The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana

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TABLE OF CONTENTS

I. Introduction ........................................... 258

II. Historical Perspective ............................... 261

III. New Orleans as a Commercial Hub ................. 262

IV. Jurisprudential Illustrations of Roman Influence ..... 264
   A. Redhibition ........................................ 264
   B. Sale of a Hope (Emptio Spei) versus Sale of an Expected 
      Thing (Emptio Rei Speratae) ..................... 267
   C. Purchaser's Call in Warranty; Vendor's Warranty Against 
      Purchaser's Eviction .................................. 269
   D. Influence of Roman Slave Law Upon Louisiana 
      Decisions ........................................... 270
   E. Licit Cause .......................................... 273
   F. Liability of Co-Owners ................................ 274
   G. Assignment of Incorporeals (In iure cessio) ............ 275
   H. Unjust Enrichment .................................... 276
   I. Servitudes ........................................... 280
   J. The Batture Cases: Riparian Rights To Alluvion ....... 282
   K. Roman Law Influence Upon Decisions of the United States 
      Supreme Court .................................. 286
   L. Wills ............................................... 287
   M. Attorneys' Purchase of an Interest in Litigious Rights; 
      Debtor's Discharge of Litigious Claim ............... 289
   N. Reimbursement of Bona Fide Possessors for Their 
      Improvements ........................................ 292
   O. Societas vs. Depositum: The Roman Classification of 
      Transactions ....................................... 294
   P. Sale: A Miscellany of Issues on Purchase Price ........ 297

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I. INTRODUCTION

The only American state among fifty with a Romanesque civil code, Louisiana contracted its debt to Roman law during a formative period before statehood when the Louisiana territory belonged first to France and then to Spain. Until 1762, early Louisiana settlers lived under the regime of the Custom of Paris. From the 1760's until the early 1800's, these inhabitants' activities were regulated by a customary Spanish law largely influenced by Roman ideas. In 1808, four years after enactment of the French Civil Code, Louisiana enacted its own digest of civil laws. This digest furnished the

1. A sketch of the colonial period appears in Section II infra. On the history of the Civil Code, see generally Richard H. Kilbourne, A History of the Louisiana Civil Code: The Formative Years 1803-1839 (1987). Recent articles have suggested that the European character of Louisiana law is on the wane. For example, a recent piece in the New York Times noted that as Louisiana approaches the next century, the French imprint on Louisiana law, and by implication the European imprint as well, seems to be eroding. Lis Wiehl, Louisiana Begins to Slip Its Legal Ties to France, N.Y. Times, Oct. 13, 1989, at B5. This article correctly noted, for example, that Louisiana law has reduced the role of certain key civilian institutions such as forced heirship, and that revised and modernized chapters of the Louisiana Civil Code seem less indebted to French law than the former chapters of the Civil Code were. Professor Vernon Palmer of the Tulane Law School has recently lamented that the Civil Code revision has resulted in a piecemeal digest of principles, not a coherent, self-contained code as defined in the French tradition. Vernon V. Palmer, The Death of a Code—The Birth of a Digest, 63 Tul. L. Rev. 221 (1988). Others have disagreed with Palmer’s assessment. Julio C. Cueto-Rua, The Civil Code of Louisiana is Alive and Well, 64 Tul. L. Rev. 147 (1989); Vernon V. Palmer, Revision of the Code or Regression to a Digest? A Rejoinder to Professor Cueto-Rua, 64 Tul. L. Rev. 177 (1989). A symposium of comments on Professor Palmer’s views appears in Symposium, The Great Debate over the Louisiana Civil Code’s Revision, 5 Tul. Civ. L. F. 49-99 (1990).

2. The Laws of Las Siete Partidas, which are still in Force in the State Louisiana Xviii-Xxii (Louis Moreau Lislet and Henry Carleton eds. and trans., 1820).

3. The full title of this digest, enacted March 31, 1808, was A Digest of the Civil Laws Now in Force in the Territory of Orleans with Alterations and Amendments Adapted to its Present System of Government (hereinafter the Digest or Louisiana Digest as contradistinguished from the Digest of Justinian). The basic components of Justinian’s legislation are explained infra note 15. Hereafter,
foundation for the Louisiana Civil Code of 1825 and its subsequent versions. Like the Code Napoleon on which it was formally modelled, the Louisiana Civil Code contained three books whose titles betrayed their French inspiration and hinted at a Roman pedigree.4

Louisiana's early colonial status made the style and vocabulary of the Louisiana Civil Code familiar to both French and Spanish lawyers. In contrast with common-law property conceptions, the Civil Code's conception of property, derived from a streamlined Roman idea of *dominium*, is based on three elements: *usus* (use), *fructus* (fruits), and *abusus* (power to sell).5 Louisiana's Romanist conception of property once prompted a Louisiana judge to remark ethnocentrically that English property law consisted of "intricate and, . . . except to the uninitiated, unintelligible modes and distinctions."6 Unlike English law, this judge suggested somewhat hyperbolically, the Roman form of perfect ownership in force in Louisiana, qualified by a fixed number of subordinate interests like usufruct and servitude, was "abundantly sufficient to meet all the wants of civilization, there is no warrant of law, no reason of policy, for introduction of any other." The Roman law tradition has also given the Louisiana Civil Code institutions such as *lesion* (Latin: *laesio* = injury), a seller's claim for the return

unless the context indicates otherwise, all references to the Digest are to the Digest of Justinian, not to the Louisian Digest. Digest of Justinian (Theodor Mommsen & Paul Krueger eds. & Alan Watson et al. trans., 1985).

4. The titles of these books are "Of Persons," "Of Things and the Different Modifications of Property," and "Of the Different Modes of Acquiring the Ownership of Things." In 1992, the Louisiana legislature added to the Civil Code a fourth book, "Conflict of Laws," but this additional book did not materially affect the integrity of the historical tripartite code structure. Some scholars have attributed the tripartite structure of the Civil Code to the Roman jurist Gaius' dictum "Omne autem jus quo utimur vel ad personas, pertinet, vel ad res, vel ad actiones." G. Inst. 1.2.8 ("All the law that we use belongs either to persons, or to things or to actions."). Speculation on historical reasons for the architecture of the French Civil Code appear in Shael Herman, The Uses and Abuses of Roman Law Texts, 29 Am. J. Comp. L. 671 (1981); and Alain Levasseur, On the Structure of a Civil Code, 44 Tul. L. Rev. 693 (1970).

5. Further information on the Latin vocabulary of the Civil Code appears in Herman, supra note 4.

6. Succession of Franklin, 7 La. Ann. 395, 418-19 (1852). The "intricate" character of English property law was the main reason given by the court for rejecting the engraftment of the English trust upon Louisiana property law. Louisiana's resistance to English landholding rules has persisted. According to Professor A.N. Yiannopoulos, since the French Revolution, "the only right of ownership recognized in the legal systems belonging to the family of French law has been full ownership corresponding to the dominium of the early Roman law. This is also the nature of the right of ownership under the Louisiana Civil Code." A.N. Yiannopoulos, Property § 5, at 8, in 2 Louisiana Civil Law Treatise (1991). The enactment of the Louisiana Trust Code, a unique amalgam of ingredients drawn from both civilian and Anglo-American property law, probably requires qualification of Professor Yiannopoulos' assertion, but in principle the assertion remains accurate.

7. Louisiana v. The Executors of John McDonogh and the City of New Orleans, 8 La. Ann. 171, 251 (1853). See discussion infra Section IV.L.

8. The origins of the doctrine of lesion and its role in Louisiana jurisprudence are discussed in Shael Herman, The Anomalous Institution of Lesion in Louisiana Law, 10 Rev. Gen. de Droit (Ottawa) 192 (1979); and infra Section IV.O.
of immovable property because of a derisory price; and the redhibitory action, a warranty claim for a latent defect in immovable property or movable goods. Louisiana periods for liberative and acquisitive prescription correspond generally to those of Roman law. Among particular kinds of contracts governed by separate titles in the Louisiana Civil Code, many are familiar to students of Roman law. Gratuitous agreements like *mutuum*, *mandate*, *deposit*, and *commodatum* are some examples; the *partnership in commendam*, an analogue of the limited partnership found elsewhere in the United States is another. The intellectual pathways and vocabulary of the Civil Code have impelled the state’s bench and bar to seek in Roman, French and Spanish law a bridge to their civilian heritage.

As the early Louisiana jurists recognized, Roman law provided common ground for civilian jurisdictions in much the same way that Latin furnished a common foundation for Romance languages. Unlike Germany and the European continent generally, Louisiana never experienced a Roman law “reception” as a necessary stage prior to codification. Theoretical and speculative aspects of the Roman law tradition characteristic of the work of the Pandektenschule generally escaped the attention of the Louisiana bench and bar. Spanish and French antecedents spurred local interest in Roman law as a storehouse of ready-

9. On the European reception of Roman law, see generally John P. Dawson, The Oracles of the Law (1968); Franz Wicacker, Privatrechtsgeschichte der Neuzeit: unter besonderer Berücksichtigung der Deutschen Entwicklung 46-132 (1967); and Shael Herman & David Hoskins, Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations, 54 Tul. L. Rev. 987, 996-1009 (1980). Lest readers overestimate the influence of the Roman tradition upon Louisiana law, I hasten to mention that Louisiana jurists, like their counterparts in other civilian jurisdictions, adopted Roman law doctrines selectively, not on a wholesale basis. Louisiana jurists ransacked Roman texts, readily available in both Justinian’s legislation and Las Siete Partidas, a Spanish source available in 1819 in an official English translation. See infra note 17 and accompanying text. Alternatively, they may have imported what their French ancestors had borrowed from the Roman texts for the French Civil Code. The Louisiana drafters initially embraced some Roman institutions, which later became casualties of history. As noted hereinafter in Sections IV.A and IV.D, Roman slave law provided a foundation for Louisiana slave regulation until the Civil War. See Judith Kelleher Schafer, Slavery, The Civil Law and the Supreme Court in Antebellum Louisiana, 1803-1857, 56 La. L. Rev. 409 (1995). Influenced by their Spanish and French counterparts, the Louisiana lawmakers also rejected some Roman institutions. For example, the Louisiana law of marriage and divorce originated in canon law principles; the Roman approach to these social institutions was rejected here as in France, Italy, Germany and other civilian jurisdictions generally. We must also take care to avoid unjustifiably broad claims for Louisiana’s civilianism. Both Louisiana’s political structure and her public, administrative and criminal law descend directly from the Anglo-American tradition, not the Roman or civil law tradition. This Anglo-American influence was inevitable because Louisiana laws in these important areas, like similar public laws in all the other states of the union, are subject to judicial scrutiny in accordance with standards enunciated by the United States Supreme Court in its ongoing reinterpretation of the federal constitution.

10. On the Pandektenschule, see generally Dawson, supra note 9, at 441-61; and Wicacker, supra note 9, at 217-70
made answers to practical questions. The Louisiana legal community routinely viewed Roman law sources through prisms of French and Spanish law. Among French, Spanish, and Roman sources then available in the newly settled territory, Louisiana jurists sought confirmation of the correctness of solutions to problems arising from the rough-and-tumble of a burgeoning economy on a new frontier. This essay assesses the character of Louisiana's debt to Roman law by inquiring into the extent to which Roman law figured in the analytical framework of Louisiana's early jurisprudence from 1803, the year of the Louisiana Purchase, until 1862, roughly the middle of the American Civil War. Such an assessment calls for a brief overview of Louisiana's early history, which this essay discusses next.

II. HISTORICAL PERSPECTIVE

On April 9, 1682, the French explorer, Robert LaSalle, took possession of the land watered by the Mississippi River and named it Louisiana for his king. From the date of LaSalle's arrival, settlers trickled into the territory. In 1699, Pierre le Moyne Sieur d'Iberville explored the Mississippi and established a royal colony at what is now Ocean Springs, Mississippi. In 1718, when a French trading company named the Company of the West established a trading outpost on the Mississippi River, the rate of settlement began to accelerate. Iberville's brother, Bienville, the French commandant of the area, chose for settlement a site in the crescent of the Mississippi River where it flowed near Lake Pontchartrain. He named the settlement New Orleans for the Duc d'Orleans. In 1762, France, to save Louisiana from the English grasp, ceded the settlement to Spain, along with all of France's territory west of the Mississippi. During Spanish domination, immigration and trade with the American colonies and foreign powers accelerated again. In August, 1769, Don Alejandro O'Reilly took possession of Louisiana for Spain. For the rest of the eighteenth century, Louisiana was subject to the same laws as Spain's other possessions in the New World.

Despite its shaky beginnings, New Orleans was already a major American port by the end of the eighteenth century. As settlers moved toward the interior of the continent away from the seaports on the Atlantic coast, they floated their produce down the river to New Orleans, where it was sold locally or sent to other markets. Approximately three-eighths of the produce of the territory was transported downriver and through New Orleans. As a commercial center for the frontiersmen, New Orleans was so valuable that the United States signed the Treaty of San Lorenzo with Spain in 1795 to guarantee Americans the right to deposit goods in New Orleans for transfer to ocean going vessels. In the Treaty of San Ildefonso (1800), Spain ceded Louisiana to France, but the formal transfer

of the territory did not occur until November 30, 1803. The return of New Orleans to France alarmed President Jefferson, partly because he feared Napoleon would not honor the right of deposit stipulated in the Treaty of San Lorenzo. Jefferson dispatched to France his emissary, James Monroe, to join Ambassador Robert Livingston in negotiating the purchase of the Port of New Orleans. On December 20, 1803, twenty days after Spain formally transferred Louisiana to France, Napoleon, to raise cash chiefly for his military adventures, sold New Orleans and all the Louisiana territory west of the Mississippi to the United States for $15 million. The Louisiana Purchase, which covered 827,946 square miles (2,144,476 square kilometers), comprised the middle third of the area occupied today by the continental United States.

III. NEW ORLEANS AS A COMMERCIAL HUB

The decades following the Louisiana Purchase brought prosperity and growth to the region surrounding New Orleans. An official report indicated that the population of lower Louisiana in 1803 was about 43,000; by 1807, it had grown to 53,000; by 1810, the population had swelled to 76,000, an increase of over 75% in seven years. During the same period, New Orleans's population had doubled from 8,000 to 17,000. In 1812, the newly invented steamboat, now pressed into service, fostered economic growth by permitting the prompt and inexpensive transportation of goods downriver. By the 1830's, New Orleans, now the commercial center of the entire Mississippi River valley, was among the most important cities in America. All goods transported down the Mississippi River from the north had to pass through New Orleans. At New Orleans, cotton from the southern states was loaded on ships for shipment to the mills of England. The city also became the chief slave trading center in the south and, by United States standards, a major financial center. In 1860, port receipts totalled $185 million, and Louisiana ranked second among the states in per capita income. Steamboats arrived at and departed from the Port of New Orleans every hour; and according to an account of the period, fifty vessels routinely lined the docks at one time.

The city's vibrant commercial life attracted sophisticated merchants who were served by a cadre of lawyers learned in both civil law and Anglo-American law. In 1839, a commercial court was established in New Orleans to expedite the heavy volume of commercial cases languishing on the ordinary civil dockets of the other local courts. Like the merchant juries in France and England, the merchant juries convened for this commercial court often set customs and usages in matters concerning sales of land and merchandise. Already plagued by economic boom-and-bust cycles, the business community witnessed many

12. Dargo, supra note 11, at 6-7. The information in this section is amplified in Dargo, supra note 11, at 3-19; and Kilbourne, supra note 11.
creditors' actions against their hapless debtors. The newness of the region, primitive surveying techniques and instruments, and spottiness of land records also resulted in numerous land title disputes. The lawyers and courts who were asked to resolve these disputes drew upon their training in Roman and civil law, which constituted a *jus commune* and a reservoir of mature solutions for problems that the New World had started to face.14

The decisions of the Louisiana Supreme Court from the antebellum period are rich in references to Roman law, quoted from Justinian's legislation15 itself and from treatises of eighteenth century writers like Pothier and Domat.16 Without this Roman scholarship, many of these Louisiana decisions would be pale shades of themselves. Louisiana decisions also routinely quoted other prerevolutionary French jurists, a number of Spanish writers and primary sources, as well as Las Siete Partidas, a celebrated collection of mainly Roman laws compiled in the mid-thirteenth century by the Spanish king Alfonso el Sabio (Alfonso the Wise). In 1819, the Louisiana Legislature's authorization of an official translation of Las Siete Partidas facilitated the state bench and bar's access to Roman law sources. Francois X. Martin and Alexander Porter, illustrious Supreme Court justices of the antebellum era, were learned in both civil law and common law. Martin published popular English translations of Pothier's treatises on sales and obligations.

An examination of early decisions of the Louisiana Supreme Court suggests that Roman law left a lasting imprint upon early Louisiana law. But judicial citation of Roman law maxims does not necessarily mean that Roman law dictated the result in a particular case. A court may have quoted a Roman law maxim only to distinguish it from a Civil Code article, specifying a contrary result because the latter was at the time the positive law of the state.17 Alternatively, a court might quote a Roman law text to confer an instant pedigree on a ruling or to support a result already widely accepted in the United States and in Louisiana. Finally, a court might quote a Roman law rule out of respect

14. The behavior of these lawyers and courts vindicated Justice Joseph Story's opinion that Roman law would be a "great fountain of rational jurisprudence" for the resolution of legal disputes in the newly settled nation. Joseph Story, Growth of the Commercial Law in the Miscellaneous Writings of Joseph Story 262 (W. Story ed., 1852). Story's Roman law learning was apparent in his works on equity, often consulted by Louisiana courts. See, e.g., Bass v. Chambliss, 9 La. Ann. 376, 397 (1854); Mussina v. Alling, 11 La. Ann. 568, 573 (1856); Succession of Franklin, 7 La. Ann. 395, 416-17 (1852). For Story's contribution of Roman learning to the jurisprudence of the United States Supreme Court, see infra Sections IV.K and IV.L.

