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Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad

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HAZARDS OF A CIVILIAN VENTURER IN A FEDERAL COURT: TRAVEL AND TRAVAIL ON THE *ERIE RAILROAD*

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Louisiana's legal system has been characterized as "mixed," a combination of civilian and common law theories and practices.[1] The commentators who have described its attributes have not remarked on the additional ingredient that makes the mixture more complex: as a state in the particular type of federal union created by the United States Constitution, Louisiana's legal system functions in tandem with the national court system. By virtue of the diversity clause in the United States Constitution[2] and the diversity jurisdiction statute,[3] cases affecting Louisianians may be decided by federal courts.

The Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*[4] requires federal courts to follow state law in all cases tried in federal court if jurisdiction is based on diversity of citizenship. In all other cases, federal substantive law, derived from statutes or common law, provides the rule of decision, although in some instances the federal law adopts state law principles as surrogate federal law.[5] The renaissance of interest in Louisiana's civil law heritage prompts me to explore the

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1. J. Baudouin, The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec, in The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions 1 (J. Dainow ed. 1974); A. Tate, The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience, in The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions 23 (J. Dainow ed. 1974).

2. U.S. Const. art. III, § 1.

3. 28 U.S.C. § 1332 (Supp. 1988).

4. 304 U.S. 64, 58 S. Ct. 817 (1938).

5. See, e.g., the Outer Continental Shelf Lands Act 43 U.S.C. § 1331-56 (1986 & Supp. 1987) (specifically, 43 U.S.C. § 1333(a)(2)(A)).

experiences of a would-be true civilian lawyer who essays trial of his civil law cases in federal court. My conclusion is that the venture is perilous to civilian principles and that the lawyer who seeks a civilian approach or even a civilian method of codal interpretation should abjure it.

Let me start my travelogue by giving you some information about the narrator. Educated by such civil law traditionalists as Dean Paul M. Hebert, Joseph Dainow, Henry George McMahon, J. Denson Smith, and Harriet Spiller Daggett, I have always believed the codal system sounder than the common law system. Having struggled with such federal legislative enactments as the tax laws and the inaptly named United States Code, I admire the coherence, clarity, and structure of a true civil code as well as corollary civilian precepts. *Jurisprudence constante*, for example, seems to me less sterile than *stare decisis*, particularly when applied by multipanel courts. As a judge, I have, when the rare opportunity presented itself, sought to apply the civilian precepts.[6] So I do not examine the federal system, which is to me *terra cognita*, with a conviction that it is superior. My account is instead a warning to those who love and respect the civilian tradition.

A civil law system is one whose methodology and terminology are based on principles shaped by Romanist scholars from the Middle Ages to the nineteenth century. The substantive private law principles of such a system may be collected by the legislature in a civil code, but civilian legal systems were shaped decisively by Romanist scholars prior to the enactment of "national" codes.[7] The existence of a code is not, therefore, a prerequisite to a civilian system. France had a civil law system before it ever adopted a civil code,[8] and Scotland, a civil law jurisdiction, has never adopted one. The code and the rules of law drawn from other civilian sources set forth the precepts governing persons, family, property, obligations, and successions, while the areas of public law and some branches of private law, such as commercial, labor, and mineral law, are not considered to be part of the civil law.[9] Whether embodied in a code or statute, the bulk of the civil law is ordained by the legislature, which has the primary function of setting forth the rules of law applicable in private disputes. The exalted place of legislation as the normative source of private law has led to ascribing extraordinary significance,

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6. See, e.g., Makofsky v. Cunningham, 576 F.2d 1223 (5th Cir. 1978).

7. Yiannopoulos, Louisiana Civil Law: A Lost Cause?, 54 Tul. L. Rev. 830, 832 (1980); Stein, Judge and Jurist in the Civil Law: A Historical Interpretation, 46 La. L. Rev. 241 (1986). Comment, Louisiana's Class Action: Judge-Made Law in a Mixed Civil- and Common-Law Jurisdiction, 61 Tul. L. Rev. 1205, 1206-08 (1987).

