." See also especially p.553 for comments on lesion and civilian tradition.
A similar emphasis on the free and easy disposal of property, and certainty of rights and claims may be found in the reforms in the law of prescription, registration and in the transference of property. In the last, the old rule, *traditionibus non nudis pactis dominia rerum transferuntur*, was abolished in favour of the French code's rule that consent suffices to transfer property. 25.

Reforms in the law of testamentary succession also encouraged the easy disposal of property. In all these reforms, as in the reforms on obligations, the redactors were attempting to fit the law to society and to render the law on these matters appropriate to a modern commercial country. What must be emphasised is that the codifiers stressed the integrity of contracts, and limited in so far as possible judicial interference with bargains; 26 and, further, the redactors stressed that immoveable property changed hands frequently in Quebec, and accordingly considered the law should facilitate such transfers. 27.

The above examples relate to obvious commercial matters, where the redactors were seeking to adapt the law to the economic ideology of their period. In some other articles, one can trace a similar attempt to fit the law to the circumstances of Quebec. 28.

In the law on usufruct, there had always been a prohibition on the felling of trees in a usufruct of land, apart from in certain clearly specified exceptions. One of the rights of a usufructuary was to use for firewood wood from trees accidentally uprooted or broken down. The

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25. C.Q. 1025: see C.N. 1583 and C.L. 1903. The redactors pointed out that the same rule applied in England.
26. See Fourth Report, p.16 where a provision is stated to be "consistent with the principle of maintaining the integrity of contracts, observed throughout by the Commissioners..."; and also p.18: "These articles...harmonize with the system of adhering to contracts and preventing the modification and enlargement of them by the courts."
27. Fourth Report, p.16: "The inconvenience of such a rule [as to title where price unpaid] especially where immoveable property changes hands so frequently as in this country, is obvious."
Codification Commissioners extended this rule so that the last section of C.Q. 456 now states that the usufructuary "may even fell trees for fuel if there be any of the kind generally used in the locality for that purpose." Fuel would of course be of prime importance in a country with the fierce North American winter; and the Commissioners comment:

"The addition, which is not found in the Code [Napoléon], has been considered as necessary in a country where, as in this, fuel is of so great importance, at the same time that, in certain places it is found in great abundance, whilst in others it is scarce and difficult to be obtained." 29.

The Commissioners did not present this as an amendment of the existing law, since they considered that it accorded with the usage and jurisprudence of the country. What is important here is that the redactors attempted to fit the law to the physical conditions of Quebec. Another interesting example of the attempt to fit the law to the circumstances of the country appears in C.Q. 503 in relation to running water. In C.N. 644, the equivalent article, a proprietor of land is said to be able to use running water crossing his land only for the purpose of irrigation. The Quebec codifiers did not follow this, arguing that any use of the water for the benefit of the land should be allowed, provided that such use were not to interfere with the rights of other proprietors to use the water. The new article "appeared to the Commissioners to be more, than that of the Code [Napoléon], applicable to the circumstances of this country, where what is called in France irrigation is very little or not at all practised." 30.

Such examples of the codifiers' attempts, in many instances, to fit the law to the circumstances of life in Quebec could be multiplied; 31 but these few are sufficient.

31. McCord's Synopsis may be consulted for information.
PAGE NUMBERING AS ORIGINAL
to demonstrate the point. It has, however, been pointed out in chapter four that many of the provisions relating to family embodied in the Code could have been amended by using sources available to the redactors, such amendments being more in tune with family life in the province. Detailed reasons for the rejection of such potentially useful reforms have been set out in chapter four, and we need not repeat them here, bar to remark that the Quebec codification was in some ways conservative in nature, while the existing rules on the family were supported by an ideology of supremacy of husbands and fathers and by a strong conservative family tradition. On the other hand, the rules restricting easy transference of property and interfering with contractual liberty were antithetical to actual commerce and to the dominant ideology of economic liberalism. The laws on employment were also modernised, but modernised on the basis of existing sources. This is also an important point: all the reforms in contract, and transference of property were "borrowed" from source materials to hand. The codifiers attempted, using the materials they had, to modernise their law; but these materials, while suggesting amendments, could also limit modernisation, since amendments generally could only be suggested by the source materials consulted: the codifiers did not attempt, to any appreciable extent, to make up their own new provisions.

2. The Sources Used.

As will have been seen from chapters four and five, the redactors used a great variety of sources. The 1804 Code Napoléon, the 1825 Code of Louisiana,32 writers on the droit coutumier and droit écrêt, the Corpus Juris Civilis, civilian writers such as Voet, humanists such as Cujas, jurisprudence, ordonnances, statutes, the Code

of the Swiss Canton Le Vaud, commentators on the French code, Scots, English and American writers (especially on commercial matters), Quebec cases; all these were consulted and referred to and could suggest what the law was or ought to be.  

Brierley has shown that the redactors constructed their code round a critique of the Code Napoléon, working from that code as a basic text. Is it possible to tell how they sifted the mass of material available to them? We can, first of all, rely on the sources referred to with each article, since we know that these sources were those consulted in drawing up that article. From the frequency with which certain sources are cited, we can know that a standard procedure must have been to take each article of the Code Napoléon, and then, on its provision, consult certain works, such as those of Maleville, of Toullier, the Pandectes Françaises, and, above all, Pothier's treatises. The modern French commentators gave a critique of the Code Napoléon in operation: a critique which the redactors often accepted and drew their own article accordingly.  

Pothier was obviously not the only author on the ancien droit automatically consulted; but he was the most important. The next step, one may suggest, was that the redactors would follow any apparently interesting references in the works consulted. Thus, if say Maleville

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34. Brierley, Codification, pp.563-5 and see chapter 3 supra at notes 321-435.  
35. Instances of this will have been noted in chapters four and five. But the following examples will serve as illustrations. In chapter 5, the form of C.Q. 1600 seems to be the result of Marcadé's criticism of the C.N.: see text at notes 286-301. C.Q. 1602's definition of locateur and locataire comes from the same source: see text at notes 302-313. The rubric of the title on marriage covenants arises out of criticism of that of the C.N.: see ch. 4, notes 792-3. The C.N. restricted a husband's power to donate community property; the C.Q. redactors rejected this innovation; the criticisms of Toullier were probably influential: see ch. 4, notes 803-5. See the redactors remarks on C.N. 1429 (husbands granting leases of their wives property) at ch. 4 notes 824-5, referring to commentators on the C.N. See the problems over the wording of C.N. 127, ch. 4, notes 907-913. For further examples, see First Report, p.22, C.Q. 1118's improvement on C.N. 1214; and C.Q. 1121-1130's improvement on C.N. 1215-17: the redactors say they adopted Marcadé's views. Second Report, p.197: new rubric result of criticism of C.N.
referred to Cujas, the redactors might examine Cujas. This is how some fairly unexpected authors come to be referred to. These authors were consulted only when works more regularly used referred to them. That this is what the redactors did is obvious if the sources cited are examined carefully. Similarly, often a text of the Corpus Iuris Civilis seems to be cited only when an author consulted cited such text. There is little point in attempting to prove this, although some instances have been pointed out in chapters four and five. 36.

Some surprising works seem to have influenced the redactors. For example, a nineteenth century textbook on Roman law seems to have suggested one of the articles on louage des services. 37. Not only writers on the droit coutumier were consulted: the redactors made use, for example, of Serres work, and Serres was a writer on the droit écrit. He is referred to, for example, in respect of tutelle. 38.

All the above demonstrates that the redactors consulted works not only to find the existing law, but also to find possible provisions which could be useful for their elegance of expression or analysis and for potential reforms. In some areas of the law, notably obligations, there was no strong independent customary law tradition, and in these areas, generally derived from Roman law, the codifiers obviously felt free to research within the modern civilian tradition, as well as examine the Roman texts themselves. This would explain why the redactors examined Voet's

36. See chapter 4 supra at notes 954-5, where the redactors were apparently referred to Rousseau de la Combe by Maleville, and also at notes 936-938 where their references to Pothier seem to have been dictated by Fenet sur Pothier. See chapter 5, note 291, where it is pointed out that Maleville referred the redactors to Cujas.
37. See chapter 5 supra at notes 331-341, on C.Q. 1668. 38. Serres, Les Institutions du Droit Fran2ais, 1753. See C.Q. 284 and 293. Tutelle in the C.Q. followed the droit coutumier; that of the droit écrit was rather different.
Elementa Iuris and Ortolan's Institutes in respect of louage. Louage was a contract derived from Roman law; Voet was one of the most distinguished of the modern civilians, while Ortolan's book was a modern text book on the Roman law itself. 38.

The references to texts of the Corpus Iuris Civilis are many, and it would be of interest to study such references and to find out if there is any particular reason why the redactors cited Roman texts. There is on the part of the redactors an obvious tendency in their Reports to bolster a view by reference to Roman law. Thus, in adopting their own C.Q. 1043 and rejecting the possible amendment suggested by C.N. 1372, the redactors said that: "The old rule is conformable to the principles of Roman law and ought to be preserved." 39. On article 1062, the redactors state that it is "not in the French code, but is taken from Pothier, as derived from the Roman law." 40. On the question of judicial reduction of damages, discussed above, one of the points against the ancien droit made by the redactors is that it "does not seem to have been derived from the Justinian code." 41. Although, this does not seem to have been the main reason for following the C.N., the fact that Roman law is mentioned at all is significant. Again, in preferring their own proposed article 1087 third paragraph to C.N. 1182, the redactors state: "The old rule is founded on Roman law and is unquestionably preferable to the modern one." 42. As regards the interdiction of prodigals, the redactors thought it important to remark that the old law, which they are following, is conformable to Roman law, whereas the C.N. provision is not. 43. At the beginning of their discussion of their title on usufruct,

38. See chapter 5 supra at notes 288-301 and 331-341.
40. First Report, p.16
41. First Report, p.18.
42. First Report, p.20.
43. Second Report, p.223.
the redactors state: "The rules of usufruct, adopted by
the Code Napoléon, and, in great measure, reproduced in
the following articles, are, with a few exceptions, derived
from Roman law and conformable to the old French
jurisprudence." 44. We find the codifiers stating: "All the
articles of this chapter [i.e. that on use and habitation]... are
conformable to the Roman and to the new law, as also
to the old French jurisprudence." 45. We find article 560
described as conformable to the Roman law and the old
jurisprudence, though differing from C.N. 704. 46. The
French code had no provisions on emphyteusis, whereas the
Quebec has, and these provisions were described as
"conformable to our jurisprudence, and almost exclusively
taken from the Roman law." 47.