15. As used here, the term "Justinian's legislation" refers to the *Corpus Juris Civilis*, a code composed in Byzantium in the sixth century and rediscovered in Bologna, Italy in the eleventh century after having been lost for over five centuries. Helpful background on Justinian's legislation is supplied in Alan Watson, The Making of the Civil Law (1981); and Herbert F. Jolowicz & Barry Nicholas, Historical Introduction to the Study of Roman Law 478-500 (3d ed. 1972).

16. Thumbnail sketches of these two prerevolutionary French jurists appear in Herman & Hoskins, supra note 9, at 1016-18.

17. See, e.g., Section IV.R for examples of this point.
for a venerable tradition. That respect might be signaled by a statement that the applicable rule was consistent with the views of "civilized" legal systems that had descended from the Romans.

The Louisiana cases that best illustrate the penetration of Roman law are those in which the Roman rule is the only one quoted for the holding. The debt to Roman law is clearer still in decisions where the rule has continued as the state's positive law to the present. This essay focuses on decisions that unquestioningly acknowledge that a Roman rule shaped the judge's ruling rather than cases that cite Roman law essentially to confer a pedigree on the result. Inevitably, some decisions based on a Roman law solution may have escaped this author's attention because the Roman rule has become so well integrated into the domestic legal fabric that the judge quoted no Roman law source at all. This omission might occur either because the judge himself knew no applicable Roman rule or because he assumed that the result the court reached, although originating in Roman law, was well enough entrenched to permit him to dispense with the quotation of ancient authority as support for his ruling.

IV. JURISPRUDENTIAL ILLUSTRATIONS OF ROMAN INFLUENCE

A. Redhibition

The influence of Roman law sources is easy to identify in cases where the English or American rule would have led to a strikingly different result. For example, while both English and American sales law during the nineteenth century adhered to the principle of caveat emptor, the provisions of the Louisiana Civil Code on redhibition, deriving from the Roman actio redhibitoria, obliged a seller to warrant the object of the sale against latent defects. Upon breach of the warranty, the purchaser could rescind the sale if the item were so inferior as to be useless for its customary purpose. Alternatively, in recognition of the buyer's disappointed expectation, a court might reduce the purchase price under a plea of quanti minoris if the object were serviceable but imperfect. Today Article Two of the United States Uniform Commercial Code, effective in all American states except Louisiana, makes American law consistent with this approach to a seller's warranties of quality and merchantability, except that the Commercial Code would authorize recovery for consequential damages while redhibition, at least in its traditional Roman form, authorized only restitutiorary relief. Influenced by Roman law, Louisiana law, at least at its inception, seems to have rather decisively favored buyers over sellers. From the early 1800's, Louisiana courts granted aggrieved buyers relief under the redhibitory action

18. On the Roman law of sale, see generally Francis de Zulueta, The Roman Law of Sale (1945); Barry Nicholas, An Introduction to Roman Law (1962); Alan Watson, The Law of Obligations in the Later Roman Republic (1965); John Moyle, The Contract of Sale in the Civil Law (1892). On the remedy of redhibition in Roman law, see de Zulueta, supra, at 47-59; Nicholas, supra, at 181-82; Watson, supra, 40-99; Moyle, supra, at 201-16.
while buyers elsewhere in the United States struggled unsuccessfully against sellers who held the high ground under the doctrine of caveat emptor.

As in classical Rome, purchasers of slaves in antebellum Louisiana often invoked the actio redhibitoria on the basis that the slaves were either diseased or that they had a propensity to escape their masters. So ingrained in the judicial mind was the moral propriety of the institution of slavery that Louisiana judges, like their counterparts elsewhere in the South, viewed slaves as chattels, not as human beings who naturally yearned for freedom. In Macarty v. Bagnieres,\(^1\) for example, the purchaser of a slave sought rescission against his seller on the ground that the slave was servus fugitivus vitiosus,\(^2\) i.e., he had the habit of running away. In reply to the purchaser’s demand, the seller claimed that he had expressly disclaimed the warranty against redhibitory vices. The court held that the disclaimer would have been effective only if the seller had disclaimed such liability in good faith by means of a special clause. Here, the court found that the seller committed a “fraud and dissimulation” because he was aware of the slave’s vice when he disclaimed the warranty.\(^3\) Assuming slave sales were

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19. 1 Mart. (o.s.) 149 (La. 1810).

20. According to Professor Judith Kelleher Schafer, fifty redhibitory actions involving slaves who were habitual runaways came before the Louisiana Supreme Court in the ante bellum period, i.e. prior to 1860. The cases grew in number as the population of bondsmen swelled. A typical assertion in these cases was that the slave was addicted “to every sort of vice and defect and in the habit of running away.” Judith Kelleher Schafer, Guaranteed Against the Vices and Maladies Prescribed by Law: Consumer Protection, the Law of Slave Sales, and the Supreme Court in Antebellum Louisiana, 31 Am. J. of Legal Hist. 306, 314 (1987). Schafer’s article analyzes in detail a large number of slave cases, only a few of which are reviewed here. For further background on early Louisiana decisions on slave law, readers may also consult Schafer, Slavery, supra note 9. For treatments of the Roman law of slavery, see William W. Buckland, The Roman Law of Slavery: The Condition of the Slave in Private Law From Augustus to Justinian (1908); Alan Watson, Roman Slave Law (1987); Barry Nicholas, Introduction to Roman Law (3d ed. 1987); and Jolowicz & Nicholas, supra note 15. For a comparison of the Roman law of slavery with Louisiana slave regulation, see Leonard Oppenheim, The Law of Slaves—A Comparative Study of the Roman and Louisiana Systems, 14 Tul. L. Rev. 384-406 (1940). The moral dilemma presented by slavery under Roman law is discussed in Alan Watson, Morality, Slavery and the Jurists in the Later Roman Republic, 42 Tul. L. Rev. 289 (1968); and Peter Birks, An Unacceptible Face of Human Property, in New Perspectives in the Roman Law of Property: Essays for Barry Nicholas 61 (1988). The theme of legal protection for slave purchasers in the southern United States generally, as opposed to Louisiana exclusively, is explored in Andrew Fede, Legal Protection for Slave Buyers in the U.S. South: A Caveat Concerning Caveat Emptor, 31 Am. J. of Legal Hist. 322 (1987).

21. The court here relied upon Dig. 21.1.14.9-.10 (The Edict of the Aedile, Rescission, and the Action for Diminution):

If the vendor expressly exclude some disease and, for the rest, declare the slave healthy or give security in respect thereof, the agreement made is to be observed (for there is no return for those who forego their redress) unless the vendor, knowing of the disease, deliberately kept silent about it; in such a case, the defense of fraud will be available. If a disease be not expressly excluded but be such as to be apparent to all (as when the slave be blind or have a dangerous and manifest scar on his head or some other part of his body), there is no liability on that account, says Caecilius, any more than if it had been expressly excluded; for it has to be accepted that the sediles’ edict is concerned with those defects which a purchaser might not detect or be able to detect.
permissible today, the result of this case would be identical under Louisiana Civil Code article 2548, which provides:

A buyer is not bound by an otherwise effective exclusion or limitation of the warranty when the seller has declared that the thing has a quality that he knew it did not have.

The case of Andry v. Foy\textsuperscript{22} refined the rule of Macarty v. Bagnieres by stressing a principle now embodied in a provision of the present Louisiana Civil Code: a buyer, in negotiating his purchase, must exercise ordinary care and prudence in verifying the quality of the item; he cannot close his eyes to obvious defects and seek refuge in the seller's warranty. Today, Louisiana courts often tie this last point to Louisiana Civil Code article 2521 on the buyer's duty of ordinary care.\textsuperscript{23} In Andry, the seller conceded that some of the slaves sold tended to run away, but he contended this fact was public information that the buyer should have known. In another hearing of the case,\textsuperscript{24} the buyer claimed rescission of the sale for all of the slaves purchased on the basis that one defective slave spoiled the lot. In support of the claim, the purchaser cited Roman jurists such as Africanus, Labeo, and Pomponius to the effect that:

If you have sold several slaves warranting the health of all, although all be not sick, but one or more, you will be liable as to all on your warranty.\textsuperscript{25}

Though the buyer could not have quoted in 1819 Article 2540 of the current Civil Code, his contention was founded on the principle implicit in the article:

When more than one thing are sold together as a whole so that the buyer would not have bought one thing without the other or others, a redhibitory defect in one of such things gives rise to redhibition for the whole.

\textsuperscript{22} 7 Mart. (o.s.) 33 (La. 1819).
\textsuperscript{23} "The seller owes no warranty for defects in the thing that were known to the buyer at the time of the sale, or for defects that should have been discovered by a reasonably prudent buyer of such things." La. Civ. Code art. 2521.
\textsuperscript{24} 6 Mart. (o.s.) 689 (La. 1819).
\textsuperscript{25} 6 Mart. (o.s.) 694 (La. 1819). The vendor's liability for the lot of goods because of a defect in one item of the lot is debated in Dig. 21.1.34-.38.
The court rejected the buyer's contention, holding that one slave's deficiency did not render the others useless. Some years later, in *Huntington v. Lowe*, the court confirmed that the buyer's remedy to return the whole lot applied only in a limited number of cases, in which the buyer would not have taken one item without the others.

The rule is obviously a reasonable one, and we have borrowed it from the Roman law. . . . [W]hen the things are independent of each other, the redhibitory action lies for that which is affected with the redhibitory vice. The example given by the civilians is, a lot of unmatched horses or a flock of sheep. If one proves to have been unsound, the partial dissolution of the sale is permitted.26

B. Sale of a Hope (Emptio Spei) versus Sale of an Expected Thing (Emptio Rei Speratae)

Twenty-seven years before *Huntington v. Lowe*, the court granted a buyer's demand for rescission of the sale of a slave despite the buyer's knowledge that the slave was diseased at the time of the purchase.27 The buyer, according to the court, had not realized that the disease was incurable. Furthermore, the seller had warranted the slave against redhibitory vices.28 In holding for the buyer, the court examined the traditional Roman distinction, perpetuated by French doctrine, between the sale of an object and the sale of a hope.29 A convenient shorthand used by Roman jurists to allocate risks between a seller and a buyer. If the transaction were categorized as the sale of an expected object, the Roman jurists excused the buyer from payment if the object were destroyed or never came into existence. By contrast, if the transaction were characterized as the sale of a hope (*emptio spei*), the Roman jurists reasoned that destruction or failure of the thing was a risk assumed by the buyer who was, therefore, bound to pay the price though he had received no benefit from the contract. A standard example

27.  St. Romes v. Pores, 10 Mart. (o.s.) 30 (La. 1821).
28.  In a factually similar case in which both parties' arguments rested upon Roman learning, the court ordered the seller to reimburse the buyer's purchase price where the slave died shortly after the sale because the buyer apparently had not bargained for the risk of the slave's incurable illness. Dewees v. Morgan, 1 Mart. (o.s.) 1 (La. 1809).
29. 10 Mart. (o.s.) 203, 209 (La. 1821). On the distinction between *emptio spei* and *emptio rei*, see De Zulueta, supra note 18, at 14-15; Nicholas, supra note 18, at 173-74; Watson, supra note 18, at 44-45; Moyle, supra note 18, at 30-32. An intermediate category, *emptio rei speratae*, consisted of things not yet in existence that the parties nevertheless expected to come into existence in the ordinary course of events. Future crops and the unborn young of animals fell into this category. According to Watson, in *emptio spei*, the sale was intended to be valid regardless of whether the thing came into existence. In *emptio rei speratae*, the intention was that there would be a sale only if the thing came into existence. Watson, supra note 18, at 45.
of the sale of a hope was the purchase of a future haul of a fisherman's net: a graphic metaphor suggesting that the buyer had to pay the price even if no fish were caught, provided that the fisherman cast his net as he had promised.

The image of the fisherman's net is familiar to Louisiana lawyers today. Article 2451 of the Louisiana Civil Code codified the aleatory principle suggested by the net metaphor:

A hope may be the object of a contract of sale. Thus, a fisherman may sell a haul of his net before he throws it. In that case the buyer is entitled to whatever is caught in the net, according to the parties' expectations, and even if nothing is caught the sale is valid.

Pothier's comments on the *emptio spei* abound in standard Louisiana texts on the law of sales and obligations. The doctrine that grew up around the *emptio spei* became the basis of Louisiana law on the nature of mineral royalties. In *St. Martin Land Co. v. Pinckney*, the Louisiana Supreme Court, after a lively disquisition on the distinction between *emptio spei* and *emptio rei speratae* (the sale of a thing conditioned upon its coming into existence), ruled that:

A contract conveying a mineral royalty cannot be considered as a sale of a thing having a potential existence, i.e. something that might be expected in the ordinary course of events to come into being. Under such an agreement, the purchaser would be entitled to a return of the price paid in the event of failure to produce the minerals. The mineral royalty contract can only be treated as the sale of something not having a potential existence—the sale of an uncertain hope. This is so because, as is universally recognized, the exploration for minerals is very costly and highly speculative. What the purchaser acquires is the hope that exploration or drilling will take place on the land affected by his royalty, together with the additional hope that it will be successful, thereby affording him the privilege of sharing in the production. He has bet his money that the landowner will want to lease his land for the production of minerals and that such operations will prove successful. He has bought an interest in what may be caught if and when the net is cast, but he has nothing to do with the net's casting or with deciding when it will be cast.

30. The metaphor of the fisherman's haul appears in Justinian's Digest: "when we buy from a fisherman the future haul of his net... even if he captures nothing, the buyer still has a duty to pay the price." Dig. 19.1.11.18.
31. 212 La. 605, 33 So. 2d 169 (1947).
32. Id. at 605, 33 So. 2d at 175. Another decision, Losecco v. Gregory, relied upon the Roman law distinction between *emptio spei* and *emptio rei speratae* to allocate a loss of orange crops caused by an unexpected freeze of orange groves. See Losecco v. Gregory, 108 La. 648, 32 So. 985 (1901).
C. Purchaser’s Call in Warranty; Vendor’s Warranty Against Purchaser’s Eviction

As early as 1808, the year in which the Digest of Louisiana was enacted, Louisiana law imposed upon sellers, in addition to the warranty against redhibitory or latent vices, a warranty of the buyer’s peaceful possession, also known as the warranty against eviction. Features of this second warranty, including the institution of calling the seller in warranty, have roots in Roman law.\(^3\) According to this institution, the buyer, promptly after he has learned of a threat to or disturbance of his possession based upon the right of a third party, must notify his own seller so that the latter can defend his title and, in the process, quiet the buyer’s possession. In exceptional circumstances, the seller is exonerated from the warranty if the buyer fails to notify the seller of the interference which he has experienced in time.\(^3\) However, for the seller to be released from the warranty, he must show that he had convincing evidence with which he could have defeated the third party and that he failed to produce the proof because he was not notified in time of the third party’s claim.\(^3\) In the early 1800’s, Louisiana opinions contained judicial pronouncements based on the principles embodied in Article 2517\(^3\) on the call in warranty. In Delacroix v. Cenas Heirs,\(^3\) an evicted buyer failed to notify his seller in time for the latter to defend his title, and the court held that the buyer’s failure to notify his seller resulted in the buyer’s loss of his recourse in warranty. As the court stated, “the

\(^{33}\) On the vendor’s warranty against eviction, see de Zulueta, supra note 18, at 42-46; Nicholas, supra note 18, at 180-81; Watson, supra note 18, at 75-86; Moyle, supra note 18, at 112-41. In Fulton’s Heirs v. Griswold, 7 Mart. (o.s.) 223 (La. 1819), the court traced the origins of this warranty through the prerevolutionary French jurist, Domat, to the Latin maxim, “[a]nte pretium solutum, dominii quaestione mota, pretium emptor solvere non cogitur, nisi fideiussores.” Id. at 224 (If, before the price has been paid, proceedings have been instituted in which a question of ownership has been raised, the buyer is not required to pay the price unless the vendor provides adequate security against the threatened eviction). According to Fulton’s Heirs, disturbance of a buyer must result from an actual suit, not a hypothetical or anticipated action. Question of ownership means “an actual investigation of the title of ownership,” not a speculative danger of eviction. 7 Mart. (o.s.) at 224. To fulfill the condition of eviction, a more relaxed, modern Louisiana standard now requires only that the buyer allege a reasonable likelihood of a suit, not the actual filing of suit itself.

\(^{34}\) La. Civ. Code art. 2517.


\(^{36}\) La. Civ. Code art. 2517 provides:

A buyer threatened with eviction must give timely notice of the threat to the seller. If a suit for eviction has been brought against the buyer, his calling in the seller to defend that suit amounts to such notice.

A buyer who elects to bring suit against a third person who disturbs his peaceful possession of the thing sold must give timely notice of that suit to the seller.

In either case, a buyer who fails to give such notice, or who fails to give it in time for the seller to defend himself, forfeits the warranty against eviction if the seller can show that, had he been notified in time, he would have been able to prove that the third person who sued the buyer had no right.

\(^{37}\) 8 Mart. (n.s.) 356 (La. 1829).
vendor should not be made responsible for anything which a knowledge of the
suit would have entitled him to avoid.\textsuperscript{38} The court found that the result
dictated by Louisiana law was consistent with both Spanish law and the Digest
of Justinian. Under those authorities, an evicted purchaser lost his recourse for
damages against his vendor if the purchaser failed to notify the vendor of the
imminent dispossession so that the vendor could defend himself against the
buyer's claim of breach of warranty.\textsuperscript{39} In 1846, the Louisiana Supreme Court
announced that the "Roman law had placed the principle of vouching in warranty
beyond all controversy."\textsuperscript{40} In varying forms, this Roman law principle of
timely notice to a seller has been cited routinely up to the present as the basis
for excusing a seller from the warranty of peaceful possession.