8. Yiannopoulos, supra note 7, at 832 (1980).

9. Id.

both legal and psychological, to the civil code where one has been promulgated.[10]

By contrast, a common law system is one based on the English model. Jurisprudence evolves on case-by-case basis. Once a decision is reached, the doctrine of *stare decisis* requires that the same result be reached in later cases. The federal court system is a common law system. Before we examine its characteristics, let us look more closely at the structure of the civilian system.

Much of the recent commentary on the civilian system focuses on the nature of the civil code and the methods that lawyers, teachers, and judges should use in interpreting and applying that code. Having a code, however, and following a particular method of interpreting it are not, as we have seen, the sole or even indispensable components of a civilian system.

In those civilian systems that have adopted a code, the respect due the code and the manner of interpreting it are based on the thesis of legislative supremacy, combined with respect for the inherent qualities of the code and the Romanist tradition. Judges are primarily interpreters of law, without the law-development functions assigned to common law judges. In most civil law countries, judges are neither elected by the people nor chosen for life, and they have not traditionally been endowed with judicial independence. In many contemporary civilian systems, they are selected by administrative officials. In some countries, like France, students select a judicial career while in law school and devote their lives to progress through a hierarchical judicial system. In others, they are appointed to the bench after a career in government service and are rarely, if ever, selected from the ranks of the practicing bar. In a few nations with civilian systems, such as Argentina, a different pattern has developed, and judges are chosen from the ranks of experienced practitioners. In most, however, judges are professional judges,[11] regarded as high-ranking and respected civil servants.[12]

In the trial of cases, the determination of factual questions, interrogation of witnesses, and development of evidentiary materials are the duty of the judge, not the lawyers. Cases in civilian jurisdictions proceed through a series of consecutive stages, without a single concentrated and dramatic trial.[13] It is the judge, not the lawyers, who first considers the

10. Dean R. MacDonald, History and Source of the Civil Law of Quebec, Unpublished paper, 1988.

11. See, e.g., Kerameus, A Civilian Lawyer Looks at Common Law Procedure, 47 La. L. Rev. 493, 502 (1987); Stein, supra note 7, at 247.

12. Kerameus, supra note 11, at 494; A. Tate, supra note 1, at 24-25.

13. Kerameus, supra note 11, at 498.

relevancy of each party's allegations and orders the taking of appropriate evidence. The judge ripens the evidentiary material gradually, with the cooperation of the lawyers. After the judge has developed the facts, the parties may brief the case or argue orally about the legal conclusions to be drawn.

There is no jury in this process. And, because of its nature, there are virtually no rules governing what evidence is or is not admissible. Although civilian systems for centuries adhered to strict rules regarding quantitative evaluation of witnesses and evidence,[14] these formal restraints on judicial evaluation were eliminated in the early nineteenth century. As Professor K. D. Kerameus in his 1986 Tucker Lecture said, "Free evaluation of evidence was hailed as the all-sweeping principle, empowering the judge to ponder, in each particular case, contrasting means of proof. [T]his principle rendered obsolete the rules of admissibility . . . ."[15]

The fact-finding function of the civilian trial court is diminished in importance by the virtually unlimited power of intermediate appellate courts to review the facts. "[N]ot only may findings of fact in the court of original jurisdiction be re-evaluated on appeal and modified or overturned on the same evidentiary review, but also new evidence, to a large extent new factual allegations, and to a restricted extent even new claims may be introduced on appeal."[16] Resort to the highest court, which usually restricts its review to matters of law, is of right.[17]

Because of the reviewing power of appellate courts, the trial judge may pay great respect to the decisions of these courts. He is not bound to do so, however, because the doctrine of *stare decisis* does not apply. Instead, each judge, trial and appellate, may consult the civil code and draw anew from its principles. Interpretation of the code and other sources of law is appropriate for each judge. The judge is guided much more by doctrine, as expounded in legal treatises by legal scholars, than by the decisions of colleagues.[18] The latitude for decision making is even greater for appellate courts of last resort, whose decisions are not subject to review. In theory, and indeed in practice, an appellate court is free to review its prior decisions and change its rulings unless it can and wishes to distinguish them. Instead of *stare decisis*, the rule is one of deference to a series of decisions, *jurisprudence constante*.