Roman texts have been cited in regard to some of the
articles of the Quebec code studied in chapters four and
five. In C.Q. 1418, 1419 and 1425, the redactors departed
from the terms of the ancien droit: they appear to cite
the Roman texts and stress their articles conformity to
Roman law in order to support their copying of the C.N. 48.
In respect of C.Q. 188, the redactors again seem to cite
Roman provisions to support their departure from the ancien
droit. 49. The redactors cite a Roman text in respect of
C.Q. 84 on the domicile of servants: this citation was
perhaps to support the redactors' following of the
criticised provision of the French code, when the ancien
droit was uncertain. 50.

More examples of the redactors' references to Roman
law could be given; but to do so is unnecessary here. One
point to be noted is that when the redactors specifically
refer to Roman law, 51. they always describe the Roman law

44. Third Report, p. 375.
48. See chapter 4, note 863.
49. See chapter 4, text at notes 1017-1020.
50. See chapter 5 supra at notes 284-286.
51. As distinct from merely citing a text under an article
without a comment.
as being the same or "conformable" to the old law or the C.N.: nowhere do the codifiers state that they are introducing a rule of Roman law purely because it is the Roman law. A second point is that the references to Roman law are generally quite unnecessary: since the redactors are codifying the ancien droit with amendments, to refer to a proposition as being derived from the ancien droit is sufficient, the references to Roman law being thus redundant. It is different, of course, when the mention that they are copying an article of the C.N. which differs from the C.N., and cite a Roman text in its support: though they obviously are copying the French code, the Roman text gives added authority. Were more time available, it would be interesting to explore this further to assess the accuracy of the redactors' remarks and to examine all the articles under which Roman law is cited. It is unnecessary to do this here; but the references do show an attempt to bolster propositions of law with the prestigious Roman law. One could quote examples where the redactors stated that the law they were reducing to articles was contrary to Roman law. This shows that the redactors felt it necessary to act against the prestigious Roman law: they had to explain why they did not follow it. The influence of texts of the Digest on the Quebec code is unclear, and no attempt has been made here to trace such influence. It can be stated that the references to Justinian's Corpus Iuris examined in chapters four and five have had no positive influence on the law in the code: the redactors have not adopted any provisions from Roman law contrary to the ancien droit or the French code. (This does not mean that other references not examined have not had an effect on the law: though I can spot no such.) Any "Roman" provisions embodied in the code as here studied,

52. See e.g. First Report p.16; Second Report, p.203; Third Report, p.403. More examples could be given: these should suffice.
53. See as well as supra notes 48-50, chapter 4 notes 1099 and 1104.
have always come from other works: in adopting a "Roman" proposition of law, the redactors were following, for example, the ancien droit, and the fact that the proposition is ultimately of Roman origin is irrelevant. The knowledge that much of the law in force was of Roman origin combined with frequent references to Roman law in the authors the redactors studied, must have led the redactors to examine the Roman law, and to cite its texts from time to time; but it would appear that the Roman law proper has had little direct influence on the Quebec code.

One other potential source of provisions in the Code would have been decisions of the Quebec courts. Surprisingly little use, however, was made of such decisions. (It will have been noted that none were referred to in chapters four and five.) Professor Morel states that:

"Si l'on néglige le quatrième livre du Code, consacré en réalité aux lois commerciales, on ne peut retenir que 64 articles sur un total de 2277 qui compose les trois premiers livres où soient invoquées des décisions de nos tribunaux. Rarement, d'ailleurs, trouve-t-on plus d'un arrêt sous un même article: toute la jurisprudence canadienne que nous laissons connaître nos codifications se ramène à 72 décisions, dont quelques-unes sont reprises à deux occasions différentes." 55.

Nor were court decisions used to any appreciable extent in the fourth book on commercial law, for Brierley informs us that only 95 decisions are cited in all the Reports. 56.

Since in chapters four and five we have not met with any citations of Quebec cases, nothing may be said here as to their use by the redactors. We may, however, comment generally on the paucity of references. By the time of codification not many volumes of Reports had been published, 57 and this undoubtedly would depress the importance of court decisions as a source. Further,

57. Brierley states 32 volumes available by 1865: Codification p.551, note 87.
the method adopted for codifying the law, as discussed above, would tend to emphasise doctrinal writings at the expense of court decisions. Doctrinal writings tend to give a complete synthesis of the law grouped in convenient classifications; whereas court decisions tend to turn on one or two points, do not give convenient syntheses of the law, and, being scattered through volumes collected generally by year, would not be convenient to use: this is a point the redactors make themselves. The redactors referred to several French Recueils and Repertoires of jurisprudence such as those of Denisart, Merlin, and Guyot: these would be convenient to use, purely by reason of their organisation of the material. These are, of course, only suggestions, a thorough examination and analysis of cited court decisions and their relationship to the articles would be instructive, but is outwith the scope of this work. Morel examined the influence of court decisions on testamentary succession in the Code: it is perhaps significant that decisions were important in this area of the law, introduced by statute and somewhat different from the ancien droit. Cases had to be used, since the writers on the ancien droit did not deal with the matter in a relevant fashion.

It has been pointed out that English, American and Scots commentators were used by the redactors. These authors were used mainly in Book Four on commercial law, and have thus not featured in chapters four and five. That these authors should have been used in these areas of law and not in others is significant. In the "traditional" areas of private law - property, obligations, family - the redactors did not consider that Erskine, Bell, Kent, or Blackstone had anything useful to tell them, or could

58. See Seventh Report, p.216 where, on commercial law, the redactors state that they refer to jurists and textwriters as more convenient than the cases on which their opinions were based.
59. See Morel, op.cit. note 33 supra, passim.
60. Walton, op.cit. note 2 supra pp.139-147 is useful in showing where these authors were used.
suggest new insights or useful wording. (Compare with this the use of Blackstone in the 1808 Louisiana Digest.) In a sense the action of the redactors is hardly surprising: they had been instructed to codify the law in force, and it would have been difficult to argue that these Anglo-American and Scots authors stated the law in force in Lower Canada; similarly, these authors would not provide useful models, the French code being pre-eminent in this respect. When commercial law is considered, the reasons for using these Anglo-American and Scots authors become obvious.

To show some of the reasons for the use of the Anglo-American and Scots authorities, it is necessary first to set out briefly the nature of the Fourth Book of the Quebec Code. The redactors recognised that many of the provisions on contracts in the third book affected trade no less than private transactions. However, these contracts were part of the traditional law on obligations of the civil law of Europe, descending from the Roman law. Nonetheless, those traditional contracts did not cover fully the complexity of the legal transactions necessary in a modern commercial society. In France, the Code de Commerce provided for the purely commercial aspects of the law (one thinks of shipping, bills of exchange and the like). The 1808 Louisiana Digest provided no regulation of purely mercantile affairs, and the Louisiana courts tended to utilise the Castilian law in this respect. The Quebec redactors provided a fourth book to cover commercial law, and in this departed from the scheme of the Code Napoléon. They were, however, following the instructions of the legislature. After recounting that the contracts in Book Three also could pertain to commercial law, the Codification Commission stated that:

"there remains a class of subjects which so exclusively belong to the law merchant that it has been necessary to collect the rules concerning them under a distinct general heading, and for that

purpose add another to the three great divisions of the French code." 63.
The codifiers tellingly follow this by stating that this is a class of subjects on which the law is less fixed than on others in the code.64.

The redactors state that some rules of commercial law may be found in statutes or French Ordonnances; but that much is to be sought only in usage and jurisprudence, and that the Quebec system ("if system it may be called") has been borrowed indiscriminately partly from France and partly from England.65. They stress that there is no orderly design and regular practices are the result of tacit usage. They therefore conclude that the system of usage should be left as such and to be developed by interpretation and modification when necessary. They declare that:

"This course is consistent with the history and character of commercial law in all countries. It has always begun in usage, and positive law has done little more than to follow, and to declare the general and fundamental rules which such usages has originated." 66.

They state that such caution is even more necessary in Quebec than in an "older and more developed" country.

From the above, we can see that the redactors felt that in commercial law there should be the minimum of regulation: business practices should be allowed to develop on their own as much as possible, with legislation only on certain key or core points. They stated further that established usages in Quebec were drawn from both French and English practice. The redactors comment later that they cite not only the old and modern law of France and the law of England but also Scots and American jurists and continental law. They state that no difficulty arises from so doing because "the laws of commerce are of universal application." 67.

64. Ibid.
65. Ibid.
66. Ibid. p. 216.
67. Ibid. p. 216.
It thus becomes easy to see why the redactors consulted these non-French sources in Book Four. They felt it better to leave the law fairly general. The present commercial usages were already influenced by English law. The law merchant was universal. These three considerations allowed the redactors freedom in selection of sources for consultation. Nonetheless, the redactors did limit this freedom in that they felt they had to try as best they could to state the existing law. Thus we find them stating that a treatise of Pothier cannot be used because it was based on a 1673 ordinance which most people regard as not having been received in Lower Canada.