\textbf{D. Influence of Roman Slave Regulation Upon Louisiana Decisions}

Disputes over sales of slaves also invited exploration of Roman authorities
on the purchaser's recourse against the seller when the purchaser had lost the
slave through eviction because the slave was actually a free person. In \textit{Edwards
v. Martin's Heirs},\textsuperscript{41} the plaintiffs, children of a free woman of color, filed a
now obsolete action for personal liberty and freedom.\textsuperscript{42} One can only hazard
a guess at the drama behind the facts recited in the case. The plaintiffs alleged
that their mother, Polly Edwards, though she was a freeborn black, was
mistakenly sold as a slave in 1802 to the defendant's ancestor. The defendant's
ancestor then sold Polly to another man against whom she won a judgment
declaring that she was a free person. When Polly obtained her judgment, her
owner called his own seller in warranty for restitution of the purchase price.
When Polly's children sued the defendant's ancestor for their freedom, he in turn
called his seller in warranty. The latter admitted the sale but denied liability for
the value of the children born after the sale. Counsel for each side marshalled
an impressive array of Roman authorities on the law of slavery as well as texts
of Pothier, Dumoulin, and Lopez to address the issue whether it was equitable
to claim from a seller the value of the fruits (i.e., the offspring of the slave) from
which the purchaser was evicted.\textsuperscript{43} Since the facts arose in 1802, just before
Spain's formal transfer of Louisiana to France, the court found that Spanish law
applied. The court considered a number of contradictory texts from Justinian's

\textsuperscript{38} 8 Mart. (n.s.) at 361-62.
\textsuperscript{39}  Dig. 21.2.53. In Goodwin v. Heirs of Chesnesu, 3 Mart. (n.s.) 409 (La. 1825).
\textsuperscript{40} Cockerell v. Smith, 1 La. Ann. 1 (1846). The Cockerell court cited in particular two works
that were popular in nineteenth century Louisiana jurisprudence: Christian F. Muhlenbruch, Doctrina
Pandectorum (1830) and Ferdinand MacKeldey, Handbook of the Roman Law (1883).
\textsuperscript{41} 19 La. 284 (1841).
\textsuperscript{42} A slave's action for freedom was well established in Roman law. See Dig. 40.12 (De
Liberali Causa) (The Suit for Freedom). On this action, see generally Watson, Roman Slave Law,
supra note 20.
\textsuperscript{43} On a Roman slaveowner's rights to his slave's offspring, see generally Birks, supra note
20, at 61.
Digest and offered a technical discourse on the difference between the *actio ex empto* and the *actio de evictione*,
pointing out that the latter action was inappropriate here because Roman law authorized its use only when the buyer had actually been evicted from the object itself. Here the action was in the nature of the *actio ex empto*, authorized by the Roman texts for recovery of damages where the purchaser lost the object of the sale, i.e., the mother; or anything proceeding from the object, i.e., the offspring, although there was no actual eviction by a third party or the vendor.

Leaving aside the inherent immorality of slave trading, the court reached an equitable result by authorizing the return of the purchase price of the mother but not the value of her offspring because, in the court's view, the offspring's value greatly exceeded the damages the seller could ever have reasonably contemplated. The court noted that Justinian's legislation itself had imposed a limitation on amounts recoverable from a seller in good faith. Furthermore, the buyers had fully recovered their investment, and had enjoyed the slave's services for twenty-seven years. Relying on a text of Justinian's Digest, the court held that the vendor's warranty of the title of a slave, unlike a similar warranty for land, did not contemplate perpetual enjoyment of the slave.

As the purpose of this section is to illustrate the application of Roman law in early Louisiana jurisprudence, judging the appropriateness of such application in the decisions themselves is, generally, outside the scope of this essay. Because slavery was crucial to Louisiana's experience as a southern state, however, a brief critical comment on the judicial reliance upon certain Roman slave regulations might reveal both social concerns and technical problems associated with that reliance. For this excursus, the Edwards case is ideal because the court itself correctly acknowledged that the quoted texts on the Roman law of slavery were contradictory. These contradictions seem to have been inevitable because Roman law viewed slaves ambivalently and fitted them into a unique category. Roman traders freely bought and sold slaves as commercial objects. Roman law also recognized that slaves had reason, will, and capacity to act. They "had the potential for freedom and absorption into the citizen body; but unless and until they were manumitted the same law applied to them as to the ox and the ass."

Professor Barry Nicholas has summed up the slave's position in Roman law:

> Being endowed with reason . . . [the slave] was inevitably a peculiar thing and could, for example, acquire rights for his master. But he himself had no rights: he was merely an object of rights, like an animal. It was not until the first and second centuries AD that any

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44. The distinction is discussed at 19 La. at 293, which quotes Justinian's Code. On the *actio ex empto*, see Watson, *supra* note 18, at 76-80; Moyle, *supra* note 18, at 114-15; de Zulueta, *supra* note 18, at 42-47.

45. The court relied upon a text in Dig. 19.1.45 (Paul Ad Edictum 8). See 19 La. at 295.

attempt was made to regulate the master’s treatment of his slave, and such regulation as there was took the same form as our legislation for the protection of animals.47

Among the areas of contradiction and confusion for the Roman law of slavery was the legal status of a slave woman’s offspring. As a general rule, the owner of a living thing such as a tree or an animal also owned its fruit and offspring. If living things were subject to a usufruct, then the usufructuary owned the fruit and offspring. But for children of slaves Roman law deviated from this general rule, holding that the child of a slave woman could not be yield or fruit because, in Gaius’ words, “nature provided the yield of all things for mankind.”48 The Roman rule did not mean that the child could not be property. If that were true, then there would quickly have been no more slaves. By this rule, the Roman jurists meant that the child of a slave woman subject to a usufruct belonged to the naked owner, not the usufructuary.49 These implications of the Roman rule seem to have eluded the Edwards court. In Edwards, the purchaser insisted upon the traditional rule that the owner of the thing was entitled to the fruits. If this rule were applied to the children of Polly Edwards, then loss of the slave herself in violation of the vendor’s warranty of title necessarily implied that the purchaser could also recover for the loss of Polly’s children born after the purchase. The seller’s counsel defended his client against the buyer’s claim that the offspring of a slave woman were fruit or yield by citing contrary Roman authority. The court, apparently unable to reconcile the inconsistencies in the Roman law of slavery, sought to resolve the dispute by reference to the distinction between the actio ex empto and the actio de evictione and texts on recovery from a good faith seller. If the Edwards court reached a humane result, it did so by muddling through superficially relevant Roman texts on slavery and by sidestepping inconsistent ones. In general, Louisiana courts seem to have lacked any moral compunction about the institution of slavery. In fact, they exhibited a devotion to the logic of the Roman juridical method, even when the method was invoked to protect slave traffickers.50 The Edwards result likely

47. Nicholas, supra note 20, at 69.
48. Birks, supra note 20, at 63-65. For both humane and not so humane explanations of the seeming inconsistency of this rule with the general Roman law proposition stated in the preceding sentence of the text, see Birks, supra note 20.
49. [T]he widow usufructuary gets not merely a usufruct over but full ownership of the calves and lambs; yet so far as concerns the offspring of the slave-women she gets no interest at all, not even a usufruct. Her son, by contrast, even though his ownership of the slave-women is a bare entitlement (nudum ius) during the currency of the usufruct, acquires by virtue of that right a full, beneficial, and immediate ownership (pleno iure) of their off-spring.
Birks, supra note 20, at 62.
50. Professor Schafer has explained the Louisiana judiciary’s faithful adherence to the slave laws: The state [Louisiana] constitution severely limited the judicial discretion of the court in interpreting the law and provided for an impeachment process for recalcitrant judges.
stemmed from this misplaced devotion and the consequent inability to make sense of the pertinent texts, rather than any humane or enlightened impulse.

E. Licit Cause

Louisiana jurisprudence has long been concerned with the allocation of fault and the casting of blame upon a party to a contract on the basis that he knew or should have known that the cause or purpose of the agreement was illicit. In a classic hypothetical situation taught to Louisiana law students, a landlord loses his right to collect rent from a tenant because the landlord knows that the tenant intends to operate a brothel from the premises. Although Louisiana Civil Code article 2030 couches the issue in terms of contracts generally, the article also applies to leases because leases are a type of nominate contract. The landlord’s enforcement of a lease with an illicit object or cause is barred because the illicit object of the contract renders it absolutely null.\(^5\) Performance may not be recovered by a party who knew or should have known of the defect that made the contract null.\(^2\) While most American courts would hold the landlord was “estopped”\(^3\) by his own conduct to demand benefits from the contract, Louisiana courts would deny his recovery based upon a Latin maxim “Allegans suam turpitudinem non est audiendus.” This aphorism is so familiar to Louisiana

51. La. Civ. Code art. 2030 provides that “[a] contract is absolutely null when it violates a rule of public order, as when the object of the contract is illicit or immoral.” Some Louisiana Civil Code articles, repealed in 1985, also addressed the issues of illicit cause and illicit object of a contract. For example, La. Civ. Code art. 1893 (1870) provided: “An obligation without a cause, or with a false or unlawful cause, can have no effect.” La. Civ. Code art. 1895 (1870) provided: “The cause is unlawful, when it is forbidden by law, when it is contra bonos mores (contrary to moral conduct) or to public order.”


So venerable was the idea of detrimental reliance that it even acquired its own Latin maxim: venire contra proprium factum (no one can contradict his own act). In its usual applications, the maxim performed the function of estoppel: after an assertion that a certain fact presently existed, reliance on the assertion barred proof that the assertion was false.

Id. at 714. A number of instances from classical sources are collected in Erwin Riezler, Venire Contra Factum Proprium 4-32 (1912). In Bradford’s Heirs v. Brown, 11 Mart. (o.s.) 217, 218 (La. 1822), the court identified as a Roman law example of estoppel the rule that the donee’s subscription and acceptance of a deed of gift may be made per epistolam, i.e. by letter, not necessarily within the four corners of the deed itself.
lawyers that it does not routinely require translation. Justice Martin noted in *Greffin's Ex'r v. Lopez* that this maxim applied where a plaintiff sought the price or reward stipulated in an illegal or immoral agreement. Down to the present day, a defendant may successfully defend himself in limine by urging an exception grounded upon illicit cause.

The stern morality of Roman maxims relied upon by Louisiana courts has taken root in American jurisprudence generally. For example, Chief Justice John Marshall, in *Armstrong v. Toler,* laid down the general principle that no action could be maintained on a contract, "the consideration of which is wicked in itself or prohibited by law." In *Gravier's Curator v. Carraby's Executor,* an early and celebrated Louisiana case, the supreme court, inspired by Roman law, denied recovery to a debtor who had placed property in the hands of a third person for the purpose of defrauding his creditors, and thus enabled the holder of the property to retain what did not belong to him. Drawing inspiration from the Digest, the court declared that the purpose of the Roman law principle was to assure that courts were "not reduced to the humiliation of adjusting among dishonest men the results of their unholy speculations or of protecting a party against another while engaged in a common purpose at war with the best interests of society and subversive of public order." 

F. Liability of Co-Owners

Because maritime law has traditionally been included in *ius gentium,* issues in maritime law lend themselves to an exercise in practical comparative

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54. "One may not be heard to allege his own wrong." On the significance and popularity of this maxim in Louisiana jurisprudence, see La. Civ. Code art. 2033 and its official comments. See also Grégoire Tzarano, Étude sur la règle "Nemo auditur propriam turpitudinem allegans" (1926); Philippe LeTourneau, La règle "Nemo auditur..." (1970).

55. 5 Mart. (o.s.) 145 (La. 1817). The maxim *allegans suam* percolates through early Louisiana cases. See, e.g., Harvey v. Fitzgerald, 6 Mart. (o.s.) 530, 551 (La. 1819). For students of Roman Law, his last case is also interesting because it refers to a passage by Gaius that contrasts peremptory defenses (i.e., perpetual or definitive) with defenses that are dilatory (i.e., temporary). The Louisiana Code of Civil Procedure codifies this distinction as the peremptory exception and dilatory exception. See La. Code Civ. P. arts. 921-934.

56. 24 U.S. (11 Wheat.) 258 (1826). Without referring to the Roman source, the Court actually paraphrased the Roman maxim *allegans suam* "No man ought to be heard in a Court of justice, who seeks to enforce a contract founded in or arising out of moral or political turpitude." *Id.* at 260.

57. 17 La. 118 (1841).

58. 17 La. at 131. The Roman principle, now shared by modern legal systems generally, was also affirmed in Slidell v. Pritchart, 5 Rob. 101 (La. 1843), in which the court held that "for the same reason that the law repudiates the enforcing of the illegal agreement, ... a fortiori, ought this court [not] to allow an action to recover back the money paid in compliance with it." The court relied upon Roman principles found in Dig. 12.5.8 (Paul, Ad Edictum 3), concerning De conditione ob turpem causam (The Condition For Immoral or Illegal Payments).

59. This term is generally translated as "law of nations," suggesting that maritime law, like a supranational natural law of right reason, applies to all "civilized" peoples at all times. As the Roman Empire expanded, conquered aliens were governed by the *ius gentium,* not the *ius civile* that
Inquiries into maritime issues have traditionally entailed wide ranging surveys of the laws of countries with maritime interests, even though their legal systems might otherwise have little else in common. In *Carroll v. Waters*, the court considered whether co-owners of a steamboat were liable to freighters for damages suffered by their merchandise during the voyage to the extent of their respective interests in the vessel, or whether each owner was liable for the entire sum of damages suffered. In legal parlance, were the owners jointly liable or solidarily liable? After a scholarly survey of authorities including Jacobson's *Law of the Sea*, Febrero Adicionado, Curia Philippica, Pothier's *Traité de Charte Partie*, and Grotius's *de Jure Belli ac Pacis*, the court concluded that the owners were liable only jointly, i.e., for their respective shares. In so holding, the court rejected the Roman rule urged by the plaintiff.

**G. Assignment of Incorporeals (In iure cessio)**

The imprint of Roman law is also apparent in the Louisiana Civil Code provisions on assignment and on the sale of incorporeal rights such as a debt, a lease, rents, or an option to purchase. The modern Louisiana Civil Code provisions on assignment translate the originals of the French Civil Code, which in turn were derived largely from Roman law. Early Louisiana cases construed these Civil Code provisions to determine the extent of an assignor's implied warranties. In *Shuff v. Cross*, a promissory note that had been assigned proved to be valueless because both its maker and an endorser were insolvent. When the assignee of the note sued the assignor, the latter defended himself by relying upon Articles 125 and 126 of the Louisiana Digest of 1808. Based on these articles, the *Shuff* court excused the assignor from liability for breach of warranty because he had not agreed to warrant the debtor's solvency. Derived from the Digest of Justinian, the rule in *Shuff v. Cross* regulated only Roman citizens. According to Jolowicz & Nicholas, *supra* note 15, *ius gentium* in modern times commonly refers to the law governing relations among states. In classical times Cicero identified the law of nature with *ius gentium* because in Cicero's view, natural reason had set certain rules for all men irrespective of their nationality. On *ius gentium*, see generally, Jolowicz & Nicholas, *supra* note 15, at 102-07.

60. 9 Mart. (o.s.) 500 (La. 1821).
61. A popular Spanish treatise often quoted by the early Louisiana courts.
62. The plaintiff relied unsuccessfully upon the maxim "si plures nauem exerceant, cum quilibet corum in solidum agi potest." Dig. 14.1.1.25 (Ulpian, Ad Edictum 28) (if a ship is being managed by several people, each may be sued for the full amount).
64. 12 Mart. (o.s.) 89 (La. 1822).
65. "Art. 125. He who sells a debt or an incorporeal right, warrants its existence at the time of the transfer, though no warranty be mentioned in the deed." La. Digest art. 125 (1808); "Art. 126. The seller does not warranty the solvency of the debtor unless he has agreed so to do." La. Digest art. 126 (1808).
66. "Qui nomen quale fuit uendidit, dumtaxat ut sit, non ut exigi etiam alicquid possit, et dolum
remains the basis of some modern judicial opinions in Louisiana. For instance, in *Ratcliff v. Mcllhenny*, the plaintiff, an assignee of an option to purchase, sued his assignor for return of the price of the assignment when he discovered that the option grantor’s title was unmerchantable. Likening the option grantor to an ordinary debtor, the court decided for the assignor, saying “the assignment of an option to buy [was] nothing more than the sale of an incorporeal right; and hence, all that the seller warrants is the existence of that right, not the solvency of the obligor (i.e., the ability of the obligor to perform his contract.)”

H. Unjust Enrichment

“By the law of nature it is fair that no one become richer by the loss and injury of another.” Anglo-American and continental lawyers would probably agree that this ancient Roman aphorism expressed both a moral ideal and a standard for judgment in their respective systems. As Professor Dawson has argued, “the sense of justice supports the conclusion drawn from simple arithmetic, that a loss translated into another’s gain is much more impressive than the loss would be alone.” Assuming lawyers on both sides of the Atlantic agreed generally on the sentiment expressed in the Roman maxim, their views could still diverge on the practical remedies for effectuating the proposition. Their technical vocabularies would also differ. Discussing unjust enrichment, English and American lawyers would speak of common counts, *quantum meruit*, constructive trusts, inadequacy of legal remedies, and equitable subrogation. Influenced by Roman regulation of “enrichment without cause,” civilians would speak of the *condictio* and the doctrine of *negotiorum gestio*.

On unjust enrichment, differences between civilians and common lawyers would go deeper than their technical vocabulary. Seemingly at odds over first principles, their disagreement could concern the social utility of the doctrine of *negotiorum gestio* and the appropriate cases for recovery on the theory of unjust enrichment. To a civilian, a gestor would be a good samaritan; to an American lawyer the same gestor might be a “busy body,” or an “officious intermeddler.”