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14. Id. at 500.
15. Id. at 500-01.
16. Id. at 505.
17. Id.
18. A. Yiannopoulos, Jurisprudence and Doctrine as Sources of Law in Louisiana and in France, in The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions, 82-90 (J. Dainow ed. 1974).

The doctrine of separation of legislative and judicial powers is deeply embedded in continental traditions. An orthodox application of this doctrine has precluded judicial review of the constitutionality of legislation. Historically, only in Greece have the civil courts have been endowed for some time—indeed, since 1845—with the power to review the constitutionality of legislation, while the Council of State, the supreme administrative tribunal, has the power to review the constitutionality of acts of administration.[19] Since World War II, moreover, many democratic nations on the continent have adopted constitutional provisions endowing judges with judicial independence and have created federal courts that have a measure of judicial review power.[20]

The Italian Constitution of 1943, for example, provided for the establishment of the Constitutional Court. The Court comprises fifteen judges of the highest ordinary or administrative courts, university professors, or practicing lawyers with at least twenty years of practical experience.[21] The Court has jurisdiction over disputes regarding constitutionality of laws; it is not a court of general jurisdiction. A provision that the Court declares unconstitutional ceases to be effective the day following the publication of the decision.[22]

The 1949 Constitution of the German Federal Republic also provided for the establishment of a centralized constitutional court charged with reviewing constitutionality of legislation. A 1951 amendment provides a procedure whereby a citizen whose fundamental rights have been abridged by state action can bring a direct action on the constitutional issue to the Constitutional Court, thereby obtaining an expedited hearing. Similar centralized Constitutional Courts have been established by Turkey and Cyprus.

France technically established a system of judicial review of constitutionality of legislation when it effectively accorded that power to the Conseil d'Etat in its 1958 Constitution. Since the enactment of the new Constitution, the Conseil d'Etat has continued the previously authorized review of the constitutionality of administrative acts but has been much more tentative in a similar review of the constitutionality of legislative enactments. Nevertheless, the structure would permit the Conseil d'Etat to expand its role to include reviewing the constitutionality of legislation. A 1958 ordinance to the Constitution established a separate political, nonjudicial body, the Conseil Constitutionnel, to rule on the

19. See, e.g., Deener, Judicial Review in Modern Constitutional Systems, 46 Am. Pol. Sci. Rev. 1083 (1952); M. Cappelletti, Judicial Review in the Contemporary World 50 n.14 (1971).

20. M. Cappelletti, supra note 19, at 60.

21. Italian Cost. art. 135.

22. Italian Cost. art. 136.

constitutionality of proposed, unpromulgated legislation. The council is composed of all ex-presidents of the republic and nine other members.[23]

In these and in most other countries that now permit judicial review, the power is vested in a special federal or constitutional tribunal and is usually far more limited than the power exercised by federal judges in the United States. It must, in any event, be viewed not as a continuation of, but as a breach with, civil law tradition.

In all of the continental systems having codes, as in Louisiana, the legislatures have enacted numerous statutes governing private law; but, for the civilian, the true spirit of the private law is embodied in the code.

It is not my purpose in this paper to compare the Louisiana mixed system with either traditional civil law systems or with a common law system. Instead, I assume that a lawyer, law teacher, or judge who is truly interested in the civil law heritage would tend to emphasize the civilian attributes of Louisiana's system. For present purposes, therefore, I compare the paradigm civilian practice with the practice in a specific common law jurisdiction, a federal court sitting in Louisiana.

A case may be lodged in a federal court for the trial of a matter governed by state law in two ways. Invoking diversity-of-citizenship jurisdiction,[24] a plaintiff who is diverse in citizenship from a defendant may file a suit in federal court, becoming in the process subject to federal rules. If he does so, the defendant has no choice of forum. The defendant, too, is subject to trial according to the rules of federal court. In fact, half of all of the diversity cases tried in federal court are instituted by plaintiffs who, for one tactical reason or another, prefer that jurisdiction to state courts.[25]

A defendant who is sued in state court by a plaintiff who is diverse in citizenship may remove the case to federal court.[26] Less than half of the federal diversity cases arrive in federal court by this route. When a defendant properly removes a case to federal court, it is the plaintiff who has no choice. The plaintiff must go to federal court. Plaintiffs who wish to avoid removal to federal court may do so if they can join, in addition to the non-resident defendant, a resident defendant, thus

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23. Cappelletti & Cohen, Comparative Constitutional Law 29-45 (1979).