One interesting consideration is that the new Code de Commerce ought properly to have been ignored for the same reason as Pothier's treatise was ignored: its provisions could never have been regarded as the law of Lower Canada; yet an important consideration supported the redactors in their use of the modern French law - its modern nature. This suggests that had the redactors had a use for this treatise of Pothier, they would have used it anyway. The argument for this treatise's exclusion is not totally convincing for another reason. If we turn to that section of the redactors' Report on maritime law, we find a brief history of maritime law from the lex Rhodia de iactu onwards. The 1681 Code de la Marine is praised highly, and the redactors state that it gave maritime law to a large portion of the continent and to England. They go on to say that it cannot have had force in Quebec, first, because of the problematic nature of the validity of such Royal legislation in Quebec, and second, because the change in sovereignty would have done

68. Ibid. p.216.
69. See chapter 3 supra, at notes 324-325.
70. See Seventh Report, p.224.
away with the old admiralty law anyway. Nonetheless, the redactors use this French legislation to a very considerable extent because they regarded it as written reason of universal sanction and authority, even though the Code de la Marine was not registered in Quebec. We thus can see that the redactors could easily have defined any of the French ordinances as written reason and used them in the code, had they so wished.

Thus, though the redactors were willing to reject some sources as not being in force in Quebec, they were willing to classify other sources as written reason and draw on them for their code. The argument could be turned to favour the Anglo-American and Scots sources: they, if required, could be defined as written reason expressing the universal law merchant. What was obviously of importance was the modernity and utility of the source: thus the use of the Code de Commerce. This stress on modernity would influence the redactors in their use of contemporary English, American and Scots law. Indeed, the Commissioners explicitly state that the courts refer more to modern French law and the English law (in commercial cases) than the ancien droit:

"from the want of completeness and full adaption [of the ancien droit] which an extended commerce and enlarged jurisprudence have given to the law of the present day, and not less from absence of treatises of a character to fix as a system the law of that earlier period." 72.

In Bell, Story and the like, the Commissioners found a modern comprehensive statement of commercial law; a necessary modern statement, as the ancien droit dealt with a society where commerce was not nearly so highly developed as in Quebec in the nineteenth century.

The reasons why the Anglo-American and Scots textbooks were used so extensively in the Fourth Book are now obvious, as are the reasons why they were only used in the Fourth

Book. The nature of commercial law demanded this use; the modernity of these sources facilitated their use, while equitable principles of the universal law merchant could be relied on to validate any references. We also find that the Commissioners regarded the Scots law as being often analogous to the Quebec; they accordingly frequently referred to Bell's Commentaries. These reasons for the use of these sources would not be applicable when other areas of the code were considered. In these other areas there was a strong French tradition: the laws were certain and fixed except in so far as the French sources themselves gave differing views. There could be no possible argument for reference to the Anglo-American law by reason of its modernity: the French code was far more modern in its provisions and exposition of the law.

We can conclude this general section on how the redactors used the sources available to them by commenting that by far and away the bulk of the code was culled by the redactors from the writings work of French jurists of the ancien régime, writings which the redactors synthesised using the French code; as commented on by the modern jurists, the French code itself suggested provisions. Much of the Code Napoléon could be taken (and was so taken by the redactors in Quebec) as the expression of the ancien droit in a modern synthesis. This synthesis the redactors compared with the ancien droit and the criticisms of the modern commentators; and they drew up their own code on the basis of this sustained critical evaluation of the French code, selecting their provisions as they saw fit, whether the reasons behind the selection were legal conservatism, a support for economic liberalism or whatever. (Chapters four and five will have shown to some extent the reasons behind selections; these reasons will be

73. See Seventh Report, p.230: "The Scotch law, which is exposed by Bell with his usual precision and clearness, has been consulted as analogous to our own." See also Walton, op.cit. note 2 at pp.140-146 for an account of the use of Bell.
discussed further infra.) 74.


Prominent in the discussion of the Louisiana Digest of 1808 has been the vexed question of the Digest's relationship to the pre-existing law. This question arose because of disputes over the nature of the Digest as a "code". No such dispute exists over the Quebec code; no one doubts its nature as an authentic code in the modern civilian tradition, and we thus need not discuss the interpretation of the code by the courts. The Quebec redactors, in a passage concluding their seventh Report, and urging caution in legislative amendment of the code, put forward their own view on the code; This view concisely expresses the nature of a modern civilian code:

"The Code is intended to cover, either by express terms or by legal implication, all questions belonging to the wide range of subjects with which it deals. It constitutes a system, with careful adaption of its different parts to each other, and any fragmentary legislation, with a view to particular changes, may seriously affect parts of the work not intended to be touched, and lead to great and unforeseen derangement and confusion." 75.

The codifiers thought that their code was a unified whole composed of interrelating and interpenetrating legal propositions, capable of extension by reasoning to cover circumstances for which there were no express provisions.

Nonetheless, the redactors did consider the question of the relationship of the Code to the old law; and to explain this relationship, they inserted at the end of the Code a general article applicable to the whole Code. 76. This article, 77.2613, provided thus in relevant part:

"The laws in force at the time of coming into force of this code are abrogated in all cases:

In which there is a provision herein having expressly or impliedly that effect;

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74. See chapter 8 infra.
75. Seventh Report, p.262.
76. See Supplementary Report, p.369.
77. The Code concludes with a short general section of three articles: 2613-2615. For our purposes, C.Q. 2614 is irrelevant.
In which such laws are contrary to or inconsistent with any provisions herein contained;

In which express provision is herein made upon the particular matter to which such laws relate; ..."

It should be read along with article 2615:

"If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws, that version shall prevail which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention.

From these two articles, it can be clearly seen that the redactors still considered the pre-codification law as applicable in interpreting the code: the old law was not totally abrogated, and, potentially, still had a rôle to play. 78. As Brierley points out, this means that the Quebec code is not the exclusive source of Quebec private law: it is only the primary source in a hierarchy of sources. 79. The former law still has a secondary role to play: the use of the pre-code authority to interpret the code is known even for the Code Napoléon, though for that code, use of such authority is more imperio rationis than ratione imperii, while the pre-code law in Quebec still has some formal force. 80. In effect, the position of the Quebec code vis-à-vis the old law is not radically different from the position of the 1808 Digest, and shows that those scholars who deny the Digest the status of "code" are blinded by the almost complete abrogation of the ancien.


80. One thinks of Fenet on Pothier. Maleville, the Pandectes Françaises and the like also referred to the ancien droit in their explication of the C.N.
droit in the promulgation of the French code: they thus do not see that each codification may be unique in its effect on the previous law. However this may be, the important point is that the Quebec redactors did not envisage their codifications as a point of rupture from the old law, except in so far as its provisions amended or abolished the old law; but rather they viewed it as a continuation and restatement of the old law. They nonetheless did innovate and consciously select among provisions; and their code is in some essential sense - even if only in that of providing a synthesis - new law. As was stressed at the beginning of this chapter, the Civil Code of Lower Canada resembles the Code Napoléon far more than it does the ancien droit. To argue that it has remained truer to the pure spirit of the ancien droit would be nonsensical. The Quebec code is a true nineteenth century code, and the genuine offspring of the French code.


As discussed in chapter three, the Quebec code was the result of the need felt for a useful synthesis of the law in both of the languages of the Province. The existing sources of private law were numerous and confused; and the whole was in need of rationalisation. It is unnecessary to go into this in any greater detail because of Brierley's work. There is a possibility that a fear of the introduction of common law was instrumental in supporting the idea of codification; but the evidence for this is slight. It would seem that, at the time of codification, the French Canadian laws were secure and unlikely to be abrogated; and all the available evidence suggests that the "legal or technical factors", in Brierley's phrase, were those which primarily brought about codification. It cannot be doubted, however, that the protection of their laws was dear to French Canadian hearts.

81. See chapters 1, 3 and 6 supra passim.
82. Codification, pp.525-542 and see chapter 3 supra at notes 386-99.
Brierley highlights the point that it is quite remarkable that, in the early period, there had been no advocacy of codification "simply as a measure of intelligent reform".83 In the next chapter, we will consider the respective timings of the Quebec and Louisiana codifications; but it is important to point out here that Brierley's statement that codification was not publicly advocated until 1846 is not quite accurate. I have discovered two other references to codification before this date, and they will be considered in the chapter following this. It is appropriate to say here, however, that for various reasons codification was not seriously considered until the period of union of the two Canadas.

We have seen that the redactors of the code considered their task to be as much as possible to codify the existing law, using the French code as a model, while drawing inspiration also from the 1825 code of Louisiana. They carried out their work by means of a critique of the French code, as already explained, and, because of their method of working, always were able to consider many possible amendments of the law. Further, as they themselves realised, even deciding what the law in force actually was involved them in a process of selection, a selection which they tried to fit, according to their own account, to the state of the Province.84 It will have been seen that as regards the law of obligations, the redactors innovated in a very important way to promote security and freedom of contract. Freedom of contract was in line with the dominant contemporary ideology of economic liberalism. Similar influences seem to have affected their choice of provisions on the transfer of property, registration of title and the like. These innovations were of immense importance and give the 1866 code an obvious nineteenth century appearance. If we consider the material covered

84. See text at notes 12-31 supra, and see chapter 3, at notes 423-429.
in detail in chapters four and five, a rather different picture emerges. The laws on family were very traditional and not obviously fitted to the state of the province: the redactors, with the material available to them, could have selected provisions more suitable to Provincial life. They preserved the old law; this preservation of the old law was — certainly as regards puissance maritale — supported by current ideology. Similarly, the provisions on employment, while in line with the ideas of classic contractual freedom current in the Province, were obviously inadequate for an industrialising society.

One important point is that virtually all the provisions considered above were drawn from other sources. The innovations promoting freedom and security of contract were largely taken from the French code (though amended in transplantation); the conservative provisions on family were taken from the ancien droit. Very little was made up by the redactors. For example, the improved definition of louage to take account of bail à champel was suggested by Marcadé. The codifiers might have researched widely for what they considered suitable law; but their research was restricted by the materials available to them and by the fact that they themselves deliberately excluded certain materials from their research. For example, the redactors did not consider that Blackstone might have had provisions on family law which they could usefully have borrowed. It should be remembered that although the redactors were instructed to codify the laws in force, their conservatism in family law was not imposed. The fact that they felt free to innovate in contract means that they could have proposed (in theory at least) a substantial reform of family law; that they obviously never considered such a reform is significant. The redactors' indebtedness to other legal systems for innovation is all-pervasive. Thus it is doubtful if they would have considered the amalgamation of mandate and lease and hire of services had not Marcadé pointed out that the Austrian code, the Allgemeines bürgerliches Gesetzbuch, had chosen to treat all services
paid for as objects never of mandate, but always of lease and hire. 85.