As an American text on restitution explains:

praestare cogitur.” Dig. 21.2.74.3 (one who sells a debt as it stands is required only to be liable that it does exist, not that anything can be claimed, and that he is not himself fraudulent).

67. 157 La. 708, 102 So. 878 (1925).

68. Id. La. Civ. Code arts. 2642-2654 continue the principle which originated in Roman law. As to assignment of options, the principle is now specifically codified in La. Civ. Code art. 2622: “The Assignor of an option to buy a thing warrants the existence of that option, but does not warrant that the person who granted it can be required to make a final sale.”

69. “Iure naturae sequum est neminem cum alterius detrimento et injuria fieri locupletiorem.” Dig. 50.17.206. Attributed to Pomponius, this is one of the most celebrated Roman maxims of natural justice.

The starting point of Anglo-American law, as distinguished from systems which have a Roman law background, is that one who, without request when not legally or morally bound to do so, and with no interest to protect in so doing, confers a benefit on another, cannot expect any reward. A person is entitled to be free to conduct his own affairs and should not be forced to compensate busy bodies, no matter how advantageous to him their conduct has been. If a donor chooses to be generous, to give or do something for another, the law does not allow him to change his mind and later charge the recipient for the gift or favor. One who seeks to recover the value of a gratuitous benefit is often dubbed an intermeddler or, if the court strongly disapproves of his conduct, an "officious intermeddler" or a "mere volunteer."

In the Roman legal order, the most important remedy for prevention of unjust enrichment was the condiction, the essential elements of which may be traced back to a period before the Twelve Tables, an early source of Roman rules. This remedy generally required return of goods or money withheld without just cause. Though the usual purpose of the *condictio indebiti* was essentially to recover payments of nonexistent debts, it also included overpayments, transfers of a specific object of ownership like a slave, and payments by or to the wrong person. The *condictio ob causam datorum* authorized recovery of an item given for a specific purpose because that purpose could not be achieved or because the cause had failed. The Code Napoleon and the Louisiana Civil Code incorporated the *condictio indebiti* in a modified form, and the *condictio ob causam datorum* helped form the doctrine of cause.

The Code Napoleon and the Louisiana Civil Code also incorporated another important Roman law remedy, *negotiorum gestio*. According to this doctrine,

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72. Dawson, supra note 70, at 45-46.
one who manages another's affairs without the authorization of the latter, is
deemed his agent or mandatary. As such, he is entitled to recover expenses he
has incurred in managing the principal's affair even if his actions did not inure
to the principal's benefit. Over time courts and scholars broadened the definition
of "another's affairs" to include all sorts of enrichment one party had conferred
upon another without any intention of granting the benefit gratuitously.

The Louisiana Civil Code has codified both the condictio indebiti and
negotiorum gestio, the first under the heading "Payment of A Thing Not Due"
and the second under the title "Of the Quasi-Contract Resulting From Manage-
ment of the Affairs of Another." A full quotation of the relevant provisions of
these two titles is beyond the scope of this survey. Suffice it to say that one
could not easily conclude that the applicable regulations of the Louisiana Civil
Code would characterize a good Samaritan as a "busybody" or an "officious
intermeddler." Former Article 1965 of the Louisiana Civil Code, virtually a
translation of a dictum of Domat, sanctified the role of the good Samaritan and
the volunteer. That provision intoned reverentially:

The equity intended by this rule is founded in the Christian principle not
to do unto others that which we would not wish others should do unto
us; and on the moral maxim of the law that no one ought to enrich
himself at the expense of another.75

Because of the avowedly Roman character of remedies ordering restoration of
benefits to a so-called busy-body, and the sharp contrast between the communi-
tarian impulse implicit in these remedies and the more individualistic common
law impulse, Louisiana cases on unjust enrichment have constituted a reasonably
reliable gauge of the penetration of Roman law into the judgments of Louisiana's
early judges. In several early decisions, the judges unabashedly quoted Roman
texts as the sole or main authority for ordering a return of benefits conferred by
claimants upon defendants.

In Police Jury v. Hampton,76 a police jury directed the defendant to make
certain repairs to his plantation so that his neighbors would not be unnecessarily
damaged. A syndic for the police jury warned the defendant that if he did not
perform the work in conformity with the police jury's directions, the work would
be done at his expense. When the defendant, after notice, failed to perform the
work, the policy jury had the work performed for his account and billed him for
the cost. Upon his failure to pay, the police jury sued him. The court stated the
issue as whether the defendant [could] enrich himself at the expense of others,
by refusing to pay for labor, which was both necessary and useful to him.77

76. 5 Mart. (n.s.) 389 (La. 1827).
77. Id.
Deeming the defendant's receipt of the enrichment as a tacit ratification of the jury's initiative, it answered the defendant's contention as follows:

It is a maxim common to the jurisprudence of all countries, that no one is permitted to profit by the labor of another, without compensating him for it. *Jure naturae equum est, neminem cum alterius detrimento et injuria fieri locupletiorem.* On this principle, the Roman jurists held, that he who acted for another by transacting his business, or by making repairs on his property, could recover the amount of the expenses incurred, or the value of the repairs; provided the acts of the *negotiorum gestor* were necessary and useful to the person for whom he acted. This doctrine has descended to us, and makes a part of the positive legislation of the state.\(^7\)

In support of the plaintiff's recovery, the court also quoted from Gaius' Provincial Edicts. "Si quis absentis negotia gesseserit licet ignarrantis, tamen quidquid utiliter in rem ejus impenderit vel etiam ipse in rem absentis alicui obligaverit, habet eo nomine actionem."\(^8\)

In *Worlsey v. The Second Municipality of New-Orleans*,\(^9\) the plaintiffs sought to recover amounts they had paid as taxes on their goods in the mistaken belief that the taxing ordinances were valid when in fact they were illegal and unconstitutional. A review of the arguments advanced in the case compels the conclusion that the attorneys were classically trained, for there are abundant citations to Chancellor D’Aguesseau, Toullier, Merlin and Roman legal authorities. To demonstrate the court's reliance upon Roman law principles, we quote below at length from the opinion:

This is the *condictio indebiti* which we derive from the Roman law, with very slight, if any modification. The Civil Code lays down the principle that: "He who has paid through mistake, believing himself a debtor, may reclaim what he has paid. To acquire this right, it is necessary that the thing paid be not due in any manner, either civilly or naturally." Among the natural obligations, enumerated by the Code, the first is: "Such obligations as the law has rendered invalid for the want of certain forms, or for some reason of general policy, but which are not in themselves immoral or unjust." Art. 1751. No suit will lie to recover what has been paid, or given in compliance with a natural obligation. The principles which govern this action are developed much at length, and illustrated by various examples, in the 5th title, of the

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78. *Id.* at 392 (citations omitted). The Latin is translated in the text at the beginning of this subsection.
79. *Id.* at 398 (If any man has managed the affairs of an absentee, even though it is without his knowledge, he still has an action for whatever he has spent beneficially on his business, and also for any obligation he has taken upon himself in furtherance of the business of the absentee.).
80. 9 Rob. 324 (La. 1844).
12th book of the Roman Digest. It is treated as an equitable action, and
the plaintiff must show himself entitled to recover ex aequo et bono.
[i.e. by equity] It begins by announcing the general principle to be: "Si
quis indebitum ignorans solvit, per hanc actionem condicere potest. Sed
si sciens se non debere, solvit, cessat repetitio." And here we find, in
connection with the doctrine relating to this action, the great rule of
natural equity, that no man ought to better his condition at another's
expense. "Hoc natura aequum est, neminem cum alterius detrimento
fieri locupletiorem." If the party receiving the payment may conscien-
tiously retain it, on account of some natural obligation on the part of the
person making the payment, then the latter cannot maintain this action.
A mere right to withhold payment does not necessarily imply a right to
recover back what has been paid. "Ex quibus causis retentionem
quidem habemus, petitionem autem non habemus: ea, si solverimus,
repetere non possum." The mother who had settled a dowry, believing
she was bound to do so, was not allowed to take it back. The reason
given is: "Sublata enim falsa opinion reclinitur pietatis causa ex qua
solutum repeti non potest."81

This passage prefigures the court's eventual rejection of the plaintiffs' claim on
the basis that they were bound by a natural obligation, though not a civil
obligation. The decision was based almost entirely upon civilian and Roman
authorities.

I. Servitudes

New Orleans' physical location and topography have deeply influenced the
direction and the evolution of Louisiana law, in general and Louisiana property
law in particular. Virtually surrounded by water, New Orleans is situated in a
low-lying basin, several feet below sea level. The surrounding area consists
mainly of marshes and swamps full of exotic flora and fauna. In the past, a
tropical climate has made the locale a breeding ground for mosquitoes and an
incubator for tropical diseases. Much of the area is still wild and unmanageable.
One can scarcely imagine the conditions facing the earliest settlers who had to

81. Book XII of the Roman Digest, referred to in this quotation, is entitled "De Condiciione
ob turpem Vel Iniuistam Causam" (Condictio for Immoral or Illegal Payments). The first Latin
passage in this quotation from the decision beginning "si quis indebitum . . ." appears in Dig. 12.6.1
(which concerns Condictio Indebiti) and is translated as follows: "If someone mistakenly pays what
is not due he can recover by this condicio. However, if he knows the money is not owed, the
payment is not recoverable." "Hoc natura" is translated as "for it is by nature fair that nobody should
enrich himself at another's expense." Dig. 12.6.14. Compare text supra note 68. "Ex quibus causis
retentionem" is translated as "in cases in which we have a lien, but no claim, if we release the lien,
we cannot recover it" and appears in Dig. 12.6.51. "Sublata enim falsa opinionem" is translated as
"When the false belief is removed, the moral duty remains so that the payment cannot be recovered"
and appears in Dig. 12.6.32.2.
secure the region and make it habitable. Their effort required unusual engineering skills, similar to those exhibited in the Netherlands when the Dutch reclaimed great expanses of low-lying lands from the sea. In early Louisiana jurisprudence, some of the most interesting decisions concerned laying out of canals, drainage of inhabited areas, measurement of land by primitive instruments, and claims of good faith possessors, who, believing that they had acquired the land they paid for, invested in it only to discover later that others were the rightful owners. In these types of disputes, the judges and litigants often found guidance in the Roman sources and leading civil law works of their own era.

In The Orleans Navigation Co. v. Mayor etc. of New-Orleans, the plaintiff, a corporation chartered to improve the navigability of water courses in and around New Orleans, sued the city to determine the city’s right to drain stagnant waters through a certain canal to a nearby creek known as Bayou St. John. The plaintiff company dammed up the stagnant water from the city so that the canal could be exploited for navigation. The city destroyed the dam.

A number of factors complicated the case. First, the city, apparently having failed to act through its properly authorized representatives when the canal was first built, had no formal grant authorizing use of the canal as a sewer. Second, advocates of the canal project made outlandishly inconsistent promises to the inhabitants to secure their cooperation. For example, a number of citizens contributed money and labor to the construction of the canal on the assumption that the canal, if used as a drain, would ease their lives in town. Proponents of the canal also claimed that the canal could be used for navigation by schooners, and its banks for pleasant promenades by citizens. As the court remarked, these purposes were unfortunately inconsistent.

This case appears to have had intensely political implications. It concerned the city’s eventual commercial direction and its physical development. Aligned with the city’s interests were citizens who hoped to enhance their lives and livelihoods by contributing considerably to the construction of the canal. Others were more concerned about commercial prospects for the whole city. The court finally enjoined the city’s use of the canal as a sewer. To reach the result it reviewed the Roman law of praedial servitudes. Using as a springboard a text from the Digest of Justinian, the court considered whether a servitude of drain could exist in favor of the city by implication.

83. 1 Mart. (o.s.) 269 (La. 1811); 2 Mart. (o.s.) 10 (La. 1811); 2 Mart. (o.s.) 214 (La. 1812).
84. "Jus cloacae mittendae seruitus est." Dig. 8.1.7 (Ulpian, Ad Edictum 13) ("The right to lead a drain is a servitude."). The servitude of drain is discussed in Alan Watson, The Law of Property in the Later Roman Republic, 176, 197-98 (1968). The redactors of the Louisiana Civil Code of 1825 attributed the sources of the Louisiana Civil Code definition of the servitude of drain to the Digest of Justinian. A.N. Yiannopoulos, Property § 16, at 48 & n.12, in 4 Louisiana Civil Law Treatise (1983). On the servitude of drain under Louisiana law, see generally Yiannopoulos, supra, at 48-78.
The court also considered a subsidiary question whether citizens who had furnished money and slave labor for canal construction could be characterized as third party beneficiaries entitled to enforce the canal's use as a sewer. The majority of the court answered no. In dissent, Justice Martin argued that the city was entitled to a servitude of drain on the basis that under Roman law, once the canal was established it could not be unilaterally altered or blocked; and that citizens who had furnished money and labor for construction were in the nature of third party beneficiaries entitled to an actio utilis based upon equity. According to Justice Martin, if these people could not enforce their rights equitably as third party beneficiaries, then they should recover the benefits under the condictio ob causam dati, causa non secuta. The discussion of unjust enrichment has already mentioned briefly this last condictio: its function was to recover a payment given for a purpose that could no longer be accomplished. In Justice Martin's opinion, if the beneficiaries' right was not affirmatively enforceable, then they should be returned to the status quo ante and recover whatever they had paid or performed. Today, assuming that these claimants could show their entitlement as third party beneficiaries, their claim under Louisiana law would likely be for reimbursement on grounds of failure of cause.

On the first rehearing of the case Justice Martin persuaded the court to entertain a motion for a new trial. The opinion denying the motion was a colloquy among the justices of the court and the attorneys on the Roman law of praedial servitudes, which the court declared some years later to be "the best anticipated commentary" upon the titles of the Louisiana Civil Code concerning that subject. The Roman law of servitudes remains the starting point for study of Louisiana's modern law of praedial servitudes.

J. The Batture Cases: Riparian Rights to Alluvion

As this essay has already indicated, the financial development of Louisiana and particularly of New Orleans hinged upon waterborne commerce, both inland and overseas. Quite literally, the area's fortunes flowed with the Mississippi River. The river provided the region's gateway to the world. Access to the river was over the batture, a band of ground at the river's edge created by alluvial deposition.
deposits of the river. During the early years after the settlement of New Orleans, local citizens used batture soil and sand to fill streets, to construct sidewalks, and to reinforce levees against flooding. Through long established custom, the batture itself was used for anchorage and wharfage. As the batture widened, there naturally arose a tension between the public, who wanted to continue the batture's customary public uses, and riparian owners, who sought gradually to increase their private holdings by enclosing the batture and pushing the levees further toward the water's edge at the high water limit. As commerce in the port grew, the batture appreciated in value and utility. The local citizenry became inflamed whenever a riparian owner sought to exclude the public from the part of the batture that fronted his property and to control river traffic for his personal gain.

During the early 1800's, the most celebrated batture controversy concerned the St. Mary Batture, an expanse of alluvion near the center of New Orleans that formed part of a tract granted the Jesuit Order in 1726 by the French crown. In 1763, upon the suppression of the Society of Jesus in France, the Jesuits' Louisiana land holdings, including their batture rights, were sold to private owners, who, by established Roman and civilian doctrine, were entitled to enjoy the alluvion thrown up unpredictably by a navigable waterway. The peculiar circumstances of the plantation belonging to one particular New Orleanian, Jean Gravier, compelled the Louisiana courts to investigate the limits of the Roman doctrine that authorized a riparian owner to enjoy the adjacent batture. By the early 1800's, Gravier's plantation no longer fronted on the Mississippi; several suburban lots sold off by a prior owner in the 1790's had separated the Gravier plantation from the batture over which Gravier had asserted rights. This separation cast doubt upon Gravier's rights to the adjacent batture. The

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88. Historical background on the controversy is discussed in Dargo, supra note 11, at 74-101.

89. Gravier's batture claim was first adjudicated in Gravier v. Mayor and Aldermen of New Orleans, a case decided by the superior court of the territory of Orleans but not collected in the state's published reports. A helpful summary of the facts of that case, which also gives the context for our discussion, appears in Succession of Delachaise v. Maginnis, 44 La. Ann. 1043, 1050 (1892):
Gravier owned a riparian estate contiguous to the city, with a public road along the river in its front. He laid out that part within the road into lots, forming a suburb. He sold the lots which fronted the road by fixed boundaries, according to a map on which the lots are delineated, and none of the boundaries passed beyond the road.

In 1804, after the suburb had been incorporated into the city, his successor, Jean Gravier, claimed the alluvion formed in front of these lots, and advanced the levee so as to take in the batture. The corporation resisted his appropriation of this batture, and Gravier brought his suit to be quieted in his possession and for an injunction against disturbance. So far as Gravier's title was concerned, it will be seen, the case [i.e. Succession of Delachaise v. Maginnis] presents the precise issues involved in this case. . . . (1) [t]he question of fact whether or not at date of sale of the lots there existed in front of them any batture susceptible of private ownership; and (2) the question of law whether, if no such alluvion then existed, the conveyance of these lots fronting the road divested Gravier of his riparious rights.

Id. at 1050.
Louisiana courts had to settle the issue of whether a non-riparian owner could be assimilated to a riparian owner insofar as enjoyment of the alluvion was concerned. During the early years of Louisiana jurisprudence, no other issue seems to have attracted more judicial attention. The courts devoted hundreds of pages to investigating the Roman and civilian authorities on the law of alluvion and river banks. Below, this essay briefly examines two opinions in which Roman law played an important role in the court’s analysis of the issues.