24. U.S. Const. art. III, § 2; 28 U.S.C. § 1332 (Supp. 1988).

25. Rubin, An Idea Whose Time Has Gone, 70 A.B.A.J. 16 (June 1984). According to unpublished data compiled by the Administrative Office of the U.S. Courts, 67,071 diversity cases were filed in 1987. In 32,785 the plaintiff was a resident of the state in which suit was filed.

26. 28 U.S.C. § 1441 (1973 & Supp. 1988).

avoiding the complete diversity of citizenship that is a prerequisite to federal court jurisdiction.[27]

Driven by the manipulative character of American lawyers that is tolerated and indeed abetted by the American legal system, a plaintiff may, if he chooses, "work both sides of the street" simultaneously. The plaintiff may file a suit in state court, naming the principal target, a non-resident defendant, as co-defendant with a secondary target, who is a resident. This prevents removal. If the resident defendant is not indispensable, the plaintiff may also file a virtually identical suit in federal court. The plaintiff may then continue to prosecute both suits, deciding ultimately to try the case in the forum that, at the moment, appears to be most advantageous.

If the case is lodged in federal court, *Erie Railroad Co. v. Tompkins*[28] dictates that state substantive law applies, although the court must abide by federal procedural law. While there are complexities in distinguishing between matters substantive and procedural,[29] what is important is that only a part of the civilian system is applicable in the diversity case tried in federal court. The federal court will follow only the civilian rules of substantive law, and, perhaps, the method that a state court follows in arriving at decision, for example, its method of interpreting the civil code. If federal trial judges wish to adopt the distinctive civilian interpretation methods, they must be adept at hat-changing, for approximately eighty percent of all civil cases filed in Louisiana federal court are not diversity cases,[30] and federal interpretive rules—that is to say, common law or non-civilian rules—apply.

In common law cases, of course, the rule of *stare decisis* prevails. More importantly, the reviewing power of appellate courts dictates obedience to their decisions. If the appellate court has announced a rule of law, the district court is bound to follow it or be reversed. If the trial court decision is appealed to any of our multi-judge, multi-panel federal courts, *stare decisis* applies with a vengeance: Not only is the court bound by its own prior decisions, but each panel is bound by the decision of any other panel. This fixes the law of the circuit, which can be altered only if the court sits en banc.[31]

The rules of decision will be applied in a system that is managed by persons different in character and experience from continental civilian

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27. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Cf. 28 U.S.C.A. § 1359 (1976) (fraudulent joinder). See C. Wright, Federal Courts § 31 (4th ed. 1983).

28. 304 U.S. 64, 58 S. Ct. 817 (1938).

29. Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136 (1965).

30. Annual Rep., Dir. of the Adm. Ofc. of U.S. Cts., 1986, p. 184.

31. See, e.g., Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986); Lewis v. Timco, Inc., 716 F.2d 1425 (5th Cir. 1983).

judges and in the context of a vastly different procedural system. In diversity cases, either party may demand trial by jury.[32] Of all federal district court cases in which jurisdiction was based on diversity that reached the trial stage during the year July 1, 1985 through June 30, 1986, forty-three percent were tried to a jury.[33] Sixty-seven percent of all tort cases were tried to a jury.[34] The jury is instructed on the applicable principles of law by the judge, but it may in effect disregard these instructions. The jury's findings are almost supreme; the district court may set aside a jury verdict only if reasonable people could not have decided as the jury did,[35] although the court does have somewhat greater latitude to grant a new trial before another jury if the verdict appears to be against the great weight of the evidence.[36] On appeal, the fact findings by the jury are similarly buttressed: They may be reversed only if the court finds that reasonable people could not have returned the verdict in question.[37]

The use of a jury is hostile to civilian principles. The civilian judge is to obey the law. The essential purpose of the jury is to provide a mechanism whereby the rule of law may be tempered by lay notions of equity and justice. Even if both parties to the suit waive or fail to assert their right to trial by jury and the case is tried by the judge, his role will be different from the role of the civilian judge. The trial judge's fact-finding is given weight almost equal to that accorded to a jury's finding. A judge's findings of fact can be reversed on appeal only if clearly erroneous.[38]

Whether the trial is to the jury or to the bench, formal rules of evidence apply. While the Federal Rules of Evidence, which became effective in 1975, are far less exclusionary than the old common law rules, they still constrict admissibility.