We may conclude that the Quebec code of 1866 provided the Province with a rationalised and modernised system of private law. The code is in many ways something completely new and unique, although this uniqueness is the result of a redaction drawing on many different sources. The Commissioners for Codification in Quebec borrowed extensively to draw up their own new code. There are few articles which cannot be traced to some definite source. The Quebec code is original in that it is a new assemblage of old provisions garnered from many sources, through a process of selection by the codifiers.

85. Sixth Report, p.8; and see chapter 5 supra at notes 272-280.
Chapter Eight.
Conclusion:
Codification, lawmaking and legal change.
1. Codification.

Both the 1866 Quebec Code and 1808 Louisiana Digest are transplanted or borrowed codes: they are not original since their redactors utilised a foreign code both as a model and as a quarry of accessible and readily borrowable provisions. Both codes are obvious offspring of the 1804 Code Napoléon. Indeed, very many codes are borrowed from other countries or heavily influenced by foreign codes. The form of a code seems to facilitate borrowing. That is, the arrangement of the law into concise propositions forming a coherent whole of relatively short length is easy to borrow wholesale and is attractive because of its rational, logical structure. For most of the nineteenth century, the Code Napoléon was the archetypal code, the paradigm copied by countries as diverse as Italy (1865) and Haiti (1825).

We can say that the Quebec and Louisiana codes are both borrowed codes; but this does not mean they are necessarily slavish, unthinking copies. In fact, as will have been seen, both codes deviate in certain areas from the French code: both as regards substantive provisions and as regards topics chosen or arrangement. Thus, we can see that copying was deliberate: the redactors appear always to have considered alternatives and to have assessed the "suitability" (by their own criteria) of the Code Napoléon. There is sufficient evidence for us to assume that radical changes in the law made by codification were in fact quite deliberate.

The lack of originality in codification is worth

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1. See Watson, Society, p.136.
stressing. Very many codes have been adopted from other countries, or if not, have been influenced as regards individual provisions or institutions by the law of other countries. Lack of originality is also betrayed by the use of existing material for the confection of codes. As a code, the Code Napoléon is new; but much of it is composed of old material. The old material is combined to make something new (i.e. a code); but there is no necessity for a code to introduce sweeping changes in the law, although it may well do so.

In many respects both the 1866 Quebec code and the 1808 Digest are different from their model(s). These differences do not indicate originality in composing provisions by redactors, as the provisions are generally drawn from other sources, but rather originality in putting old sources together in a new way. (Similarly, of course, much of the Code Napoléon and the B.G.B. is composed of old provisions combined in a new way.) What is most relevant here is why the redactors selected the provisions they did.

This brings us to an important consideration: that of sources. We have noted that Blackstone was used by the Digest redactors in the traditional areas of private law, while, in these traditional areas, the Quebec redactors used only French and civilian sources. Can any reason be given for this difference? The reason why the Quebec redactors did not utilise common law sources in these areas must have been their consciousness of their task of codifying the law in force. Blackstone, for example, would not suggest any useful improvements or provisions which could be borrowed. From our examination of the areas of the Louisiana law in which Blackstone was used, we can state, as a general rule, that the provisions taken from Blackstone were not such as to modify the system of the modern civil law, but rather such as would harmonise with

4. As its compilers recognised.
it and cover a situation which the redactors felt required a legal provision. If, for example, we look at the use of Blackstone's texts in the section of the Digest dealing with apprentices, we find that Blackstone provided a series of propositions of law which were useful and could be borrowed without difficulty and without doing violence to the system of the civilian code. It should also be recalled that the Digest redactors were more adventurous than their Quebec equivalents and innovated more freely (perhaps because of their natural law opinions). Another point to be considered is that, for the Digest redactors, the Justinianic compilation was still a living source of law, whereas for Quebec, despite references to the Roman laws, it does not appear that the Corpus Iuris was a living source. This could be because of the more adventurous spirit of the Louisiana redactors and because the Castilian law authorised the Roman law to be used as a source imperio rationis. (Although the Roman provisions selected for governing the seashore as pointed out above are not particularly sensible.) The Quebec redactors appear to have used the Roman law in their Reports to bolster decisions already made, whereas the Louisiana redactors used it as a quarry for potential provisions. (It is of course feasible for the Quebec redactors to have incorporated Roman provisions; but they do not appear to have done so.)

Three points arise out of the foregoing brief discussion of sources. First, redactors may use sources which are not part of their traditional law but which fit into its system. The Digest redactors used Blackstone because he provided statements which could usefully be incorporated into their system of law not because they wished to introduce English law. Blackstone's provisions could be regarded by the redactors as general statements of universally valid law. Second, redactors may reject sources for ideological reasons. The Quebec redactors did not consider Blackstone as a source in the law of persons because he was a common lawyer. They would fear the
introduction of common law, and the preservation of the
civil law was an emotive topic in French Canada. (Their
fears were reasonable, consider the problems caused by
the use of the term "consideration" in the code.) Third,
the prestige of a legal system may influence redactors:
thus, the prestige of the Code Napoléon influenced both
the Quebec and Louisiana redactors, while, similarly, the
Quebec redactors used Roman law to support their decisions,
although it does not appear to have been an effective
cause of those decisions.

Both the 1808 Digest and the 1866 Quebec code are
offspring of the French code, yet nearly 60 years separate
them. Why did Quebec codify only in 1866, while Louisiana
codified in 1808? The reasons for this difference must
be sought in the histories of the two countries.

In Louisiana, the purchase of the Territory by the
U.S. brought legal confusion. The early period of the
U.S. administration seems to have seen a revival of the
French law alongside the Castilian. An 1805 court
decision had decided that the French, Roman and Spanish
laws were the laws in force. At the same time, the U.S.
administration hoped for a reception of the common law in
the newly acquired Territory. Both to settle the
confusion over which were the authoritative sources of law,
and to help forestall the possible introduction of the
common law, the territorial legislature passed a bill
stating which sources of the law were authoritative.

This bill was vetoed by Governor Claiborne. In the same
year the legislature appointed Brown and Moreau Lislet to

5. See C.Q. 984 and 989. It seems likely that Day only
intended to use an alternative form of expression for
cause; he did not intend to introduce the English doctrine
of consideration. See First Report, p. 10 and also
Brierley, Codification, p. 564.
6. See chapter 3 supra at notes 156-170.
7. See chapter 3 supra at notes 168-169.
8. See, above all, Dargo, op. cit., passim, esp. at pp.
105-153.
prepare a code. For various reasons, investigated by Dargo, Claiborne allowed the redaction of the Digest. Thus both a desire to settle the laws in force and one to prevent reception of the common law seems to have motivated the redactors of the Digest in 1808.

Brierley expresses surprise at the lateness of codification in Quebec and at the fact no one seems to have considered codifying the Quebec laws until the 1840s. That codification was not seriously considered until the 1840s may be explained by an examination of the history of the Province in the first half of the nineteenth century.

The period leading up to the unification of the two Canadas in 1840 had been one of great political strife culminating in the rebellions of 1837 and 1838. One point at issue was the Quebec civil law. It is undoubtedly the case that many of the anglophone inhabitants of Lower Canada wished for the introduction of the English common law. As pointed out in chapter three, s.8 of the Canada Tenures Act appeared to mean that some areas of English law were applicable in Quebec. The law was in a confused state. The French Canadians in the 1820's feared for the preservation of their law, while the anglophones apparently wished its abolition. The question of codification appears briefly in the evidence given by John Neilson before the Parliamentary Select Committee on the Civil Government of Canada. Neilson remarked that in Louisiana "they have adopted a code very much like the Code Civile [sic]; and if there were a code drawn up, there would be no objection to the laws in Lower Canada, for the objections arise more from ignorance than anything else". Neilson's remark is in the nature of an aside: codification does not seem to have been seriously considered.

10. See, e.g. Dargo, op.cit., p.141.
First, given the confused state of the law, the partial introduction of aspects of English law, and the fact that the judges were in general common-law trained, it is conceivable that any attempt to codify would have been construed as an attempt to introduce the common law or to preserve those aspects of the common law already introduced. This point was made forcibly by Papineau in 1832. In a speech devoted to the legal system and laws, and reported in La Minerve, he said:

"La rédaction d'un code de nos lois ne peut dans ce moment-ci offrir de grands bienfaits parce que nous avons des juges politiques qui maîtrisent les délibérations des conseils....

L'État de la Louisiane... nous offre quelqu'une analogie par rapport aux systèmes de lois qui y ont prévalu. On a senti la nécessité d'un refaîtié et dans le travail on a tâché de se rapprocher autant que possible du Code-Napoléon, monument de législation le plus vaste, le plus judicieux qui ait été donné à l'humanité. Tandis que l'on poursuivant ce grand travail qui devait entraîner de si grands avantages, ici on a voulu introduire la masse de la jurisprudence anglaise que les Anglais eux-mêmes malgré leur partialité national qui leur a fait admirer l'exagération tout ce qu'ils ont de bon, reconnaissent pour être le code civil le plus imparfait d'Europe." 13.

Given the applicability of some aspects of English law in some areas of Quebec, given what was seen as the ignorance of the judges and their partiality for common law, it is hardly surprising that no moves were made to sort the legal confusion through codification, lest the English law be introduced in the process of codifying.14.

Second, the 1820s and 1830s were periods of political and constitutional upheaval in Lower Canada. These were periods of constant conflict between the elected Assembly and the Government of the Province. For much of this time the Assembly was continuously prorogued, because of its refusal to pass Appropriation Acts. Undoubtedly, the

14. See chapter 3 supra at notes 337-370.
state of affairs in the legislature was not such that a comprehensive programme of legislative reform such as codification could be embarked on and successfully carried through.\(^{15}\) Codification would hardly be considered during the power struggle between the Governor and Assembly.\(^{16}\)

Third, the nature of the laws militated against codification. The laws were confused and unsatisfactory. The feudal system of land tenure was still in force and the object of major dispute, while apparently retarding the commercial development of the province;\(^ {17}\) it would have been unthinkable to have codified the feudal law, but not to do so would have required a comprehensive but complex programme of reform in the process of codification. Political circumstances militated against this, as did fears that such a reform might result in the introduction of the English laws.