*Morgan v. Livingston* posed a problem similar to Gravier’s: whether an estate owner has an interest in the river bank and a right to enjoy the alluvion attaching to his estate if the estate is separated from the river by a public road. In *Morgan v. Livingston*, talented Louisiana lawyers of the time marshalled an impressive array of legal sources and texts to assist the Louisiana Supreme Court, which answered this question in the affirmative. In reaching this conclusion, which followed Roman learning on the topic, counsel cited and the court reviewed a number of practical matters such as land surveying methods and the preparation of legal descriptions as well as the Roman law of limited fields or tracts (*ager limitatus*), river banks, riparian rights, alluvion, and the conveyance of land *per aversionem* versus *ad mensuram*.

The case effectively illustrates the style of argumentation and the depth of learning of the best educated members of the Louisiana bar and judiciary. To develop their arguments, the attorneys surveyed classical texts of Justinian, as well as later writers such as Heineccius, Vinnius, Huberus, and Barbeyrac. The court’s decision itself refers to Justinian, Godefroy, Gronovius, Azo, Pufendorf, Grotius, and Voet, and cited no fewer than thirty different Roman texts. The court relied particularly upon Grotius for the view that the owner of a field may enjoy the alluvion even though a public road separates the field from the river. The court also quoted Voet’s *Commentarius ad Pandectas* on alluvial rights of

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90. 6 Mart. (o.s.) 19 (La. 1819).

91. According to Roman law, the landowner’s right to alluvion turned upon whether the tract was defined by natural boundaries (e.g. a river, a stream) or by manmade survey lines. In the former case, the landowner acquired the alluvion; in the latter he did not. A Roman law case similar to Morgan v. Livingston is discussed in Watson, supra note 84, at 75-77.

92. *Ager limitatus* was land whose boundary was defined by straight lines or a survey, not by natural features such as the bank of a river. Watson, supra note 84, at 76.

93. In a transfer of land *per aversionem*, a tract is sold by definite boundaries irrespective of the number of feet or acres it may contain. By contrast, in a sale *ad mensuram* a plot is sold at so much per unit of measure. Both the sale *ad mensuram* and *per aversionem* are codified in La. Civ. Code arts. 2492-2495 and in Code civil arts. 1616-1624 (Fr.). On the Roman sources of sales *per aversionem* and *ad mensuram*, see Moyle, supra note 18, at 72, 83-84. On the Louisiana law of sales *per aversionem* and *ad mensuram*, see generally Claiborne Dameron, *The Obligation to Deliver in Sales of Land*, 1 La. L. Rev. 608 (1939); and Waldon M. Hingle, *Sales of Immovables: Per Measure, Per Lump, Per Aversionem*, 47 Tul. L. Rev. 852 (1973).

94. 6 Mart. (o.s.) 231 (La. 1819) (“Si meum inter agrum et fluvium interaeat publica via tamen meum fieri quod alluvio adjicit.” (If a public road lies between my field and the river, still what the throw up as alluvion is my own.)). For a sketch of Grotius’ contribution to the systematization of Roman law, see Herman & Hoskins, supra note 9, at 1003-04.
owners of unlimited fields (i.e., fields defined by natural boundaries) (Illis quibus agri sunt concessi usque ad flumen jure alluvionis gaudent, tanquam possidentes agros non limitatos.). Given the similarity between Louisiana’s maritime experience and that of the Netherlands, the court’s reliance upon these Dutch jurists seems particularly appropriate.

The erudition displayed in Morgan v. Livingston and other early batture cases prompted the Louisiana Supreme Court later to remark in Succession of Delachaise v. Maginnis:

The earlier decisions of this court on the subject of alluvion are the brightest jewels in the diadem of Louisiana jurisprudence. Taken in connection with the remarkable briefs of counsel they may be said to exhaust the learning and science bearing on the subject, and they leave to succeeding judges little more than the humble task of faithfully applying them. In these decisions we find authority ample to solve every question in this case. 96

This encomium perhaps understates the contribution of later courts to the law of riparian owners’ interest in alluvion, for Morgan v. Livingston explained a fundamental principle in determining title to alluvion:

The principle underlying and determining the title to alluvion in our system is the equitable one expressed in the maxim, qui sentit onus, sentire debet et commodum. As Portalis, in his “Exposé des Motifs” of the Napoleon Code, quaintly states it, “There exists, so to speak, an aleatory contract between the riparious owner and nature, whose action may at any moment despoil or increase his estate, in which sense it may be said that rivers give or take away like change or fortune.” If it takes away, the owner must bear the loss; if it gives, justice accords him the gain. Another principle is that title to alluvion is a purely accessory right, attaching exclusively to riparian proprietorship, and incapable of existing without it. This is implied in the very name given to the right as a right of accession; and the chapter of the code under which the provisions relative to alluvion are found is headed thus: “Of the Right of Accession to What Unites or Incorporates Itself the Thing.” 97

95. 6 Mart. (o.s.) at 249 (citing Voet, Commentarius ad pandectas 41.1.15). The Latin is translated thus: “Hence those to whom lands have been granted up to a river enjoy the right of alluvion as if they possessed lands not strictly demarcated (i.e. unlimited fields).” The point of this quotation is suggested supra note 91.

96. 44. La. Ann. 1043, 1049 (1892).

97. Id. at 1048-49. The thought of J.E.M. Portalis, one of Napoleon’s key juris consults and the drafter of the property articles of the French Civil Code, is developed in Herman, supra note 4; and Alain Levasseur, Code Napoleon or Code Portalis, 43 Tul. L. Rev. 762 (1969), which contains a translation of Portalis’ preliminary discourse on the draft legislation that was eventually enacted as the French Civil Code. The Latin maxim is translated as follows: “He who bears the burden ought also to have the benefit.” The principle is derived from D.L.17.10.
K. Roman Law Influence Upon Decisions of the United States Supreme Court

Commentators rarely mention that the Justices of the United States Supreme Court, when they could find no guidance among English authorities on a particular point of law, sometimes relied upon Roman law to resolve legal issues in the fledgling republic. Justice Joseph Story considered this judicial reliance upon Roman law warranted; for him, Roman law was a fountain of rational jurisprudence and a reservoir of solutions to problems that American jurists would eventually confront.

This essay will refer to several United States Supreme Court opinions that invoke Roman law principles and doctrines. The first such case, Livingston v. Dorgenois, requires a slight historical expansion of the above report on Gravier's batture claims. When, in 1807, the Louisiana Supreme Court confirmed Gravier's right to the batture near his plantation, Edward Livingston, a distinguished Louisiana lawyer and the defendant in Morgan v. Livingston, acquired a one-third interest in Gravier's batture property. Livingston promptly began a series of works and improvements on the batture, claiming that they would benefit the public at large. The citizens, unimpressed by Livingston's self-serving claim, became indignant at his interference with the customary uses of batture.

Meanwhile, on the federal level, the United States Congress passed a statute intended to establish title to the batture in the United States. Pursuant to this statute, President Thomas Jefferson ordered Le Breton Dorgenois, the United States Marshal in New Orleans, to claim the batture and to evict Livingston as a squatter. Irritated by Jefferson's animus toward him, Livingston resisted the eviction. His resistance became the basis of a dispute before the United States Supreme Court in Livingston v. Dorgenois. Significantly, the Livingston Court, referring to Domat, remarked that the United States, to assert ownership in the batture, "had a clear adequate remedy to protect their rights by intervention, as known . . . in the civil law."

The court then characterized the action as an interdictum unde vi citing the title of Justinian's Digest, de vi et vi armata as well as the works of Pothier. The court then observed:

98. 11 U.S. (7 Cranch) 577 (1813).
99. 6 Mart. (o.s.) 19 (La. 1819).
100. 11 U.S. (7 Cranch) at 577.
101. 11 U.S. (7 Cranch) at 580.
102. 11 U.S. (7 Cranch) 577, 583 (1813). Under Roman law, possessor utilum "protected possession as an existing state of fact without reference to its rightfulness or wrong . . . Roman jurists divided possessor utilum into three classes, according as they served the purpose of acquiring, retaining, or recovering possession . . . interdict unde vi enabled a man to regain possession of land from which he had been ousted violently." Jolowicz & Nicholas, supra note 15, at 259-61.
103. 11 U.S. (7 Cranch) at 583. On the interdicts vi and vi armata see generally Dig. 43.16.
The action *interdictum unde vi* is a possessory action only; and the only question is the *forcible entry*, and its legality. The title does not come to question . . . If there had been a question of title, he might have had the *actio utilis* with his possessory action.\(^{104}\)

The opinion reflected the court’s irritation with the federal government’s highhanded tactics: “Even under the Roman civil law, the emperor himself cannot by rescript affect the property of a person who has not been heard.”\(^{105}\)

In this case, as well as in others this essay describes, one is at first startled by the Supreme Court’s casual reference to Roman law. The Justices seem to have displayed no reluctance toward referring to Justinian and civilian writings in opinions of the early American jurisprudence. American jurisprudence is richer for such references.

**L. Wills**

In *State of Louisiana, State of Maryland Intervening v. The Executors of John McDonogh and the City of New Orleans*,\(^{106}\) the Louisiana Supreme Court explored Roman authorities for proper construction of one of the most celebrated wills ever probated in New Orleans. John McDonogh, a citizen of Louisiana and native of Baltimore, Maryland, left virtually all of his extensive estate in equal fractions to the mayors, aldermen, and inhabitants of Baltimore and New Orleans. McDonogh’s will charged these bequests with several annuities to be paid by the devisees of his general estate out of the revenues of the estate. The purposes of the legacies were essentially charity and public utility, i.e., the establishment and support of “free schools in each of the cities wherein the poor of both sexes of all classes and castes should be educated.” McDonogh's will forbade the mayor and aldermen of each of the cities to alienate the corpus of the estate, instead instructing them to lease the assets and to use the rents for the prescribed purposes. The will further stipulated the names of the particular societies and institutions that would benefit from revenues earned by the corpus. Both McDonogh’s collateral relatives and the states of Louisiana and Maryland attacked his will. Because McDonogh had no forced heirs automatically entitled

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The *interdictum unde vi* had two forms depending upon whether the violence complained of had been armed or unarmed. “Vi” alone denoted that the claimant had been forcibly ejected. “Vi armata” meant armed force or violence aggravated by the use of weapons, and this assertion of armed force deprived the ousting party or dispossessor of certain defenses enjoyed by a defendant in the ordinary case. Jolowicz & Nicholas, *supra* note 15, at 261. In the classical sources Cicero’s celebrated speech pro Caecina involved the *interdict vi armata*. Background on the interdict and its place in Roman history appears in Bruce W. Frier, *The Rise of the Roman Jurists: Studies in Cicero’s pro Caecina* (1985).

\(^{104}\) 11 U.S. (7 Cranch) at 587. *Actio utilis* is explained briefly *supra* note 85.

\(^{105}\) 11 U.S. (7 Cranch) at 589 (citing authorities in the Corpus Juris Civilis).

\(^{106}\) 8 La. Ann. 171 (1853).
to inherit certain fractions in his estate, the collateral relatives' attack was dismissed.

More serious were the attacks of Louisiana and Maryland. These were based on the following arguments: (a) Carried to its logical conclusion, the purpose of the McDonogh will would be to vest large inalienable estates in the cities, a condition "ruinous to commerce." (b) Vesting of title as contemplated by the will was unknown because the law required an owner for every species of property. As the titles were unrecognized in law, the legacies were null. (c) The legacies were null as substitutions and fidei commissar, because they were made upon impossible conditions.

Among the briefs and documents submitted to the court was an excellent scholarly opinion in the nature of a succinct treatise or brief amicus curiae in support of the cities' contentions. Five distinguished nineteenth century French jurists—Coin-Delisle, Delangle, Giraud, Duranton and Marcadé—had prepared this treatise especially for the Louisiana Supreme Court's consideration. Running to about thirty-five pages in the case reporter, their submission discussed in detail the parties' contentions and analyzed them in light of French law and Roman law. This French opinion merits study, for it demonstrates the depth and richness of scholarship at the court's disposal to aid its deliberations in the case.

For its part, the court upheld McDonogh's bequests as "legacies to pious uses." "They are an element," said the court, "in the polity of municipal administrations in all countries which have preserved the features and jurisprudence of Roman civilization." The court reinforced its holding with a variety of Roman texts indicating that Roman law authorized cities to be legatees, that bequests of this type were not fideicommissary substitutions and could be maintained by reading out certain conditions as not written, and that a legacy to pious uses was valid, though the beneficiaries were identified only by a general adjective, i.e., the "poor," and not by particular name.

Most likely, the Louisiana Supreme Court found some guidance for its ruling in the McDonogh case in an unanticipated source, the early United States Supreme Court reports. Immediately after Justice John Marshall's celebrated decision, Trustees of Dartmouth College v Woodward, there appears a lengthy appendix entitled "Charitable Bequests." This learned discussion, sandwiched between opinions of the court, elaborates upon legacies to pious uses, an issue raised and discussed at length in the Dartmouth College case. The anonymous author of this appendix, now identified as Justice Joseph Story, must have been steeped in the Roman tradition, for within the first few lines of the discussion he states:

107. Id. at 222.
108. A fideicommissum, like an informal trust, was a charge in a will imposed upon an heir or legatee to transfer property to someone else. The Louisiana Civil Code generally banned such charges because they tended to remove assets from commerce. Today, Louisiana lawyers sometimes use a trust to achieve the result of a fideicommissum.
... it became fixed as a maxim of Roman jurisprudence that legacies to pious uses which included all legacies destined for works of charity, whether they related to spiritual or temporal concerns, were of peculiar favor and to be deemed privileged testaments. The construction of testaments of this nature was most liberal; and the legacies were never permitted to be lost either by the uncertainty of failure of the persons or objects for which they were destined. In all cases where the objects were indefinite, the legacy was carried into effect under direction of the judge having cognizance of the subject. The high authority of the Roman law, coinciding with the religious notions of the times, could hardly fail to introduce the principles of pious legacies into the common law of England.\(^\text{111}\)

Especially interesting in this appendix are references to civilian and Roman authorities—for Story refers to Domat and Swinburne—writers also mentioned in the McDonogh case. Although the McDonogh court did not refer to Story's appendix, it is likely that here the Louisiana court was reassured to find confirmation of the correctness of its holding in both the United States Supreme Court decisions and Roman law authorities.

**M. Attorneys' Purchase of an Interest in Litigious Rights; Debtor's Discharge of Litigious Claim**

In Europe generally, the legal profession has traditionally frowned upon compensation of attorneys based upon a percentage of recovery. Except for contingency fees in personal injury cases, United States' practice has generally followed this rule. The exception for personal injury cases has been recognized in the twentieth century as a means of affording impecunious tort victims access to the courts. Following the lead of Roman law, nineteenth century Louisiana law rejected the calculation of attorneys' compensation based upon a percentage of recovery. In Livingston v. Cornell,\(^\text{112}\) the Louisiana Supreme Court considered the following issue:

111. 17 U.S. (4 Wheat) 341, 341 (1819). Justice Joseph Story himself authored this note at the request of "the able and learned Reporter (of the Supreme Court), with an express understanding that its author should not then be made known." Joseph Story, II Commentaries of Equity Jurisprudence as Administered in England and America 389 n.1 (1836), reprinted in American Law: The Formative Years (Morton Horwitz & Stanley Katz eds., 1972). This supposition about Story's authorship would be reasonable even without Story's own acknowledgment; for there are similar allusions to Roman and civil law in an appendix after Justice Story's opinion on the same issues in the Trustees of Philadelphia Baptist Ass'n v. Smith, 28 U.S. (3 Pet.) 481 (1830). The English doctrine on charitable trusts, supplemented by occasional references to civilian and Roman authorities, is elaborated in detail in Trustees of the Philadelphia Baptist Ass'n v. Hart's Executors, 17 U.S. (4 Wheat) 1 (1819). Legacies to pious uses are discussed, in C.1.2.19.

112. 2 Mart. (o.s.) 281 (La. 1812).
Does the law give an action to an attorney and counselor, prosecuting a writ of error, on a contract to take upon himself all charges that will accrue, for one-tenth part . . . on the sum in dispute in case of success; engaging that if he does not succeed he will make no other charge?113

To this question the court’s answer was no. It based its conclusion upon Roman doctrine:

it [was] not lawful . . . for a lawyer to make any bargain de quota litis. This kind of precaution, against the ingratitude of the client, has always been considered as sordid. Quod si partem dimidiam ejus quod ex ealite fuerit, pactum iniquum censebitur. Pactum hoc de quota litis injustum.114

The holding, no longer strictly enforced in Louisiana, was founded on the view that an attorney, unlike an ordinary laborer, was not “hired” in the traditional sense, i.e., under a contract of locatio conductio. The attorney’s compensation took the form of an honorarium, i.e., a gratuity for professional services. According to the court, Roman law ordinarily barred advocates, seen as an advisory elite for Roman society, from resorting to suit “in order to compel ungrateful clients to do them justice.”115 By the 1800’s, the Roman ethos applicable to attorney compensation no longer uniformly prevailed in Louisiana law. Even the Livingston case conceded that an attorney could set a fee for his services. However, the attorney’s remuneration could not “rest on an agreement depending on the issue” [i.e., outcome] of the suit.116 A fee contract in which an attorney stipulated for a part of the matter in dispute as his reward was “highly condemned and reprobated.”117

Traces of this Roman sentiment, as well as the law’s prejudice against purchasers of litigious rights, appear in the following articles of the Louisiana Civil Code:

Art. 2447. Sale of litigious rights.