Federal court procedure in either kind of trial, jury or bench, is, of course, completely different from the civilian procedure. The ultimate goal is a single discrete event, a trial, conducted in a formal manner and at a pre-determined time, without interruption for other matters. Before that main event, the parties prepare by conducting discovery, in an effort to determine the evidence that may be adduced at trial. All discovery is by the parties, with intercession by the trial judge only to

32. U.S. Const. amend. VII; Fed. R. Civ. P. 38(b).

33. These data are based on a conference with the statistics division of the Administrative Office of U.S. Courts.

34. Id.

35. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969).

36. C. Wright, The Law of Federal Courts, 633-46 (1983).

37. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969).

38. Fed. R. Civ. P. 52(a).

resolve disputes between the parties. Discovery is not for the purpose of adducing facts to the trial judge but for the purpose of preparing for the formal trial. Preparation is intensive. Witnesses are coached in preparation for trial. Lawyers, at least the good ones, plan every detail.

The trial is the process with which all of us are familiar. It is a formal, sometimes dramatic, process. Save those who are not available and whose depositions may for this reason be used, all witnesses appear personally in court. They are examined by the lawyers, not by the judge. Methods of interrogation on direct and cross-examination are formal. The emphasis at trial is not on the rules of law but on the facts. The determination of legal issues is subsidiary to the formal trial. These are developed either by rulings on motions, requests for jury charges, or, when cases are tried by the judge, in opinions rendered in a formal manner after trial.

Federal trial judges are chosen, for the most part, from the practicing bar or from the state bench. Appellate judges usually come from the district courts, state courts, the bar, or the academic profession. Rarely is a judge appointed directly from government office unless the judge has extensive prior trial or academic experience or both.

Most federal judges have not been professional judges before their appointment. They have by and large been successful in other careers: as lawyers, as prosecutors, as politicians. They are appointed by the President, with the concurrence of the Senate. The Constitution endows them with a supreme degree of independence: They are appointed for life, and cannot be removed from office save by impeachment. Their independence is enhanced by the power of judicial review,[39] which gives them at least some superintendence over the work of legislatures, federal and state. It is difficult for them to accept completely and wholeheartedly the absolute supremacy of the legislative will even though their colleagues warn them when they ascend the bench that they have been appointed and not anointed. Practitioners are prone to remark, with empirical justification, that a certain amount of hubris seems to attend most federal judges.

Let us assume that these judges do, however, wish at least to follow true civilian methods of legal interpretation in diversity cases. It is a struggle for them to do so. Lawyers file briefs in diversity cases that look just like the briefs in federal law cases. In urging a judge to adopt a certain legal rule, they follow the same format as they do in the other eighty percent of the cases filed in federal court: they rely extensively on case citations; they seldom cite a treatise or a law review article;

39. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

they use case-oriented research methods, such as Westlaw, Lexis, and the West Digests. I cannot recall during my twenty-one years on the federal bench a single brief that referred to *jurisprudence constante*, let alone attempted to distinguish it from *stare decisis*. I cannot recall a brief in a Louisiana civil law case that was significantly different in style from the briefs in common law cases or an oral argument that suggested any major difference in approach.