Hence, we can see that although codification might have been a sensible solution to problems over the law, the situation of the country rendered it impossible. In the 1840s, the situation had changed. The country was politically stable. Important and necessary reforms were undertaken relating to hypothecs, unifying the law and abolishing feudal tenure. The necessary political stability allowed the comprehensive reform required for codification to take place.\(^ {18}\) In Louisiana, circumstances were very different. There was indeed antagonism between the governor and the elected legislature; but the Territory was generally stable. Further, preservation of the civil law was a greater issue than in Quebec, whose laws were more secure: similarly, there seems to have been greater

\(^{15}\) Consider the difficulties encountered in codifying in France under the National Assembly, Legislative Assembly, Convention and Directorate. See General Survey, p. 280.

\(^{16}\) On this, see the references in chapter 3, note 371, especially Manning.

\(^{17}\) See chapter 2 at notes 101-106 and chapter 3 at notes 337-370.

\(^{18}\) See chapter 3, notes 371-399 supra.
confusion over the laws in force in Louisiana.

The above discussion illustrates that codification can be a political issue or depend on political considerations. In a country where there is a great political dispute, as in Lower Canada in the 1820s and 1830s, a programme of codification, rationalising, consolidating and reforming the law, is not considered, because legislatures, politicians and lawyers are concerned with matters other than reforms of the law of a largely technical nature. Basic politics are of more immediate importance. Codification can, of course, be itself a political issue, as it was in Louisiana; but it cannot be doubted that the lack of a movement for codification in Quebec should be attributed to the political situation of the country. The legal-technical need for codification, even with obvious models available, is not sufficient. There must be both a desire for codification and sufficient stability to allow such a comprehensive, lengthy task to be carried out.

A point related to the above should be considered: codification required a necessary ideological consensus or stability and certainty of ideas. A few examples will illustrate this. Codification as a process demands reflection on the laws and on the general principles underlying them: if there is no general agreement as to what these principles should be, the codification process is likely to be frustrated. Thus, prior to the redaction of the Projet de l'An VIII, the various governmental organs in France from the Revolution onwards failed to promulgate a code. Although political instability hampered their actions, a major difficulty was lack of agreement on the nature of the code: how general it should be, how detailed, how "philosophical". If codification had been considered in Lower Canada in the 1820s and 1830s, whether or not feudal tenure should have been preserved,

and whether or not s.8 of the Canada Tenures Act should have been preserved, would have caused possibly insuperable problems. 20.

Similar problems confronted the 1945 French Civil Code Reform Commission. Léon Julliot de la Morandièreremarked thus in his 1953 Preliminary Report:

"[T]he revision of the Civil Code...poses more problems than mere juridical technique. The moral, philosophical, economic and political bases of its rules have to be examined." 21.

This posed particular problems in the law of property and obligations; and in France after 1945 there was a conflict between socialist and liberal principles: was private property still an inalienable right? should freedom of contract prevail rather than there being a controlled economy? These conflicts and doubts hampered the work of the Commission. 22. Codification was not taking place in a period of ideological certainty and basic principles could not be decided on. On the contrary, the period of codification in Quebec and Louisiana was a period of ideological certainty: no one doubted that property rights were absolute; no one doubted that freedom of contract should prevail. In both countries the laws were reformed to support these principles, the relevant articles being culled from the Code Napoléon, which itself reformed the law of France in this way. The redactors of the Code Napoléon similarly had no doubts as to the principles

20. On this section, see chapter 3 at notes 364-366. It was the section which decided English law governed land held on socage.


their code should embody. Codification, in general, because of its emphasis on law as a logical system, requires reliance on first principles, whether these principles are stated in the code or merely implicit in it. Periods of great instability in ideas do not readily permit codification, because of the lack of a firm ideological consensus to underpin the basic principles supporting a code.23.

One further difference between the codes of Quebec and Louisiana is of interest. Quebec included in its code a fourth book dealing with commercial law: in so doing Quebec innovated, the Code Napoléon not dealing with commercial law, which was served by its own separate code. Nevertheless, the Quebec Code, in codifying a body of commercial law distinct from the civil law, was, in a general sense, following the French pattern, and indeed the traditional civilian distinction between droit civil and droit commercial. Louisiana did not codify its commercial law. In the territorial and early state period, its courts continued to apply in general the commercial law of Spain.24. When the Louisiana legislature proposed codification in 1806, the French Code de Commerce did not exist. It seems likely that the idea of codification in Louisiana was suggested by the obvious advantages of the French code which was closely followed as a model, the 1808 redaction being highly derivative.25. It is probable, then, that no one in 1806 in Louisiana conceived of codifying

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23. It is interesting to read the Report on the new Draft Civil Code, which seems to reveal a new form of consensus about the nature and objects of the law: a consensus involving fairness in contracts and recognition for unions other than marriage (to give two examples). See Report on the Quebec Civil Code, vol. 1. foreword by P.A. Crépau, pp.XXIII-XXVI.


25. There is no evidence that the appearance of the C.N. prompted codification in Louisiana, but such is the natural inference: the C.N. showed what could be done, and served as a model.
commercial law, since the *Code de Commerce* had not yet appeared to prompt such a codification and to serve as a model. The 1808 redaction was confined within boundaries set by the 1804 French civil code. The *Code de Commerce* was not finished until the end of August, 1807, and came into effect only on 1st. January, 1808. It apparently did not occur to anyone in Louisiana to codify laws other than those traditionally designated "civil" laws, that is, those embodied in the French code. The Resolution appointing Brown and Moreau Lislet to carry out the codification talked only of "Civil Code" and "Civil Laws". 26.

The lack of such a Code of Commercial law has one curious effect on the 1808 Digest. In chapter four it was shown that the 1808 Digest, the 1866 C.Q. and the 1804 C.N., all have provisions on the authorisation of married women by their husbands. 27. There is no necessity for such authorisation if the wife is a public trader acting in course of her trade. Article 4 of the French *Code de Commerce* provides that a wife may not be a public trader without the consent of her husband. This provision appears in the C.Q. in the section on authorisation of married women, being taken from the French commercial code. 28. There is no equivalent in the Digest. Hence, because the 1808 Digest in this respect followed the C.N., which was to some extent relying on the future existence of the *Code de Commerce*, the Digest lacks a provision on a rule of some importance.

In the 1820s, when the Commission of Livingston, Derbigny and Moreau Lislet was at work, drawing up the new

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27. See chapter 4 *supra* at notes 360-464 and 876-981.
28. C.Q. 179: see chapter 4 *supra* at notes 914-919.
code of civil law, a Code of Commerce was drawn up; but it was not adopted. The reasons for the rejection of this Code are unknown. This unenacted commercial code followed the French Code de Commerce, although with some variation. Thus, we find in the projected commercial code a provision stating that married women must have the consent of their husbands to their being public traders.

Conclusions as to why the projected commercial code was rejected would be entirely speculative, and with one exception below, we need not concern ourselves with them here. However, that the French commercial code was followed in the redaction of the projet in Louisiana must be of significance, in that it supports the argument that no-one in 1806 conceived of codifying the commercial law, because there was no model either to suggest such a codification or available to be followed.

This difference between the 1866 Quebec code and 1808 Louisiana Digest can be assigned to the fact that the two countries codified at different times. Louisiana codified before the French Code de Commerce could serve as a model, while Quebec codified long after the promulgation of the Code de Commerce. In Quebec, because the pre-code commercial law was drawn up by Livingston.


30. Nathan describes thus the projected Commercial Code: "Indisputably the Code followed the French Code de Commerce as a model, but the French code was more a springboard than a matrix. Although the formats are similar, and many of the articles identical, the Louisiana Code added many provisions of its own and omitted many of the French provisions." (p.48).

Book two, on maritime commerce, was almost identical to that of the French commercial code. Other books varied to a greater or lesser extent. Unfortunately I have not been able to see a copy of the Louisiana projected code.

31. Article 5 of proposed Code of Commerce.

32. See the suggestions of Nathan, op. cit., p.53.
law was an amalgam of French and English principles, the Code de Commerce could hardly be copied as readily as the Code Napoléon had been copied. Further, the inclusion of the commercial law as a separate book in the civil code was one of obvious convenience, and one which did not detract from the traditional separation of "civil" and "commercial" law. The non-codification of commercial law in Louisiana in 1808 may be taken to suggest just how important models may be in codification, as both a quarry and a stimulus.

Nathan suggests that the projet of the 1820's was rejected in part because the socio-economic state of Louisiana did not warrant a separate code for merchants, Louisiana being an agrarian society. If he is correct for the 1820's, his arguments would apply a fortiori to Louisiana in the territorial period. This speculation of Nathan's seems to be unacceptable, for, as shown in chapter two, there was a fairly strong mercantile community in Louisiana based in New Orleans; the territory was not merely composed of plantations. Further there are a significant number of early Louisiana cases which deal with commercial matters outwith the scope of the 1808 Digest, and in which the Spanish sources of commercial law were used by the courts. This would surely indicate that in the early period a Code of Commerce would have been useful.

One must conclude that, whatever contributory factors there may have been, it is most probable that there was no codification of commercial law in Louisiana because there was no foreign model to copy and from which to borrow. The importance of a model in many codes cannot more adequately be stressed; there was no commercial code not because there was no need, but because there was no model.

34. See chapter 2 supra at notes 6-38 on mercantile community. On Spanish commercial law in the courts, see chapter 6 at notes 192-200.
Had the 1804 Code Civil des Français had a fourth book on commercial law after the pattern of its descendant in Quebec, we can be certain that in 1868 Louisiana would have adopted a code of four books with the last book devoted to commercial law.