Officers of a court, such as judges, attorneys, clerks, and law enforcement agents, cannot purchase litigious rights under contestation in the jurisdiction of that court. The purchase of a litigious right by such an

113. 2 Mart. (o.s.) at 283.
114. 2 Mart. (o.s.) at 284, 284-85. The court’s Digest reference to this Latin quotation is incorrect, but the text at Dig. 2.14.53 is in the same vein. The quoted Latin text is roughly translated as follows: “But if he had made an agreement for half of what would be recovered in the lawsuit the agreement would be judged unfair. This agreement for part of the litigation is unjust.” I am indebted to Professor Peter Stein, Queens College, Cambridge, for having indicated that the Latin fragment “does not come from the Corpus Juris, but is a summary, perhaps medieval, of the effect of D.2.1.53.” Letter from Professor Peter Stein, Queens College, Cambridge, to Shael Herman (Mar. 5, 1990) (on file with author).
115. 2 Mart. (o.s.) at 293.
116. Id. at 295.
117. Id. at 293.
officer is null and makes the purchaser liable for all costs, interest, and damages.

Art. 2652. Sale of litigious rights.

He against whom a litigious right has been transferred, may get himself released by paying to the transferee the real price of the transfer, together with the interest from its date.

These Civil Code articles retain vitality in Louisiana jurisprudence, though they are not read so strictly as to exclude contingency fees in personal injury suits. Even today, a debtor seeking to avoid vexatious litigation by paying off a transferee of a claim against him will often rely upon Louisiana Civil Code article 2652. In Smith v. Cook, the Supreme Court of Louisiana traced the origin of the principle of Article 2652 into the Lex Anastasiana elaborated in Justinian's legislation:

... the articles of our Code concerning litigious rights are founded on the laws “per diversas and ab Anastasio, C. Mandati.” These Latin words are an old style reference to the Codex, which is one of the divisions of Justinian's Corpus Juris Civilis, under the title “Of Mandate,” and refer to an ordinance established by the Emperor Anastasius, which was later renewed by Justinian.

Dr. Ferdinand Mackeldey, in his Handbook of the Roman Law, Second Book, Chapter 2, Title “Of the Cession of Claims,” under “Lex Anastasiana,” gives the substance of these laws as follows:

To prevent the purchasing of claims from avarice or to injure the debtor, Anastasius ordained that whoever purchased a claim for a less price than its true value shall not sue the debtor for more than he paid for it in addition to the lawful interest. This ordinance was afterwards renewed by Justinian, and in several points more precisely determined and elucidated. From the combination of these two ordinances arise the following principles:

4. In the cases where the debtor can invoke the Lex Anastasiana against the cedee (i.e. transferee), the effect is that where the claim amounts to more than the price paid for it with interest, the debtor shall have such advantage. And therefore the cedee must also always show how much he paid for the ceded claim, because he is only to be reimbursed the amount of such payment and interest for it.

118. On the lawfulness and ethical propriety under Louisiana law of an attorney's contingency fee contract, see Marlin Risinger, The Transfer of Litigious Rights in Louisiana Civil Law, 1 La. L. Rev. 593, 605-07 (1939).
119. 180 So. 469 (La. 1938).
120. See Code Book 4, Title 35, Laws 22 and 23 (citations omitted).
121. Id. (citations omitted).
In 1800, the United States was scarcely a generation old. The most populous areas of settlement were the original thirteen colonies along the Atlantic seaboard. To the west of these original thirteen colonies, the territory was largely uncharted wilderness. In varying degrees, in 1800, these western regions, including Louisiana, experienced an influx of new settlers onto vast expanses of vacant land for which title records were either fragmentary or nonexistent. Because of the unsettled condition of these land titles, many settlers, when they acquired land, were uncertain whether they had purchased from the true owners. The true owners often dispossessed the settlers after they had taken over the lands and had improved them. In some of these western states, legislatures were concerned to protect expectations of settlers who were encouraged to settle the land and who, in many cases, honestly believed that their investment in the land was secure. Given the important role of private property in the young nation, the law had to recognize the true owners' vital interests. But the legislators also recognized that the law had to protect the expectations of the settlers, at least for as long as they lacked notice that their titles were defective. As one lawyer put it in an early United States Supreme Court decision, *Green v. Biddle*, 122 "[t]he possessor in good faith has covered the face of the country with his own property, the fruits of his toil and industry, which it is not just that the owner of the unimproved land should take from him without indemnity." 123

To protect these good faith possessors who had erected valuable improvements on land they did not own, Kentucky and Virginia enacted statutes excusing an occupant evicted by a person with a better title from restoration of rents and profits that had accrued before actual notice. These state statutes also required the true owner, if successful in his eviction action against the possessor, to reimburse the latter the value of lasting improvements made on the land before actual notice of the adverse title. Certain owners attacked these statutes as unconstitutional, and the United States Supreme Court ultimately set them aside. Roman and civilian authorities on the doctrine of the bona fide possessor supplied the backdrop for the Court’s examination of the statutes at issue. Among the Roman authorities, the court found a consensus favoring reimbursement of the bona fide possessor on the basis of unjust enrichment, although the texts disagreed about when the bona fide possessor lost his preferred status and became mala fide. This loss of preferred status could limit and even extinguish the possessor’s claim to reimbursement and his right to retain profits. Among the authorities cited by the Court were Papinian, Justinian, Pufendorf, and Domat.

To appreciate fully the Roman learning on bona fide possessors available to the United States Supreme Court, one may consult the case reports themselves. Sandwiched among the decisions is a slim treatise on the civil law of bona fide

122. *21 U.S. (8 Wheat.) 1 (1823).*
123. *Id. at 36.*
possessors. This piece, like the discourse on legacies to pious uses mentioned above,\textsuperscript{124} was a study aid on the issues the justices themselves discussed. This study aid mentions or reproduces texts of the English medieval scholar Bracton; the Roman jurists Justinian, Papinian, Celsus, and Vinnius; and the prerevolutionary French jurists Pothier, Vinnius, Cujas, Domat, and Argou. According to most of these authorities, a bona fide possessor, on notification by a true owner, lost his privileged status. A possessor’s recovery thereafter was normally limited to reimbursement for expenses incurred to preserve the property. Furthermore, the possessor could remove articles installed by him on the property so long as such removal did not damage the property.

It is uncertain whether the justices of the Louisiana Supreme Court had the benefit of the little treatise located in the Supreme Court reports when they considered in Packwood v Richardson\textsuperscript{125} the issue of when a bona fide possessor was deemed to lose his privileged status. Interestingly, the Louisiana court in Packwood traveled some of the same paths chosen by the United States Supreme Court in Green v. Biddle. In Packwood, the court, relying on a provision of the Louisiana Civil Code then in force, held that a bona fide possessor lost his preferred status when he learned of the defects in his title, i.e., his status depended upon his own subjective appreciation of his rights. The Louisiana court lamented the fact that this provision reversed the former law which had declared that good faith terminated on commencement of a suit. The court noted that “the commentators on the French law, seem to regret that the provision was introduced into the Napoleon Code, as substituting a rule which from its arbitrary and uncertain nature, gives rise to a great deal of litigation, in place of the old and certain regulations, which made the good faith to cease from the time suit was commenced.”\textsuperscript{126} The court explained that “there [was] a great difference between knowing that a title is set up, and . . . that it is a good one.”\textsuperscript{127} Significantly, the Supreme Courts of both the United States and Louisiana extensively relied upon the intellectual construct of the Roman law to frame the issue in the above cases. In Louisiana, a Roman analysis has survived in Article 496 (“Constructions by Possessor in Good Faith”)\textsuperscript{128} and Article 497 (“Constructions by Possessor in Bad Faith”).\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{124} See supra text accompanying notes 108-111.
\item \textsuperscript{125} 1 Mart (n.s.) 405 (La. 1823).
\item \textsuperscript{126} Id. at 409.
\item \textsuperscript{127} Id. at 410.
\item \textsuperscript{128} La. Civ. Code art. 496 provides:
When constructions, plantings, or works are made by a possessor in good faith, the owner of the immovable may not demand their demolition and removal. He is bound to keep them and at his option to pay to the possessor either the cost of the materials and of the workmanship, or their current value, or the enhanced value of the immovable.
\item \textsuperscript{129} La. Civ. Code art. 497 provides:
When constructions, plantings, or works are made by a bad faith possessor, the owner of the immovable may keep them or he may demand their demolition and removal at the expense of the possessor, and, in addition, damages for the injury that he may have sustained. If he does not demand demolition and removal, he is bound to pay at his
O. Societas vs. Depositum: *The Roman Classification of Transactions*

Alan Watson, the distinguished Roman law scholar, has noted in *The Making of the Civil Law*, Roman law, at least as it appears in classical sources, divides naturally into self-contained, self-referential blocks. As a consequence of these blocks, Roman jurists seem to have conceived contract theory in terms of a taxonomy of contract features that today figure in the special contract titles of a typical civil code—sale, lease, mandate, commodatum, mutuum, permutatio, donation, pledge, surety, mortgage and so forth. In its turn, Roman procedure, by requiring an aggrieved party to commence his action with a particular formula based upon the specific nature of his contract, reinforced the Roman scheme of contract classification. The Roman conceptual framework has impelled both judges and lawyers who work with a modern civil code to classify transactions so as to fit neatly into and to permit easy analysis under specific titles of the Civil Code. The conceptual framework also has encouraged civilians to draw nice distinctions between the rights and duties of, say, sellers and buyers on one hand and landlords and tenants on the other. The twin impulses to classify agreements and to make subtle distinctions among transaction types are apparent in a number of cases decided by the Louisiana Supreme Court during the period under review.

In *Guillot v. Dossat*, the defendant's liability depended on whether he was deemed a partner or a depositary. According to the court, the question was whether the quasi-contract of joint ownership imposes an obligation of exercising ordinary diligence over particular property or whether fraud (i.e. dishonest conduct) must be present to render the joint owner liable. Although the court did not explicitly acknowledge it, at the heart of its analysis was the distinction between onerous

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131. Of course, these formulae did not fall from the sky. They grew out of the collision of the Roman jurists' intellects with daily reality. A high Roman official, the *praetor*, annually authorized by edict the various formulae, each of which indicated a certain legal action that he would allow. Patterns of formulae were displayed in the *praetor's* album. Roman procedure required the parties to present the issue in dispute to a *iudex* (judge) in terms of a specific formula. For each cause of action, there was an appropriate form of action, and each action was expressed in a set of words or formula. The formula constituted the parties' pleadings and provided the focus or springboard for the eventual resolution of the dispute. Thus, if there had been a sale (*emptio venditio*) and the seller refused to deliver what he had sold, the buyer had an action on the purchase (*actio emptii*); conversely, if the buyer refused to pay the price, the seller had an action on the sale (*actio venditii*), and each of those actions had an appropriate formula in which the issue was defined. Barry Nicholas, *Introduction to Roman Law* 20 (2d ed. 1962). On the formulary scheme, see generally Jolowicz & Nicholas, supra note 15, at 199-232.

132. 4 Mart. (o.s.) 203 (La. 1816).

133. *Id.*
agreements, which benefit both parties, and gratuitous contracts, which benefit only one of the parties. According to the authorities reviewed by the court, a partnership benefits both partners while a deposit, a gratuitous contract in the Roman tradition, benefits only the owner who deposits his property with a customarily uncompensated depositary. In this case, the defendant and the plaintiff co-owned a slave and the plaintiff alleged that the defendant had failed to use diligence to keep the slave from escaping and to find him after the escape. The defendant claimed that he had dealt with the slave honestly and hence owed his co-owner no duty of diligence. The defendant further argued that because he was a depositary he should be liable only if he had been dishonest. Relying on Roman authorities, the court thought that an uncompensated party to a transaction should be judged by a more relaxed standard than a compensated party.

The contract being useful to the partner, who holds the property, he ought to be bound to carefulness: not so the depositary; for the deposit being only a charge to him, he ought to be bound to honesty only. The digest L. Contractus 23, distinguishes two kinds of contracts. Those in which fraud alone gives room to repetition [i.e. reimbursement], qui dolum duntaxat recipiunt, as that of deposit; the other, those which, besides good faith, require diligence, as that of partnership. Contractus quidam dolum malum duntaxat recipiunt, quidam et dolum et culpam. Dolum tantum depositum . . . societas et rei communio dolum et culpam recipiunt. In contracts and quasi contracts, which are for the reciprocal advantage of the parties, as those of sale, exchange, partnership and in the quasi contract of ownership that care is required, as to the thing which is the object of the contract . . . which prudent men usually bestow on their own. In societate, dolus et culpa praestatur.134

The court eventually condemned the defendant to repay the plaintiff the value of the latter's interest in the slave. Implicit in the court's award was a finding that the status of co-ownership should be analogized to partnership, not deposit. Having drawn this analogy, the court imposed liability on the defendant for his negligence by fitting the transaction into a particular block or category that contained its own interlocking rules, including the applicable standards of conduct for the defendant.135

134. Id. at 205. The translation of the Latin passage is as follows “[s]ome contracts involve only bad faith, some also culpability. Deposit and precarium involve only bad faith; mandate, loan for use, sale, acceptance in pledge . . . involve bad faith and culpability." The final Latin quotation, a fragment of a long sentence, is translated as “in partnership there is liability for willful conduct and fault." The entire sentence is illuminating in the present context: “. . . where, as in sale, hire, dowry, pignus, and partnership, the interest of each party is advanced, liability is for both willful conduct and fault." See Dig. 13.6.5.2 (Ulpian, Ad Edictum 28).

135. In 1819, the Supreme Court relied upon the same text of the Digest quoted in Guillot to impose liability on one co-owner of a vessel for his failure to insure a second co-owner's half interest while the former had impaired his own interest. Ralston v. Barclay, 6 Mart. (o.s.) 649 (La. 1819).
The judicial impulse to classify transactions and to analogize between transaction types was also apparent in *Percy v. Millaudon.* In that case, the plaintiff and defendant jointly owned a plantation, with the defendant having the management of the property. When the crops were sold, the plaintiff sued the defendant for an accounting. In response, the defendant denied that there were any profits and then counterclaimed for the plaintiff's share of the expenses incurred to operate the plantation, which included the cost of erecting valuable buildings on the land. The plaintiff apparently had acquiesced in the erection of these improvements.

The plaintiff's defense rested upon a Louisiana Civil Code article prohibiting one partner from changing or improving the partnership property without all other partners' approval, even if the change benefitted the partnership. The court's response to the plaintiff was that these parties were joint owners, not partners. Citing texts from the Digest, the court held that even if the parties were partners, the plaintiff's acquiescence in the improvements as they were erected would bar him from claiming the benefit of the quoted Civil Code article.

Shifting from the law of partnership to the law of successions and bona fide possessors, the court then analogized the defendant to an heir who has entered into possession of the whole estate and then contests the coheir's right to any part of it. In rendering his account, said the court, the heir in possession deserved a credit for the improvements he had installed on the property, citing Digest texts on the contrast between the right of reimbursement for a good faith possessor and that of a bad faith possessor.

Among Louisiana lawyers, the characterization of transactions evokes memories of their classroom exercises. Standard Louisiana texts on the law of sale and lease, for example, have always opened with cases contrasting sale and lease with other particular contracts like pledge, mandate, and loan, but hardly anyone remembers that Roman law inspired such exercises. Litvinoff's *Sale and Lease in Louisiana Jurisprudence* offers the following explanation for the exercise in classifying transactions:

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136. 6 Mart. (n.s.) 616 (La. 1828).
137. The interaction between the contract of partnership and the formulary system is illuminated by reference to a passage in Gaius' Institutes which narrates an action similar to the one presented in *Percy v. Millaudon.* "If A and B are partners and A is suing B for a share of profit made by B out of partnership business amounting to 10,000 sesterces and B wishes to claim from A 3,000 sesterces, A's share of expenses incurred by B on partnership business," the judge may "take this [mutual indebtedness] into account and condemn B only for the difference, 7,000 sesterces." Jolowicz & Nicholas, supra note 15, at 212. This text from Gaius also deals with *compensatio* or set-off, a Roman principle codified in Louisiana Civil Code articles 1893-1902. Enacted in 1985, the current legislative definition of compensation has a classical Roman ring. "Compensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due. In such case, compensation extinguishes both obligations to the extent on the lesser amount." La. Civ. Code art. 1893.
138. 6 Mart. (n.s.) at 619. The Digest texts are Dig. 10.3.28 (Papinian, Questionums); Dig. 5.3.38 (Paul, Ad Edictum 20); and Dig. 5.3.39 (Gaius, Ad Edictum Provinciale 6).
Since each special contract is governed by rules of its own, a proper characterization of a contract, that is, a correct ascertainment of its kind, is relevant. Important matters concerning effects, remedies and prescription depend upon such characterization.¹³⁹

In a more historical vein, Professor Litvinoff reports:

Sale is the type of contract that started the Roman legal mind to think of contract in general to the point that what is known nowadays as the General Theory of Contract is, very probably, but a generalization of principles first developed for Sale.¹⁴⁰

The author might have added that the impulse to classify transactions is a modern expression of the self-referential, self-contained blocks that originated in Roman legal thinking.

P. Sale: A Miscellany of Issues on Purchase Price

The impulse to classify transactions seems to have led Roman jurists to define and to distinguish transactions in terms of their essential elements. Seemingly an exercise in abstraction, the process of classifying transactions was eminently practical: a litigant's choice of formula depended upon the kind of agreement he had entered. Each formula authorized by the Roman praetor's edict presupposed proof of specific elements, and a plaintiff's choice of the wrong formula might be fatal to his claim.