Federal judges who devoutly wish to follow civilian interpretative precepts must deal with another phenomenon: the Civil Code in theory states the entire corpus of private civil law, with the exceptions I have mentioned. The Louisiana Legislature, however, has adopted a vast number of statutes that encroach on this codal domain. When these statutes are applicable, even those federal judges who are devout civilians will follow accepted methods of statutory interpretation rather than civilian methods, whether those independently developed in Louisiana or one of those that follow the precepts of Professor Geny.[40]

In a rather primitive effort to determine how frequently federal judges might have the opportunity to apply civilian methods, my research assistant and I examined the Louisiana cases reported in volumes of the Federal Supplement and Federal Reporter embracing the two-year period of 1986 through 1987. Using computer research and a sample composed of every fiftieth reported decision, we found that in only twenty-three percent of the civil cases was a Code article even mentioned. Most of the civil cases were tort cases. While Louisiana courts have in some instances adopted civilian principles of delictual liability,[41] on other occasions Louisiana courts have followed the common law and its Restatement by the American Law Institute.[42] We may assume, I think safely, that in any tort case to which the Code is applicable, some Code article would at least be mentioned, although it is possible that a civilian approach might be adopted without citing either article 2315 or any other Code articles.

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40. Mayda, A Critical Introduction to F. Geny, Method of Interpretation and Sources of Private Positive Law (La. St. L. Inst. Trans. 1963).

41. Robertson, Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana, 44 La. L. Rev. 1341 (1984).

42. See, e.g., Mashburn v. Collin, 355 So. 2d 879 (La. 1977) (relying on case law and the Restatement of Torts in a defamation context). See also Bazley v. Tortorich, 397 So. 2d 475 (La. 1981) (relying on development under the common law and Restatement of Torts to distinguish between intentional torts and negligence in a worker's compensation context); Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988) (discussion of the common law development of the defense of assumption of risk, its incorporation into Louisiana jurisprudence, and its ultimate rejection in this case as rendered superfluous by the civilian doctrines of comparative fault and duty/risk analysis).

This phenomenon is not peculiar to federal court. In our study of reported Louisiana appellate decisions, supreme and intermediate, for the years 1986 and 1987, we also used a sample of every fiftieth case. Of these, thirty-four percent were criminal and sixty-six percent civil. Excluding such civil cases as those involving issues of procedure, evidence, or bar association matters, and those involving granting or denying writs or decided without published opinion, we examined the remainder of the civil cases. In only thirty-seven percent of such civil cases was a Civil Code article even mentioned. We surmised, and confirmed upon analysis of the individual cases, that even in cases citing the Code, the reference frequently was merely a formal justification for a decision actually based on jurisprudence.[43]

One more stretch of rough track awaits the true civilian who has ventured to travel the federal court route. Virtually all cases that proceed to final judgment are now appealed. When the case is appealed, it will go before a three-judge panel taken from a court that now comprises sixteen active judges and six senior judges. Nine of the active judges are from Texas, two are from Mississippi and, if present predictions are not in error, five will be from Louisiana. The probability that there will be only one Louisiana judge on the three-judge panel assigned to hear a particular case is about forty-nine percent, that there will be two is about twenty percent, and that all three will be Louisianians is only about two percent. If the panel is one of those that does include a Louisiana judge, then that judge may be outvoted by his two common law colleagues. It can hardly be expected that judges who have been educated in and have practiced in the common law tradition and who rarely hear a Louisiana diversity case would be able to adopt a civilian method of interpretation of substantive law even if they wished to do so. Indeed the former Chief Judge of the Fifth Circuit is fond of referring to the "quaint codal language and the beguiling mysteries of the Code Civil."[44]

There is a method by which a federal court may seek direction from the Louisiana Supreme Court on an issue of Louisiana law. In 1979, the Louisiana Supreme Court adopted a rule that permits federal circuit (but not district) courts to certify to it "questions or propositions of law of this state which are determinative" of a case "independently of

43. See, e.g., LeBlanc v. LeBlanc, 486 So. 2d 223 (La. App. 3d Cir. 1986).

44. JHJ Ltd. I v. Chevron U.S.A., Inc., 806 F.2d 82 (5th Cir. 1986). See also Crown Zellerbach Corp. v. Ingram Indus., 745 F.2d 995, 1001 (5th Cir. 1984); Walter v. Marine Office of America, 537 F.2d 89, 95 n.21 (5th Cir. 1976); Nations v. Morris, 483 F.2d 577, 587 (5th Cir. 1973); Alcoa S.S. Co. v. Charles Ferran & Co., 443 F.2d 250, 253 (5th Cir. 1971); Huson v. Chevron Oil Co., 430 F.2d 27, 31 (5th Cir. 1970); Fidelity & Casualty Co. v. C/B Mr. Kim, 345 F.2d 45, 49 (5th Cir. 1965).