The complexity of the circumstances surrounding the genesis of a civil code should be stressed. Legal-technical reasons for codification, though a factor in promoting codification, on their own are not necessarily sufficient to bring about codification: Quebec shows this clearly. Political circumstances may promote or prevent codification, as both Louisiana and Quebec show. The general political state of a country must be such as to facilitate codification. The actual form the code takes may be influenced by a variety of factors, such as the existence of foreign models, contemporary philosophy or legal science. The content of the code may be influenced by similar factors. What seems most to influence the form of the code are existing models and current philosophy, while the content seems most to be influenced by provisions in the law of the codifying country and of foreign countries. Codes are at the same time both new and deeply rooted in the past. For a country to codify is to give a dramatic new form to the law; while the process of codification aids and prompts reflection on the law and the need for its modernisation. The provisions tend to have definite historical sources: codifiers do not appear to attempt often to work out a code of law from first principles. Codification, because it promotes reflection on, and reform of, the law tends to result in borrowing of provisions. Conversely, the form of a code and its manner of expression are easy to borrow: codes are readily transplanted.

The form and content of any civil code appear to depend on a series of complex historical contingencies: from the sources available to the codifiers to their views on what the law ought to be. It would serve little purpose here - even if possible - to describe all such contingencies:
suffice it to say that they may be many.

2. Codifiers as lawmakers.

This study has stressed the actions of the redactors in reforming or preserving the law in their task of selection among competing potential provisions. Technically, of course, any reforms were made by the legislature who enacted the two codes: it cannot be doubted, however, that the real motivators of change were either of the two sets of redactors. It was they who sifted the source material; they who selected provisions; they who drew up the code for the legislature basically to accept or to reject. True that in Quebec the legislature did not accept all the proposed reforms of the Codification Commission, but this does not really affect matters. Essentially, the task of the two legislatures was to accept or reject in toto; but, even if the legislatures scrutinised the texts closely, even if they modified parts, the task of reforming (or preserving) through codification was essentially that of the two sets of redactors: it was they who were the lawmakers. Brierley points out that the Quebec Codification Commission "enjoyed the most complete freedom and responsibility in all of its work." 35. The Quebec codification especially was "a work for full time legal experts", 36. as all codes are bound to be.

This being so, the motives we have to concentrate on to discover the reasons for change or stasis are those of the redactors. Hence, presupposing that the redactors were acting purposively and reasonably, their motives should be discoverable, if they have not stated them explicitly, and it should be possible to ascertain the criteria they used in making or rejecting changes. This much has already been explained in chapter one, and the results obtained support the view.

35. Codification, p. 572.
36. Ibid. p. 573.
Problems flow from this. This emphasis on the motives and actions of the codifiers as lawmakers could eventually reduce itself to a concern with the psychology of the redactors and their particular views of the world; it would be false to become so caught up in the subjectivism of the redactors' views. The reason for this is the objectification of law: its existence as a body of theory outwith and separate from the redactors allows them to view it as separate from them and to act upon it in a manner divorced from subjective social considerations. That is, questions of the redactors' subjective opinions of the world do not arise. The redactors viewed themselves as actors in an objective world existing separate from them, and which they could manage through the mechanism of law. Consequently, the nature of the economy, the family or whatever was, for them, a fact objectively existing.

It is a mistake to oppose "society" to "law": law is one aspect of society and effective within social life. The manner in which legal regulations may have, or are intended to have, an effect on social life may be obvious; but it is not easy to grasp how social phenomena may have an effect on law. Often, "society" and "law" are opposed to one another with a vague relationship of mutual influence supposed. This approach is generally unsatisfactory and does not readily permit analysis of the relationship between "law" and "society" in casual terms. If it is accepted that law is constructed by lawmakers, examination of the actions and motives of lawmakers permits an

37. Instructive is the following remark of P. L. Berger and T. Luckmann in The Social Construction of Reality, Penguin, 1971, pp.103-4 "Especially on the theoretical level it is quite possible for knowledge to attain a great deal of detachment from the biographical and social interests of the knower."

38. This is not to say that any law may have only an intended result; not all of any law's effects may be intended.

39. Cf. some of the approaches outlined in chapter 1 supra at note 2 et. seq.
understanding of the causes of legal development or stasis by other social phenomena. This involves treating legislators (in a wide sense) as mediators between "society" and "law"; mediators as conscious agents, acting deliberately for various reasons. By studying the social context, by studying the codifiers' actions in the face of the various choices presented to them, it is possible to show how the redactors have attempted to shape the law according to the various criteria they have set themselves. Such criteria need not be thought out by the redactors; their society, and their position within that society, may result in their making assumptions as to what is desirable. The legislators act as mediators between "society" and "law"; they bring about legal development or legal stasis. The relationship of causality between all the factors potentially influencing law and the law itself is dependent on those who make the law: it is they who make these various factors effective on the law in their construction of the law. The recovery of all factors influencing legislators or lawmakers is undoubtedly impossible; but I would hope that this thesis has shown that it is possible to recover enough of these factors, and to delineate them in sufficient detail, to allow the reconstruction of the historical causes of legal development or legal stasis in such a way as to permit the making of suggestions aiding a move towards a more general theory of legal development. And

40. Cf. the following remarks of Zygmunt Bauman in *Hermeneutics and Social Science*, 1978, Hutchinson, London, at p. 12: "Men and women do what they do on purpose. Social phenomena, since they are ultimately acts of men and women, demand to be understood in a different way than by mere explaining. Understanding them must contain an element missing from the explaining of natural phenomena: the retrieval of purpose, of intention, of the unique configuration of thoughts and feelings which preceded a social phenomenon and found its only manifestation, imperfect and complete, in the observable consequences of action."

41. Using "society" in a very wide sense: see chapter 1 supra, text after note 33. It should not be forgotten that geography may have an effect on law.
this will be done in the following section.

To state that law is a human construct is to repeat a truism; but this is a truism worth stressing. Law is a human construct, and it is in human actions and their underlying causes that the reasons for legal change or stasis should be sought. A change in economic organisation or ideology (in itself a human construction) does not in itself cause a change in the law: a lawmaker has to see the change and then act to change the law because of the change in the economy. (Law is not a self-perpetuating living body: it only exists through human actions.) Indeed in the hypothetical example of change in the economy, the lawmaker may see the change, may realise that it requires (or might require) a change in the law; but yet for other reasons the lawmaker may not bring about such a change (reasons of ideology and the like) and legal stasis might result. The method we have adopted here is only valid for investigating the effect of factors other than law on law: for the effect of law on other social phenomena, another method would be required, as a change in the law may have effects on society quite different from those intended. 42.

3. The historical causes of legal development and legal stasis.

In this study we have examined in detail two areas of two codes, and have briefly glanced at other aspects of the same codes. It is appropriate now to assess the more general implications of these investigations. We shall here be concerned with drawing out what is of more general import in the conclusions already drawn on family, employment and the brief investigation of contract as they appear in the law of both codes: from this investigation of the changes - or lack of changes - in the law, we shall

42. For example the intention of legislation to raise taxes is usually to raise revenue for the government (it may of course be to discourage imports and the like); a major effect is often the employment of tax lawyers to avoid payment of such taxes.
assess the influence on, and causes of, legal development and legal stasis, so as to help depict the effect of social circumstances on law.

To this end, it is useful to consider in outline the main argument of the thesis.

It was argued that there is considerable dispute over the nature of the relationship between law and other social phenomena, and that this was a topic worthy of investigation. What was chosen for investigation was the effect on law of the social and other circumstances in which it is located (rather than, for example, the effect of law on the conduct of social relationships); and it was argued that the proper method to study this effect was to examine the changes made in the law at a period of rapid and increasing social change.

Reliance was placed on the fact that law has generally developed through borrowing, and that legislators generally choose between particular and potential rules to revise the law. Hence, a study of the rules examined in considering reform would suggest why the enacted rule was chosen. (And indeed, in both Louisiana and Quebec, redactors, in codifying their laws, obviously confined themselves to the examination of certain legal works and codes.) Furthermore, since codification focused attention on the state of the law, and provided an unrivalled opportunity for modernisation of the legal provisions, it was convenient to study codification. Louisiana and Quebec were most attractive for study because of their rich juridical culture and the transformations their societies were undergoing at the period of their respective codifications.

This being so, it was possible, by investigation of contemporary social trends in Louisiana and Quebec, and comparison of such trends with the trends in development or stasis of the law, to ascertain why the redactors of both codes selected the provisions they did. Of course, this places great stress on the actions of the redactors;
but this is - I would argue - necessary as the connection in the social structure between abstract legal formulations - such as codes - and other social phenomena is made by those whose task it is to create law. In this case, the redactors mediate between the wider society and its formulated law. Evidence is lacking for the 1808 Digest; but the redactors of the 1866 Quebec code obviously acted in the manner suggested here: they consciously selected provisions to fit in with their views of how the law should be.

In order to carry out this plan, it was necessary to build up a picture of the societies of Louisiana and Quebec at the relevant periods; and this was done: special attention was paid to the legal culture of both societies to emphasise the likely influences on the redactors. The general picture of both societies was sufficient to allow us to develop a broad understanding of trends within those societies: however, when we came to discuss the chosen topics of family and employment, it was necessary to be more careful in analysing what is meant by family and employment and in describing their development. This was done, paying some attention to recent developments and controversy in the historiography of the family.

The family was analysed through two fundamental relationships: between parent and child and husband and wife. The change and stasis in the law referring to these two fundamental relationships in the Digest of 1808 and Code of 1866 were depicted and analysed: and the conclusions deduced therefrom laid out as to the factors (historical causes) influencing the redactors' actions. Employment was analysed in a similar fashion, describing the move from the servant as part of the family to the servant as employee or wage-labourer in a formal contract with his employer which was devoid of any personal associations.

43. See preceding section (2) of this chapter, text from notes 35-42.
Some general provisions on contract were also examined; from them it was obvious that both sets of redactors were concerned to embody the ideals of liberal individualism in their codes.

All the above raised many questions about the codification of the law in both jurisdictions. The Louisiana codification is the subject of major controversy among scholars; we were able to suggest solutions to some of the problems concerning the relationship of the Digest to the previous law, the nature of the Digest and the significance of the de la Vergne manuscript. The research further elucidated the process of codification and the activities of the codifiers as lawmakers.