1. Serious Intention to Pay a Specific Price Calculated in Current Money
   (In pecunia numerata)

For Roman citizens, as for contemporary businessmen, sale was the business agreement par excellence. For the jurists quoted in Justinian's Digest, as for modern civilians trained to identify issues under the French and Louisiana Civil Codes, the term “sale” triggered a reflex to search the transaction at issue for essentials such as a precisely stated price and a precisely identified object. Book XVIII of Justinian's Digest (“Conclusion of the Contract of Purchase, Special Terms Agreed between the Vendor and Purchaser, and Things Which Cannot Be Sold”) opens with a wide-ranging exchange of views propelled by the proposition that there could be no sale without a specific price (Sine pretio nulla venditio est). This straightforward assertion, as we learn from the chorus of jurists' voices recorded in Book XVIII of the Digest, has several implications. First, the parties must intend that a price be paid; if the parties contemplate no price term because they intend a gift, then the transaction may be valid as a donation, but

¹⁴⁰ Id. at 1-2.
not a sale. Second, if the parties swap goods, then their agreement is nonetheless valid, but as *permutatio* (exchange), not sale. Third, a disadvantage of *permutatio*, according to Dig. 18.1.1.1, is that "one cannot discern which party is vendor and which, purchaser." For Louisiana judges interpreting infelicitously drafted sales transactions, the requirement of a price term was a constant. This Roman requirement was so well accepted that it usually required no judicial quotation of Roman sources. The Louisiana Civil Code articles 2439 and 2464 declare that:

Art. 2439. Definition
Sale is a contract whereby a person transfers ownership of a thing to another for a price in money.

The thing, the price, and the consent of the parties are requirements for the perfection of a sale.

Art. 2464. Price, essential elements
The price must be fixed by the parties in a sum either certain or determinable through a method agreed by them. There is no sale unless the parties intended that a price be paid.

The price must not be out of all proportion with the value of the thing sold. Thus, the sale of a plantation for a dollar is not a sale, though it may be a donation in disguise.

In *Kleinpeter v. Harrigan*, the plaintiff, by possessory action, sought to recover the title to land transferred to the defendant under a deed that declared as the consideration the defendant's "good conduct" and "recompense for services" the defendant had rendered to the plaintiff's decedent. As often happened before slavery was abolished, the decedent was the master of the defendant, a former slave, and sought to reward her for her many kindnesses. As a slave, however, the defendant would have had no cash with which to pay the price, and the court was understandably skeptical about the true character of the transaction. According to the decedent's touching declaration in the deed, "I gave [the defendant] freedom about ten years ago, yet she holds fast, and watches and cares for me in the most tender manner, and for her good conduct, 

141. Dig. 18.1.1.1 (Paul, Ad Edictum 33). Under the American Uniform Commercial Code, absence of a price term from a sale dictates no such recharacterization of the transaction or of the parties. The "disadvantage" of being unable to distinguish buyer from seller is not a serious problem. U.C.C. § 2-304 (1994) provides:

§ 2-304. Price Payable in Money, Goods, Realty, or Otherwise.
(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this Article, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

I have this day sold her fifty acres of land in the rear of my plantation."  

The court nullified the act, holding that because it lacked a price it was not a sale. Furthermore, no price could be inferred because "no price nor value [was] given to the land or [the defendant's] services."

2. Price Set by Third Party Designated by Seller and Buyer

Like Roman jurists, Louisiana lawyers also became exercised over whether a sale was invalid because the parties had left the fixing of the price to a third person. Labeo and Cassius, two Roman jurists quoted in the Digest of Justinian, thought such a sale was void, while the Proculians held such a sale to be valid subject to the suspensive condition that the person named should in fact fix the price. Controversy over the validity of such a sale raged until the time of Justinian, whose legislation stipulated that the parties were bound at the price named by the third person, but that if the third person refused to fix the price or could not fix it, the sale was void. The French Civil Code adopted Justinian's approach, and the Louisiana Civil Code duplicated the French rule. Early cases sometimes used the price requirement to nullify sales, and recent jurisprudence has continued this strict approach to setting a price. In Fort v. Union Bank of Louisiana, a transfer of bank stock was to have been effected at a price to be set by the president and cashier of the bank. The designated valuers disagreed about the value of the stock, one contending that the price should depend on the stock's intrinsic value and the other upon its real market value. The court recognized that the price, according to the Louisiana Civil Code, could be left to the arbitration of a third person, but if such a person could not make the estimation, then there was no sale. Accordingly, the court held the sale null.

Twentieth century cases involving a third party's determination of price followed the rationale of the Fort case. In a celebrated opinion, Louis Werner Sawmill Co. v. O'Shee, the defendant had agreed to sell the plaintiff land consisting of about 4000 acres. According to their agreement, the value of the land depended upon the quantity of merchantable pine timber growing on it. Each party named his own estimator to determine the quantity of merchantable timber on the land. Under the sale agreement, the parties' definition of merchantability was "sound timber not less than 14" in diameter at the stump." Apparently, the two estimators had dramatically different views on merchantability. After independently examining a substantial part of the timber, they compared notes and discovered that their counts of the merchantable timber diverged widely. When the defendant's estimator refused to go further in

143. Id. at 196.
144. Id. at 197.
145. Moyle, supra note 18, at 70.
146. 11 La. Ann. 708 (1856).
147. 111 La. 817, 35 So. 919 (1904).
148. Id. at 818, 35 So. at 919.
identifying merchantable timber, the plaintiff sued for performance. The plaintiff asked the court to order the defendant to appoint a new estimator, and on the defendant's refusal, the plaintiff asked the court to appoint an estimator. The defendant contended that the agreement was fatally defective because it did not fix a price. The plaintiff replied that the price was fixed and that the only thing to be determined was the quantity of the object. According to the plaintiff, the quantity was as ascertainable as in any sale by weight, tale, or measure.ª

The court responded that the methods of selecting the contractual object and of fixing the price could not be separated. Assuming the coefficient of $1.50 per 100 feet of merchantable timber was certain, the quantity of timber was uncertain. If the parties named the experts to calculate the object and the experts fixed the price by multiplying $1.50 by the number of board feet, then the agreement was valid.º But the court could not appoint a second expert if the first expert resigned and a party then failed to name a replacement. If the parties had not agreed to let the court name an expert in case the parties failed to do so, then the court could not substitute its will for that of the parties.¹¹ The court maintained the defendant's exception of no cause of action and reserved the plaintiff's right to seek damages.

Q. Just Price; Laesio Enormis

For Roman jurists and modern civilians, the presence of a price term, while a necessary condition for a valid sale, does not perfect a sale. The price must also be determined, or at least calculable, objectively and independently of either party's whim. As Ulpian tells us, the purchase of an object "for what you paid for it" or "for what I have in my cash box" is valid; the price thus stated is certain, because, as Ulpian explains, "[t]he case is one of ignorance of its amount rather than of the real existence of the price."¹² In Ulpian's view, the parties could always have dispelled their ignorance by opening the cash box. According to Gaius, who was also concerned with the definiteness of the price, the parties concluded no contract when the vendor said to the purchaser, "you shall buy for what you choose to give, or what you think fair or at your own estimate of its value."¹³ If the price must be objectively determinable, Gaius' remark is correct.

150. 111 La. at 821, 35 So. at 920.
152. Dig. 18.1.7 (Ulpian, Ad Sabinium 28).
153. Dig. 18.1.35.1 (Ad Edictum Provinciale 10). With this passage from the Digest, contrast Uniform Commercial Code §2-305 which authorizes an "open price term," and permits great latitude
Besides being both determinable and truly intended to be paid, the price gradually came to be scrutinized by Roman judices for its proportionality to the fairly estimated value of the object. In Latin, this judicial scrutiny came under the rubric of iustum pretium (just price). Precise determination of the just price seems always to have presented problems for judicial diagnosis, but location of the price within a range would certainly have helped a judge to appreciate the parties' understanding of the nature or quality of the object. If a buyer had negotiated a price on the assumption that he was buying gold while the seller intended to sell only a cheap alloy like fool's gold, a judge, by reference to the stipulated price, could readily uncover the latent ambiguity in the parties' assumptions.

In sales of land, a medieval literature on the just price developed under the rubric, laesio enormis (“great injury”). Attributed to the Emperor Diocletian, laesio doctrine was enshrined in Justinian’s legislation under the heading “de rescindenda venditione.” The following passage captures the essence of the doctrine of laesio as it pertained to land sales:

If your father sold a parcel of land for a price under half its value, it is just that if you first offer to the buyers the price they gave, they restore to you the estate sold by intervention of the judge, or if the buyer

in fixing it. U.C.C. § 2-305 (1994) provides:

§ 2-305. Open Price Term

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or
(b) the price is left to be agreed by the parties and they fail to agree; or
(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.


Art. 2466. No price fixed by the parties

When the thing sold is a movable of the kind that the seller habitually sells and the parties said nothing about the price, or left it to be agreed later and they fail to agree, the price is a reasonable price at the time and place of delivery. If there is an exchange or market for such things, the quotations or price lists of the place of delivery or, in their absence, those of the nearest market, are a basis for the determination of a reasonable price.

Nevertheless, if the parties intend not to be bound unless a price be agreed on, there is no contract without such an agreement.
desires, you may receive the supplement of the price. The price is too low if it does not represent half the true or just value of the thing.\textsuperscript{154}

The doctrines of \textit{laesio enormis} and just price percolated through medieval texts\textsuperscript{155} and, by a winding path, eventually made their way into the French Civil Code as the doctrine of lesion. Initially rejected by the legislative assembly, which considered early drafts of the French Civil Code, the doctrine of lesion was questioned by some jurists on utilitarian grounds because they doubted whether there was any realistic technique to determine a true price. Before the Conseil d'Etat, Berlier made a distinctly modern point by reference to what economists today would call subjectivity of value:

Things do not in general have a true price, a just price, they are worth less to one person, more to another; the degree of liking, the utility, the varying situations of the parties, there are many reasons for different evaluations; but the price is known only by the agreement itself; it establishes the price and the price should not be sought elsewhere.\textsuperscript{156}

In opposition to Berlier's view, French proponents of the lesion doctrine adhered to the view that "equity, being the basis of all contracts, the law has to assist him towards whom, by causing enormous lesion, the contract became unjust."\textsuperscript{157} In the French assembly, legislative debate oscillated between arguments for and against the subjectivity of value. Napoleon, recognizing that the Revolution had wrought havoc in land sales, swiftly cut the Gordian knot and came down decisively in favor of incorporating the lesion doctrine into the French Civil Code:

Is it not clear that the law of rescission is a law of morals that has for its object land? It is of little importance how a person disposes of some diamonds, a few paintings, but the manner in which he disposes of his land is not without importance to society... Can it be within the principles or civil justice to sanction an act by which an individual sacrifices in a moment of folly the inheritance of his fathers and the patrimony of his children regardless of the violence of his passions?\textsuperscript{158}

In the case of the lesion doctrine, the soldier prevailed over the lawyers. Inspired by Roman learning, the drafters of the Louisiana Civil Code, when they reached the issue of a just price in land sales, reproduced the French doctrine of

\begin{footnotes}
\item[154.] Code J. 4.44.2.
\item[155.] For the scholastic development of the just price doctrine, see, e.g., John T. Noonan, The Scholastic Analysis of Usury (1957).
\item[156.] \textit{See} Jean Guillaume Baron de Locrè, \textit{La Législation Civile, Commerciale, et Criminelle de la France} 65 (1827-32).
\item[157.] \textit{Id.} at 193.
\item[158.] \textit{Id.} at 89-91.
\end{footnotes}
lesion with minor changes. In the newly settled frontier society, Louisiana land vendors relied on this doctrine to obtain relief from lopsided bargains.

The antebellum Louisiana jurisprudence offers several decisions on lesion *outre moitié*. As long as the contest involved a vendor and his immediate purchaser, rescission was available, though not assured, because the seller was held to a standard of strict proof in showing the land's true value. By contrast, vendors were less fortunate when they sought rescission against subsequent buyers of the property. In *Snoddy v. Brashear*, a vendor of immovable property, claiming that he had sold his property for less than half its true value, sought rescission against the vendee of his own purchaser. In other words, plaintiff and defendant had no privity, as the plaintiff's original vendee had already sold the land to the defendant. Although no one would have doubted the validity of the plaintiff's claim if he had brought it against his immediate purchaser, the court questioned whether the plaintiff could reach the property in the hands of a third party, bona fide purchaser who was ignorant of defects in the vendor's original bargain and blameless for the vendor's loss. Citing Romanists such as Voet and Fachinoeus, the court noted that the Roman law had not settled the issue whether a vendor could reach beyond his own vendee to a bona fide purchaser. To put the issue in technical procedural terms, there was doubt as to whether the vendor had a real action that followed the property into the hands of the first purchaser's successors, or whether the action was purely personal for the original purchaser. In the second case, once title to the property had become vested in the third party, the vendor's right to rescind the sale would lapse although he might recover monetarily against his original purchaser. Noting that the Louisiana Civil Code had not adopted the French Civil Code's approach that would have authorized the action even against a third party, the Louisiana Supreme Court rejected the plaintiff's claim.

On rehearing, the plaintiff's counsel relied upon a text from Justinian's Digest: "*[et]si nullus dolus intercessit stipulantis, sed ipsa res in se dolum habet.*" This quotation presupposed that a vile price (*minus pretium*) signified fraud (*dolus*), that is, a defect in the parties' consent grave enough to make lesion a real action giving rise to *dolus re ipsa*. In a later hearing of the *Snoddy* case, the court echoed Berlier's skepticism about the likelihood of ever arriving at a just price. In this decision, reminiscent of a line from Butler's *Hudibras*, the court quarreled with the trial judge's estimation of the value of the land at issue:

This is a striking illustration of the danger of introducing lax rules with regard to the action of lesion for deficiency in the price. Land in a wilderness, though richer than the valley of the Nile, is worthless; while

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159. 3 La. Ann. 569 (1848).
161. Samuel Butler, *Hudibras* ("The value of a thing is just exactly what it will bring.").
sand may be turned into gold in the neighborhood of cities. In a section of country like this, undergoing a rapid development, the fluctuations in value of real estate afford a marked contrast to the certainty and stability of prices in a country like France. In appraising the probable value of lands at a past period, it is almost impossible to guard the mind from the influence of those accidental circumstances which have given it its present value.\footnote{162}

Napoleon's arguments in favor of the lesion doctrine prompt one to ask which French land the \textit{Shoddy} court had in mind. In the aftermath of the French Revolution, the value of much land was unstable, and this instability seems to have prompted Napoleon's worry that in a single transaction a modest family, desperate for cash, might lose its entire fortune for a derisory price.

The Roman jurists' concern with the role of price in the characterization of a transaction was also apparent in \textit{Bradford's Heirs v. Brown}.

This case concerned an indenture that transferred land for the price of a dollar. Although this routine recital of consideration would have produced no concern in common law jurisdictions, it vexed civilians concerned with the adequacy and definiteness of the purchase price. As in \textit{Snoddy v. Brashear}, the defendant had acquired the land from the plaintiff's purchaser, not the plaintiff himself. The plaintiff attacked the indenture on two grounds. First, it was void for lesion because the price expressed therein was a dollar, concededly a "vile" price less than one half the property's just value. Second, the transaction was also void as a donation, so went the plaintiff's argument, because it had recited a price, hence rendering it null as a donation as well. This was so, because under the Louisiana Civil Code, a donation, by definition, was a gratuitous agreement in which no price at all could be recited.\footnote{163} Reviewing texts from Roman law, the Siete Partidas, and Pothier, the court rejected both of the plaintiff's arguments and held, as in \textit{Snoddy v. Brashear}, that "the vendee of an estate cannot be disturbed on the score of lesion, by which his vendor acquired it. The sale is not therefore void, and if the first vendor wishes to avail himself of the benefit of the law, he must bring suit to have the act set aside, giving his own vendee the option of paying the difference between the just price and that which was paid."\footnote{165}


\footnote{163} 11 Mart. (o.s.) 217 (La. 1822).

\footnote{164} On the price issue, traps for the unwary were concealed everywhere. A fortiori, a sale for "good and valuable consideration" without reference to any currency could be fatally flawed because the price had to be stipulated in \textit{pecunia numerata} (in current money). Conway v. Bordier, 6 La. 346 (1834).

\footnote{165} 11 Mart. (o.s.) at 220-21.
R. Insolvency: Creditors' Rights

As suggested earlier, Louisiana courts sometimes took their bearings from Roman law authorities even while positive Louisiana legislation compelled a result contrary to that dictated by Roman law. In such cases, the courts seem to have found consolation in their agreement with Roman jurists as to the characterization of a legal issue even though the Roman resolution of the issue might be inconsistent with Louisiana law. *Hesser v. Black* fits well into the category we have just described. In this case, the plaintiff, a judgment creditor of the debtor, filed a revocatory action, i.e., an action to rescind his debtor's alleged fraudulent conveyance to a third party. Because the plaintiff had become a creditor of the debtor after the alleged fraudulent transfer, the court was compelled to reject the plaintiff's suit based upon former Louisiana Civil Code article 1988, which barred creditors from annulling a contract made before the time the debt accrued. In the course of its opinion, the court contrasted the result of the case with that of Roman law and Spanish law, and noted that the enactment of Article 1988 required a deviation from the Roman and Spanish result:

The proof adduced, shews, however, that the plaintiff, in execution, did not become creditor until years after the date of this conveyance from the plaintiff's father, which is alleged to be fraudulent. Under such circumstances, our law only gave an action, when it was proved that at the time of the alienation the party alienating had the intention to defraud the future creditor. The great difficulty of furnishing this proof, in practice, made the Spanish jurisprudence very nearly the same as the Roman, where the rule was, that subsequent creditors could not revoke alienations made previous to their contracting with their debtors, unless the money lent went to pay the old creditors, in which case it was held the new ones might exercise their rights. The amendments lately made to the civil code, contain a positive provision, that creditors cannot annul a contract made before the time their debt accrues.

To the present, Louisiana law has retained the rule announced in *Hesser v. Black*.