any other questions involved in said case" if "there are no clear controlling precedents in the decisions of the [Louisiana] Supreme Court . . . ."[45] The rule also permits the Louisiana Supreme Court "in its discretion" to "decline to answer the questions certified to it." While helpful in many cases, the rule has not provided a way to resolve all civil law questions. In some cases it is difficult to frame a question solely in terms of a legal rule that is determinative of the case without a mixture of fact. In other instances, the Louisiana Supreme Court declines to consider the question as it has, of course, a perfect right to do. Thus, since 1979, the Fifth Circuit Court of Appeals has certified eighteen questions to the Louisiana Supreme Court, which has accepted and decided eight, but declined to accept ten.[46] This average of one case a year can hardly be considered an open mark for a federal circuit court to the civilian authority of the Louisiana Supreme Court.

Let me give you an example of the roughness of the federal track for the civilian traveller. In *Breaux v. Schlumberger Offshore Services*,[47] an issue was whether a person who had purported to enter into an oral lease on behalf of a tenant had authority to do so. In an unreported opinion, a panel composed of three judges (Reavley, Higginbotham, and Hill), each of whom had been a member of the Texas Bar and had served in either a Texas federal district court or on the Texas Supreme Court, had reversed a judgment holding that the agent did not have real or apparent authority to enter the lease and had remanded for a trial on the other issues in the case. The federal district court then found that, even though the agent lacked apparent authority, the landlord had relied to his detriment on the agent's actions. The second appeal was heard by an appellate panel composed of Judges Garza, Williams, and Garwood, one of whom had been a federal district judge in Texas, another of whom had taught at the University of Texas Law School, and the third of whom had been a member of the Texas Supreme Court. The panel held that, even if the principal had not acted in such a fashion as to confer apparent authority on the agent, the landlord might have justifiably relied to his detriment on the principal's actions within the meaning of Civil Code article 1967, as amended in 1985, and affirmed the district court judgment. The panel majority distinguished two Louisiana cases that had been cited by the appellant, quoted the Civil Code article, and, in an opinion indistinguishable in text and substance from opinions in other common law cases, affirmed the judgment on this

45. Louisiana Supreme Court Rule 12.

46. Data compiled by Gilbert Ganucheau, Clerk of Court, U.S. Fifth Circuit Court of Appeals.

47. 781 F.2d 901 (5th Cir. 1987).

issue. Judge Garwood dissented, relying on the Restatements of Contracts (Second), Torts (Second), and Restitution.

Thereafter, on the suggestion that the case involved a Louisiana law issue that should be decided by the Louisiana Supreme Court, the Fifth Circuit panel certified the issue to the Louisiana Supreme Court in October 1987.[48] That court declined certification and the reported panel opinion was reinstated.[49]

It is not necessary or appropriate to discuss whether the result in the case is correct or incorrect. The question is one of civil law. There is ample civilian authority on the power of agents to bind principals. The opinion, however, contains no discussion of these and merely cites the Code article and discusses a few Louisiana cases.

CONCLUSION

I give you my conclusion in one sentence: the lawyer who wishes the case tried by civilian principles should shun diversity jurisdiction. The only way to avoid being dragged unwillingly onto the treacherous common law railroad is to join in a movement for the abolition of diversity jurisdiction.

Sometime ago I wrote an article advocating the repeal of diversity jurisdiction for a number of other reasons.[50] These other reasons are not applicable here. A Louisiana lawyer whose experience and integrity I respect said to me, "Judge, you wouldn't recommend the repeal of diversity jurisdiction if you had ever tried a case in Moreau-Lislet. The only salvation for the nonresident who is sued there is removal to federal court." I have tried cases in Moreau-Lislet Parish as well as in a few others that are like Moreau-Lislet Parish. Propriety forbids me to name them. If, however, we true civilians reject a trial in those parishes, we must remember that, in addition to rejecting their parochialism, we are also rejecting any real likelihood that the case will be tried or decided in a civilian manner.

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48. 832 F.2d 316 (5th Cir. 1987).
49. 836 F.2d 1481 (5th Cir. 1988).
50. Rubin, supra note 25.