From our investigations, we can state that, in the most general of terms, the Quebec codification of 1866 was highly conservative (with one exception) in comparison to the 1808 Louisiana Digest. Of course, this statement is so general that it could be regarded as a major distortion of the activities of the Quebec redactors; but, nonetheless, it is probably fair to say that in the law on husband and wife and parent and child, the Quebec redactors rejected many potentially useful reforms. Further, their provisions on employment would rapidly become anachronistic in an industrialising society; and the redactors' general conservatism prevented them from following the lead of the Austrian code in amalgamating lease of work and mandate, which amalgamation they themselves regarded as desirable. The one exception to this conservative trend in the 1866 Quebec code is the law of contract: it will be recalled that the redactors gave the law of contract a new orientation along the lines indicated by the 1804 French code, but surpassing the latter in strict adherence to freedom and sanctity of contract.

That the 1866 codification should be generally conservative in results is understandable given the conservative instructions of the legislature and the strong commitment of the members of the Codification Commission to the preservation of the French Canadian law. It was pointed
out in chapter three that these two factors were likely to inhibit massive legal change, in that the restrictive nature of the instructions and the desire to protect the law would cause the redactors to be over-cautious lest they in some way subvert the integrity of the Quebec legal tradition.\textsuperscript{44} This said, it must be recalled that the conservatism of the redactors and of the codification in general did not inhibit them from giving law of contract a new orientation. This is a very significant point; it will be returned to later.

The 1808 Digest of Orleans presents a rather different picture. The redactors introduced and consolidated major reforms in the law relating to husband and wife. These reforms had been foreshadowed by the earlier Act \textsuperscript{45} on the celebration of marriages; but this Act merely indicated a new direction for the law: the redactors consolidated the trend set by the Act, and enthusiastically gave a new direction to this whole area of the law. Thus, the law on the husband and wife relationship became northern French in style and provisions - a complete change from the previous Castilian law. As regards parent and child, investigated through the notion of \textit{puissance paternelle}, it is clear that there has been a similar radical change: the law from being Castilian has changed to French, and the broad Castilian \textit{patriaprotetad} has given way to a narrow northern French model of \textit{puissance paternelle} - this despite the preservation of the Castilian division of nonage into minority and pupillage. The Digest redactors also provided a modern law on the traditional civilian \textit{locatio operarum} on the contract for wage labour; they drew especially on the \textit{Projet} of the French code of 1804, though other sources, notably Pothier, were influential. Other provisions on employment, especially those relating to apprentices and \textit{engagés}, were drawn from Blackstone.

\textsuperscript{44} See chapter three \textit{supra} at notes 436-437
and a recent territorial Act. These provisions were such as to harmonise with the civil law. All these provisions on employment were compatible with the old Castilian law; but they were more modern and more suited to Louisiana society of the period. The law of contract also was radically modernised, following the French code. Here again there was a major shift away from the Castilian law on the topic. Lest it be thought that these changes were unconscious, due to ignorant reliance on the French codification rather than due to a desire to change the law to be similar to the French, it should be recalled that the redactors in many instances departed from the French code: consider minority, seashore, and the like. We can be sure that the Digest redactors consciously rejected the Castilian provisions in favour of those deriving from the French code and its Projet.

That this is so is not surprising. As was shown in chapter three, the civilian legal systems were amenable to the easy transmissability of legal provisions, and indeed, the Code Napoléon, during the course of the nineteenth century, was borrowed by many jurisdictions. Further, the redactors' identifiable natural law bias, and their rational systemic outlook would tend to lead them to favour the superior French code, especially when there seems to have been a return to French legal ways in Louisiana just prior to the promulgation of the Digest.

If we analyse the choices made by the redactors, we

46. Louisiana Acts, 1806, ch.11 (May 21st.).
47. See chapter 6 supra at notes 62-66.
48. See chapter 3 supra at notes 136-170; see chapter 6 at note 88 supra.
49. As Baade, Marriage Contracts shows. See also ch. 3 at notes 156-170 on the revival of French law. As argued in chapter 6 supra at notes 246a-250, I accept Baade's argument in so far as the revival of French law - to a limited extent - as a "living law" (in so far as it took place) would facilitate the adoption of French law in the Digest. I do not accept that the redactors were attempting to codify the "living law" as the law in force, that "living law" being French.
get the following results. We noted that in Quebec there were many opportunities for the redactors to update the law in codifying; but that, in general, these opportunities were not taken. Thus, the wife still suffered many traditional contractual incapacities and required authorisation by her husband. Broadly, this follows the C.N.; but unlike in the latter, lack of authorisation, under the Quebec code, rendered the wife's actions null. Again, following the C.N., the wife can only separate from the husband on the ground of his adultery if he has kept his concubine in the marital home. With certain exceptions (for our purposes here unimportant), the Quebec code has kept very close to the 

ancien droit under the Coutume de Paris as regards

puissance du mari, much closer than has the Code Napoléon. Many of the possible reforms found in the C.N. or in coutumes other than that of Paris, or in the 1825 Louisiana Code, would have rendered the law more appropriate and convenient economically, making for greater certainty and ease in transactions by women. However, the ideology of nineteenth century Quebec would follow the subjection of the wife to the husband, who was undisputed head of the household. The redactors were doubtless quite content to preserve the old law on this point, as it fitted their notions of what was proper. They merely updated the law to make it easier to operate: witness the reform of the manner of authorisation. It is surely significant in this respect that the redactors never even considered whether or not married women should be incapacitated: further, virtually all the sources they consulted would support the notion of puissance du mari, and indeed, the position of the wife under the Quebec laws regards her property was perhaps somewhat better than that of women under English law before the Married Women's Property Acts of the late nineteenth century.\textsuperscript{50} We should also consider that the inconveniences of marital authorisation would probably be slight in practice, and that the ideology of the supremacy of the husband, for which the old law was

eminently suited, would cause the retention of the status quo. The stasis in the law was not caused by the use of the Code Napoléon or the lack of foreign models: the redactors did not follow the C.N. completely, and models for provisions improving the lot of the wife were not lacking for the redactors. The redactors obviously preferred the almost complete superiority of the husband, and their choice of provisions must have been dictated by the ideology of the period: not by any vision of the material needs of society. The C.N. to some extent expressed better, in its rules on puissance maritale, nineteenth century ideology of the affective family; but there being no necessity for such a change, the Quebec redactors preserved in this respect the old law.51. We can see that the ideology of the authority of the husband and general legal conservatism must have worked together, in the face of no necessity for change, to preserve the existing law with only some technical improvements.

The Quebec provisions of paternal power are also highly conservative. Aspects of them (for example, the rejection of the Napoleonic provisions enhancing the role of grandparents) are directly contrary to the reality of Quebec family life of the period. Further, the denial to fathers of the automatic right to the tutorship of their children and to administration of their children's property, runs contrary to the ideology of the period. On the other hand, the provisions are all workable and reasonably consonant with the needs of the period, while

51. This orientation of the French code towards expressing the ideals of the affective family relates to its apparent conception of the reason for the ruissance du mari because of C.N. 224 on authorisation by minors: see ch.4 supra at notes 947-962; this does not affect the comments made above in the text on the rejection of potential reforms - consider the nullity of wives' unauthorised acts - because of the ideology of the supremacy of the husband. The ideal of the affective family is different from that of the supremacy of the husband: also, it is not so obvious that C.N. 224 has this effect as that other provisions of the C.N. derogate from the ruissance du mari.
some updating of the law has been undertaken. We may conclude that stasis here has resulted from traditionalism or conservatism among the lawyers, and has been facilitated by the rough suitability of the law and the traditions of control over children.

If we look at the Louisiana provisions on husband and wife of 1808, we note that there has been a major change from the Castilian law. Under the Castilian law, there was a very loose requirement of marital authorisation, and the law was in many respects quite antithetical to the French. Yet, we find that the redactors of the Digest adopted the French conception of *puissance du mari*, and as a result, the actions of wives became much more restricted in law. To modern eyes, the liberal Castilian provisions seem much more suitable for early nineteenth century Louisiana, and the adoption of the French provisions a puzzling retrograde step. The explanation, however, is not difficult to find. In chapter four, we pointed out that the redactors were heavily influenced by the general excellence of the Code Napoléon: its modernity, its compression, its coherence. Further, the facts surrounding codification such as the drawing up of the code in French, the 1807 Act on the celebration of marriages, and the limited revival of French legal ideas supported adoption of these articles from the Code Napoléon. However, we know that although the Code Napoléon may be classed as the *cause causans* of the choice, the choice would not have been exercised had the rules not been consonant with the general family ideology of early nineteenth century Louisiana: quite simply, the redactors, and their society, believed that wives should be subject to their husbands. Here the reasons for the selection of the particular rules were the *prestige* of the French code, its comprehensiveness in comparison to the fragmentary Castilian treatment, and the ideology of supremacy of the husband. Thus, what might seem a retrograde step, when viewed from perspective of economic efficacy, is explicable in terms of legal culture and social values.
The Digest redactors also radically changed the law on parent and child, rejecting the Casilian extended, almost Roman, *ratria potestad* in favour of a more liberal version of the Code Napoléon's limited *puissance paternelle*. To modern eyes, this change appears an obvious one of great utility. The motives of the redactors can be more precisely pinpointed in that the Code Napoléon provided them here with modern texts more suitable to conditions in Louisiana. There can be little doubt that the prime motive for reform here was the desire to update the law (the old law must surely have been virtually unworkable) and that the codifiers' selection of the Napoleonic texts was motivated by a desire to modernise, and the French code provided the most suitable modern provisions. That the desire to modernise was the main motive is evidenced by the Digest's departures from the French code and, indeed, by the Digest's more liberal provisions.

Hence, from the provisions on family law in both codes, we see that reform can be the result of the prestige of a particular system from which borrowings are made, the desire to reinforce some social value or ideology not directly related to material conditions, and the desire to render the law more consonant with material conditions and ideology. The social origins of the reform may be many and varied.

As regards stasis, we can see that it also can result from various causes. Ideology in Quebec, combined with a conservative legal tradition, prevented useful development of the law on *puissance paternelle* and *puissance meritale*, though some reforms were undertaken. Conversely, C.N. 224 suggested a new interpretation of *puissance meritale* in line with the current ideology of the affective family, as did the C.N.'s provisions on...

parental rights of tutorship and administration; legal conservatism combined with the lack of need for such a change to prevent such a development taking place.

Before going on to assess the significance of these origins of stasis and development, it is useful to look at some other results.

In both codes, we noted that the law of contract was given a new orientation around the ideals of freedom of contract and sanctity of contract. This is, out of the areas of law we looked at, one of the most important changes. This was an updating of the law due to a change in ideology, and a change in the economic system: in short, it would appear that here there is a development resulting from changed material social conditions and changed ways of regarding those social conditions. The timing of the change in both countries is significant. Louisiana moved towards the classic nineteenth century view of contract both earlier than Quebec and before Louisiana had reached an equivalent level of industrial and economic development. The reasons why Louisiana adopted these provisions are obvious: current economic theory, ideology of liberalism and the like. The significant point is the delay of Quebec. This delay is entirely due to the fact that codification in Quebec took place sixty years after that in Louisiana. The reasons for the differences in the times of codification have been canvassed above, and need not be repeated here.53 It cannot reasonably be doubted that, had the opportunity presented itself, the Quebec law on contract would have been revised along the lines it was revised in 1866: nonetheless, what was necessary was opportunity for lawmakers to act. This example of reform shows neatly that, although the reform may be supported by ideology of the society and by material circumstances, the actual reform may depend on the contingencies of politics; here the fact that codification, for various reasons, was sixty years earlier in Louisiana

53. See supra, section 1 of this chapter at notes 12-18.
than Quebec: the important point being that change in law does not mechanistically, in a necessary fashion, follow on change in society.

If we look at the rules on employment adopted in both codes, we find that they were dictated by legal tradition and the ideology of contractual liberalism. Effectively, in Louisiana, we can say that the rules were probably a fair reflexion of the requirements of the relationship between employer and employee at the period: as regards Quebec, however, it is doubtful if this is so. The rules were insufficient to meet the needs of the contract for wage labour in mid-to-late nineteenth century Quebec. The rules were, however, supported by the ideology of contractual liberalism.

If we draw all the above discussion together, we find that the following pattern emerges. First, there is little in either of the two codes that is new. Reforms were generally borrowed; even reforms rejected would have been borrowed. This is an obvious point and does not need to be stressed. Second, we find that reform or stasis may be caused by varying factors. That is, the immediate cause of any reform or lack thereof can be of an infinite variety of individual factors or combination of such. The process of reform (here codification) may affect the reform: the need for a coherent statement of law inherent in codification imposes a certain dynamic on the reform or restatement of the law resulting in certain changes. 54 Similarly, the prestige of a foreign system may be an important factor in reform. Ideology rather than "practical" needs may be of importance in either

reform or stasis. Examples of factors promoting or hindering legal change could be multiplied, but to do so is pointless. We can summarise the broad changes in the law thus: in Louisiana the prestige of the Code Napoléon (legal-cultural factor) aided by the ideology of the period, resulted in the reform of the law on husband and wife; in Louisiana, the grossly inappropriate nature of the Castilian patria potestad (material factor) coupled with the ideology of the period resulted in reform of the law on parent and child; in Louisiana, the ideology of liberalism and the nature of economic activity led to the reform of the law on contract. In Quebec the same factors led to the reform of the law on contract. Employment in Louisiana was reformed to fit material conditions and liberal ideology, whereas employment in Quebec was reformed to fit liberal ideology but not material conditions. The lack of reform in Quebec in the law on husband and wife and parent and child may be attributed to the ideology of the period and the conservative nature of the Quebec codification.

We may note that there was always a reason for the selection of any provision, but the reason may be other than that of practical needs. In both countries, the drastic reforms, or lack of reform, in the provisions of family law studied generally owe nothing to material conditions or practical considerations (in so far as the latter are ascertainable). The ideology of the society and legal-cultural factors were what determined the choice of the redactors. With the law relating to employment, again the ideology of the society played a role; but in Louisiana material conditions were probably reflected, whereas in Quebec they were probably not, for the reasons canvassed above. The law on contract in both codes was fairly radically re-oriented in order to fit in with the current notions of freedom and sanctity of contract. In making this change, the redactors recognised both the reality of business affairs in their period and the current ideology of liberal capitalism.
It may be seen that generally the redactors were not guided by the material and economic circumstances of the two countries; but rather, other considerations promoted the selection of particular rules. For example, family life in Quebec would stress the grandparent to grandchild relationship; but the redactors, following the ancien droit, gave this relationship no importance when dealing with the condition of the parentless child. Here the redactors valued legal tradition above change: the existing conception of puissance paternelle was extended logically, the legal culture's stress on coherence and tradition outweighing consideration of the nature of family life in Quebec.

The preceding summary of the findings of this thesis shows that law develops or stands still as a result of many and differing influences, and that these influences can be located in the legal culture itself as well as in the wider society. It is important to stress, however, that there is no immediate connection between a change in any particular state of affairs and a corresponding change in the relevant law. The effect of social circumstances on law is always and inevitably mediated through lawmakers. Because lawmakers act as mediators between society and law, the immediate causes of change or stasis will always tend to be found in the intellectual climate or ideology of their society as familiar to the lawmakers. Hence we may see, as we have seen here, that in their reforms the lawmakers are concerned with embodying in the law the ideals of their legal and social culture, confident in the notion that the legal provisions will have an effect in society. (Whether or not these changes or lack of changes have the intended effect is a rather different point.)55. It is thus relevant to consider the particular

social background of the lawmakers in ascertaining the reasons for any change or stasis; although, as pointed out above, we can expect a reasonable detachment on the part of the lawmakers from their own particular circumstances. We may state there is an immediate cause for every example of stasis and change, and also indeed for the whole thrust of any area of the law or a whole code: these causes are many and cannot be reduced in any obvious way to a simple proposition. The positive law in any given legal system cannot in any way be taken to be inevitable.

This said, it must be conceded that the above begs many important questions. We have succeeded in attributing aspects of legal change and stasis to a plurality of causes within society, without in any way discussing how that society itself is determined, or how the law relates to other aspects of society, that is, the effect of law on other social phenomena. These are important points, but ones outwith the scope of this study and we need not discuss them. What we have established is that no narrow mechanistic model of legal change or stasis and their relationship to social phenomena is sufficient. Legal development or non-development is a complex process, involving the interplay of many factors. What we have found in this study above all else is that legal change is likely to reflect the ideology of society as endorsed by the lawmakers. We can make no necessary connections between material circumstances, objectively viewed, and law. Law existing as a human construct in the realm of ideas is, when opportunity for reform arises, more likely to reflect those ideas than any other social phenomenon. This is shown most obviously by the change in the law on husband and wife in Louisiana: the change was caused by legal ideology (the superiority of the French code) and social ideology (the supremacy of the husband) not by any functional consideration of the family structure. Similarly with employment and contract: the

56. See preceding section of this chapter at notes 35-42.
ideology of the period is more important than any consideration of the "needs" of industry and commerce in a functional sense.

We have thus indicated the range of factors likely to be the immediate causes of legal change or stasis; as pointed out above, this enterprise leaves untouched the whole question of total shifts in the structure of society and their effect on law. It should here be stressed once more that, viewed from a "macro-structural" position, the law is itself part of the total structure. We have viewed the societies of Louisiana and Quebec in a period of transition, the period of the move towards industrialisation, of the development of the liberal economy and of the growth of the affective family. We have, for the reasons indicated in chapter one, distinguished between law and society to permit the examination of the influence of non-law on law; but it should be recalled that this is primarily a device to allow us to focus our attention on the relationship of law to other social phenomena. Conceiving of society as a totality, the transformation of the law is one aspect of the continuing transformation of that society. This study, however, has drawn attention to the actions of lawmakers, and has shown that the proper method of study of legal stasis or development is to examine the actions of lawmakers as social actors: that is, as members of, and influenced by, their society and of a particular grouping or class of that society, they are involved in an activity (law making) which is both conscious and purposive. They cannot be said to be acting as mere reflections of a class grouping, nor as unconscious agents of some hidden deeper structure (whether of the unconscious mind or of society is irrelevant). Nor are the redactors of law actors in some functionalist sense: the law we find in the 1808 Digest or 1866 Code is not a mere expression of the aims of bourgeois society, nor an attempt to embody the most efficient way of carrying out some aim. Influenced by any number of factors drawn from the social grouping and
the legal culture, the redactors clearly act consciously to embody in their codes their beliefs as to what the law should be. That is, they act consciously, but not subjectively: their position as lawmakers gives distance to their actions, and they conceive of themselves as acting in an objective sense. Lawmakers mediate between law and other social phenomena: they regulate the effect the latter has on the former.

The mediation carried out by lawmakers is a complex process, subject to many influences. Opportunity for reform is necessary, and this can be affected by many circumstances. General political circumstances and the institutions regulating the legal system may enable or prevent reform. When the causes of legal development or legal stasis are what is at issue this process of mediation is the proper object of study. What are necessary to further knowledge of the causes of legal change are studies of this process of mediation in its wider social context. What this study has shown is that explanations of legal change based on some mechanistic social principle are inadequate, as indeed are all explanations which do not take adequate account of the purposive activity of lawmakers and legislators and their intervention and mediation between law and the wider society.

57. Cf. the following remarks of Paul Hirst, On Law and Ideology, p.113: "Law and legislation must be conceived as processes.... The process of legislation has attached to it conditions of access and operation and through these conditions many and varying influences and circumstances express themselves. The conditions and influences acting upon the process are effective and are given form through its procedures. Conditions and influences are not themselves legal forms or effects: it is only through and as legislation and legal practice that they are effective." See also A. Watson, "Comparative Law and Legal Change", cited note 52 supra.
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