166. See, e.g., supra text accompanying notes 60-61 and 148-151.
167. 5 Mart. (n.s.) 96 (La. 1826).

If a debtor, in insolvent circumstances, shall anticipate the payment of a debt not yet payable, and shall make this payment to the injury of the creditors whose debts were either then due, or would fall due before that of which he anticipated the payment, this shall be deemed to have been done in fraud of the creditors, and the creditor so preferred shall be obliged to share the loss ratably with the complaining creditors, each creditor, however, preserving the right of mortgage or privilege, if any, which his original debt gave him by law.

169. 5 Mart. (n.s.) at 97-98 (citations omitted).
S. Excursus: Transfer of Property by Bare Consent versus Transfer by Delivery

To put in context the two cases next under discussion, some background on the sharp contrast between Roman law and French law concerning the moment of perfection of a sale is required. Classical Roman law rested on a dogma that a contract of sale itself did not operate transfer of a property. Although a contract imposed upon the seller the obligation of delivery, called traditio, the contract itself did not divest the property from the seller and revest it in the buyer. The traditio executed the obligation and the property was normally transferred when the transferee obtained possession.\(^{170}\)

Due partly to the exaggerated commitment to individual autonomy at the time the French Civil Code was enacted, French law, and Louisiana law as a legatee of French law, adhere rather rigorously to a view of property as a mental bond.\(^{171}\) According to prevailing French and Louisiana legal doctrine, a buyer may become owner of an object by the parties' bare consent. This principle is captured in French Civil Code article 1583 on which Louisiana Civil Code article 2456 is based. “Ownership is transferred between the parties as soon as there is agreement on the thing and the price is fixed, even though the thing sold is not yet delivered nor the price paid.”\(^{172}\)

Historians have generally credited the medieval canonists with having originated the idea that a bare agreement, unattended by formalities such as a writing or delivery, constituted the law between the parties. From the works of canonists, as well as natural law theorists like Grotius and Domat, emerged an antifeudal view of contract as an expression of the autonomy of individuals, who by their nature were free and equal and could bind themselves to legal consequences by their wills alone. As the distinguished French legal historian Viollet noted, a transfer of ownership by mere consent of the parties would seem a “monstrous heresy to the eyes of a Roman jurisconsult of the classical period.”\(^{173}\)

During the period of Louisiana jurisprudence under discussion, the evolution of Louisiana law away from the Roman requirement of delivery for perfection of a sale, and toward a French-inspired perfection of sale by bare consent is particularly impressive. In Durnford v. Syndics of Brooks,\(^{174}\) one Brooks, a debtor of Durnford, agreed to transfer to Durnford certain of his goods. Under

\(^{170}\) Beginning with the Roman law background of traditio as an essential for transfer of land, the evolution of the role of delivery in property transfers is treated expertly in Alejandro M. Garro, The Louisiana Public Records Doctrine and the Civil Law Tradition 9-63 (1989).

\(^{171}\) See La. Civ. Code art. 2456 and cmt. b; Garro, supra note 170, at 25-27, refers to “consensualistic principle,” whereby ownership may be transferred by intellectual operation alone.


\(^{173}\) On the natural law jurists' contribution to the doctrine that property could be transferred by consent alone, see Garro, supra note 170, at 25-27.

\(^{174}\) 3 Mart. (o.s.) 222 (La. 1814).
their agreement he delivered some of the goods into Durnford's possession. Soon afterwards, Brooks failed financially, and Brooks's creditors seized the goods still on his premises, although the goods had already been promised to Durnford. To obtain the seized goods, Durnford sued Brooks' creditors. Rejecting Durnford's claim, the court quoted the Roman law rule on delivery as an essential condition for perfection of a sale. "It is a principle of law, that this contract does not of itself transfer to the purchaser the property of the thing sold: such transfer is the effect of delivery. Traditionibus & usucapionibus dominia rerum, non nudis pactis transferuntur."173

A few years later Martinez v. Layton176 mentioned the Roman maxim quoted in Durnford but refused to follow it for the following reasons:

[T]he change which has taken place in the condition and affairs of society from the vast extension of commerce, and the great use of credit in modern times, has induced several of the modern nations of Europe to introduce a new and much more complex doctrine in relation to the alienation of immoveable property; and cases are contemplated, where, though the sale is declared perfect between vendor and vendee, and the thing actually belongs to the latter, it yet remains the property of the seller, so far as third parties, possessing particular rights, are concerned. We have adopted this principle in our legislation.177

By virtue of Louisiana Civil Code articles 517,178 518,179 and 2456,180 the "much more complex doctrine" referred to in the Martinez opinion remains effective law in Louisiana.

175. 3 Mart. (o.s.) at 225. Code J. 2.3.20 (C. dePactis) (The ownership of property is transferred by delivery and usucaption, and not by informal agreements without consideration).
176. 4 Mart. (n.s.) 368 (La. 1826).
177. 4 Mart. (n.s.) at 373.
178. La. Civ. Code art. 517 provides:

The ownership of an immovable is voluntarily transferred by a contract between the owner and the transferee that purports to transfer the ownership of the immovable. The transfer of ownership takes place between the parties by the effect of the agreement and against third persons when the contract is filed for registry in the conveyance records of the parish in which the immovable is located.

179. La. Civ. Code art. 518 provides:

The ownership of a movable is voluntarily transferred by a contract between the owner and the transferee that purports to transfer the ownership of the movable. Unless otherwise provided, the transfer of ownership takes place as between the parties by the effect of the agreement and against third persons when the possession of the movable is delivered to the transferee.

When possession has not been delivered, a subsequent transferee to whom possession is delivered acquires ownership provided he is in good faith. Creditors of the transferor may seize the movable while it is still in his possession.

180. See supra text accompanying notes 170-171.
As already indicated, the influence of Roman law occasionally overflowed the banks of Louisiana’s civilian tributaries and entered the broad stream of American jurisprudence. For example, Roman doctrines on mandate, or principal and agent, informed American commercial jurisprudence generally. In the formative years of the Republic, this influence was attributable largely to the work of Justice Joseph Story, whose abiding interest in Roman law and civil law has already been noted. Viewing Roman law as a “great fountain” of rational jurisprudence for the solution of legal problems in the young republic, Story authored several brilliant treatises in which he comparatively treated common law and civilian approaches to legal issues and openly conceded his debt to Roman law. Story’s treatise on agency, aptly titled Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence with Occasional Illustrations from the Civil and Foreign Law, used the Roman law of mandate as the intellectual scaffolding for his project, an elaboration of Anglo-American law of principal and agent. This treatise, like his others, fairly oozes Roman law, broadly quoting Roman authorities, the Civil Codes of France and Louisiana, as well as civilian jurists such as Pothier, Domat, Heineccius, and Cujas.

Already suggested in the above discussion of the McDonogh will case and Justice Story’s contribution on legacies to pious uses, the early American jurisprudence sometimes disclosed an intellectual dialectic between Story’s treatises and American courts. This dialectic is evident in commercial cases, whose outcomes Story may have hoped to influence intellectually with his abundant references to Roman and civil law. For example, in Hunt v. Rousmanier’s Administrators, a celebrated early American case on the law of agency, the United States Supreme Court considered at length the durability of a mandate or agency after the principal’s death. Distilled to its essence, the issue was whether and in what circumstances an agent could accomplish the purpose of his engagement after his principal’s death. According to the traditional and established common law rule, the agency should end on the principal’s death, for the agent at that moment logically had no meeting of minds

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181. See, e.g., supra text accompanying notes 96-104, 107-109, and 119-121.
182. See supra note 14.
183. See, e.g., M.H. Hoeflich, John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer, 29 Am. J. Legal Hist. 36 (1985). On the contents of a good Louisiana law library in the period under review, one should consult Hoeflich’s piece on the library of Samuel Livermore, a prominent Louisiana attorney and Harvard alumnus. In the 1800’s both Livermore and Story contributed significant civilian and Roman law collections to the Harvard library. See id. at 57-58.
185. See supra Section IV.L.
186. 21 U.S. (8 Wheat.) 174 (1828).
with the principal and thus could not act any longer for him. The Supreme Court decision cited Story’s treatise on agency at a point where Story, by means of foreign references and civilian authorities, focused on revocation of an agency by operation of law upon the death of the principal or agent. From a reading of these sections of the treatise, one may detect Story’s strategy: without forcing specific conclusions upon his readers, Story endeavored to contextualize the issue for them by comparing the treatment of the matter under common law and Roman law. In short, he was encouraging American lawyers to emulate jurists of other commercially sophisticated countries to consult the storehouse of Roman law for appropriate solutions to legal issues. Story’s analysis of Roman law, strategically situated in the crucial discussion of revocability of agency, must have influenced the Supreme Court justices who participated in the Hunt case. The Hunt case influenced later editions of Story’s treatise on agency; one such edition quoted abundantly from the Hunt case and drew direct parallels with Roman and civil law solutions to the issues arising in the case.

To illustrate Story’s scholarly debt to Roman law, a typical passage from his treatise, which notes that the Roman mandate was essentially gratuitous and suggests even that English law owed a debt to the Roman law of mandate, is reproduced below:

In the Roman law the agent was called a procurator, and he was thus defined: “procurator est, qui aliena negotia mandatu domini administrat,” so that the dominus (master) of the civil law answered exactly to the principal of our law. Indeed, the definition of an agent at the common law seems borrowed from this very source; and Lord Chief Baron Comyns has well expressed it, when he says, that “[a]n attorney is he, who is appointed to do any thing in the place of another.” It may not be without use to remark, that in the Roman law an agency was sometimes called, in a large sense, a mandatum (mandate); and the principal was denominated mandator or mandans (the employer or mandant), and the agent mandatarius (the employee or mandatory). For, in the primitive sense of the term, mandatum was not so much a contract, from which there sprung up a civil obligation and action, as a business or negotiation (negotium), which was confided to the discretion of the mandatory; “mandare est gerendum quid alicui committere.” But, in the more ordinary sense of the word, mandatum was limited to such an agency, as was authorized and undertaken for another gratuitously, and without reward. For, if a compensation was to be received, it fell under another head, and was a locatio et conductio, a letting and hiring of the services of the agent; and it was then governed by somewhat different obligations and duties. Hence it is declared: “mandatum, nisi gratuittum, nullum est, nam originem ex

187. 21 U.S. (8 Wheat.) at 175.
188. See Story, supra note 184, at 649-66.
Influenced by Roman law, the Louisiana Civil Code has traditionally declared that mandate is essentially gratuitous. The period of Louisiana jurisprudence under consideration offers a number of decisions on the law of mandate in which the influence of Roman law is acknowledged. In Flower et Al. v. Jones and Gilmore, the plaintiffs, as commission agents of the defendants, contended that the defendants had tacitly approved or ratified certain of the plaintiffs' actions in the transaction of business for the principal's account. The court was called upon to decide if a principal's silence was tantamount to his explicit ratification of the agent's acts. The court concluded that it was, relying upon a maxim of Roman law as well as French authors like Merlin. In reliance on a text of Justinian's Digest, the court also articulated a corollary to the rule that an agent, because he acts for his principal in all respects, must transfer to the principal the benefits he acquires during his engagement. According to the corollary, the principal must release (or indemnify?) the agent for liability the latter may have incurred in the performance of his duties as agent.

U. Arra (Earnest Money)

Among distinctive Roman legal institutions, few have left a clearer imprint upon the law of Louisiana and her sister states than earnest money. In classical Roman law, this institution, originally known as arra, was either a valuable object, such as a ring, or a sum of money that a buyer delivered his seller in a sale on credit. By means of arra, the buyer assured his seller of his serious intention to acquire the property and eventually to pay the purchase price.

In ancient societies, the institution of arra, in one guise or another, seems to have been ubiquitous. The giving of earnest was so practical that it could hardly have avoided its own invention. Before arra had become popular in Rome, it was known in Greek commercial practice as arrabon. There is clear evidence of arra in Greco-Egyptian law as well. According to de

189. Story, supra note 184, at 3-4 (emphasis added).
190. La. Civ. Code art. 2991 provides that "[t]he procuration is gratuitous unless there has been a contrary agreement." On the gratuitous nature of mandate, see Alan Watson, The Law of Obligations in the Later Roman Republic 150 (1965).
191. 7 Mart. (n.s.) 140 (La. 1828).
192. "Semper qui non prohibet pro se intervenire mandare creditur." Id. at 143.
193. Dig. 17.1.45 ("The Action on Mandate or the Counteraction"). The Roman law of mandate is developed in Watson, supra note 190, at 147-56.
194. de Zulueta, supra note 18, at 22. According to Moyle, a pacta arralia in relation to sales was known at the time of Diocletian. Moyle, supra note 18, at 42.
195. de Zulueta, supra note 18, at 23.
Zulueta, arrabon "seems to have remained the real sanction of sale in the Greek East throughout the Hellenistic period." The apostle Paul mentioned arrabon in the Epistle to the Ephesians 1.14. Arra served several interrelated functions, all stemming from the popular idea that "money talks." Then and now, earnest spoke eloquently—in various eras, it conveyed to sellers a variety of cherished, though sometimes inconsistent messages. As we have indicated, arra served as a badge of the purchaser's serious intention. It indicated that the parties had passed from preliminary negotiations to a definitive agreement. Arra could also serve the function of a penalty or liquidated damages, for when the buyer defaulted, the disappointed seller conveniently retained the arra as damages for his trouble. If the seller defaulted, then the disappointed buyer recovered the arra from the seller, together with a like amount as damages for his own trouble. A persistent problem associated with arra was that sometimes the parties' intentions about this advance sum might be unclear. If the purchaser had made a good bargain, then he might insist on the seller's delivery of the property, not merely on recovery of double the earnest. To justify this claim, the buyer in an unclear case could argue that the arra, far from being a forfeit upon default, was a down payment against the purchase price.

A practical and flexible device, the institution of arra appeared often in medieval law. In 1804, the French code drafters enshrined it in their Civil Code, whence the institution migrated to Louisiana Civil Code article 2464 where it is now called earnest and retains an ancient and classical formulation that would be fully recognizable to Roman jurists. Article 2464 provides:

A sum given by the buyer to the seller in connection with a contract to sell is regarded to be a deposit on account of the price, unless the parties have expressly provided otherwise.

If the parties stipulate that a sum given by the buyer to the seller is earnest money, either party may recede from the contract, but the buyer who chooses to recede must forfeit the earnest money, and the seller who so chooses must return the earnest money plus an equal amount.

When earnest money has been given and a party fails to perform for reasons other than a fortuitous event, that party will be regarded as receding from the contract.

To lawyers knowledgable in Roman law, the evolution of Louisiana jurisprudence on earnest money is a familiar story. Buyers and sellers everywhere seem still to favor the delivery of earnest to bind a sale, particularly a sale of immovable property. Like the ancient Romans and Greeks, parties today often

196. Id. at 21-23.

197. Code civil art. 1590 (Fr.) ("If the promise to sell has been accompanied by earnest, either party is free to withdraw from it, the party who has given the earnest on terms of forfeiting it, the party who has received the earnest on terms of repaying double.").
fail properly to designate the purpose of the payment or to explain its disposition upon a party's default. Such failure played a role in the landmark decision, Capo v. Bugdahl. In this case, the plaintiff, a prospective purchaser, sued the defendant seller to compel the latter's execution of a conveyance of real estate. The basis of the suit was an agreement whereby the seller agreed to sell property to the plaintiff-purchaser for a price of $2,300. In the agreement, the seller acknowledged receipt of ten percent of the price and certified that the balance would be due at the act of sale. The parties did not designate the ten percent payment as a deposit against the price or as earnest, and this ambiguity proved crucial. In the suit, the seller denied her duty to convey the property, claiming that the ten percent payment was earnest money and that, in accordance with Louisiana Civil Code article 2463, upon forfeiting double the earnest, she should be discharged from her duty to convey. To the contrary, the plaintiff contended that the ten percent payment, far from being a forfeit upon default and an escape hatch from the sale, represented a down payment against the price.

In considering the parties' arguments, the court observed:

The Roman civil law, referred to in argument, presents an inviting field which we must decline to enter, as we do not imagine that it would throw any light upon the subject. The Roman law upon the subject is interesting, but in view of the many changes it is not at all conclusive. We will, none the less, in passing, quote from a summary touching Roman law: It is intended by the French word "arrhes," an amount which one of the parties hands to the other at the moment of the contract. According to ancient usage of Rome, the "arrhes" were given as a token of a concluded bargain, as an evidence on the price. Under Justinian it assumed another character. They were given, not to serve as proof of the contract, but to retain the faculty to abandon it on the condition of losing the "arrhes" if the contract was not carried out by the one by whom they were given, or to pay double if the contract was departed from by the promisor. The "arrhes" were then a forfeit, a sort of resolutory condition of the sale.

The court then noted that "arrhes," the French version of arra, was analogous to the common law term "earnest money." After reviewing civilian authorities, the court rejected the buyer's demand for relief on a rationale that classical Roman jurists would have appreciated:

Before concluding we are led to say that it does appear that the amount must have been considered as forfeit money by the parties, for, if the plaintiff had elected not to complete the agreement, he certainly would not have recovered the amount he deposited. It could not have been

198. 117 La. 992, 42 So. 478 (1906).
199. Id. at 996-97, 42 So. at 479-80.
retained as part of the price. It would have been retained by the vendor as an amount deposited as a guaranty of the promise which the plaintiff failed to make good.\textsuperscript{200}

\section*{V. Conclusion}

By 1808, the date of the enactment of the Digest of Louisiana, Louisiana law bore the unmistakable imprint of the Roman tradition. By 1860, Rome’s influence upon Louisiana law was reasonably fixed and finite; and that influence, though it might persist, was no longer a by-product of colonizing efforts that began when Columbus set sail for the New World. From the Civil War until the present, Roman law would be imported chiefly through academic channels by European scholars who found the distinctive Louisiana law school curriculum hospitable to their intellectual interests. The Union’s ultimate defeat of the South hastened Louisiana’s inevitable integration into the political and legal fabric of the American nation. By 1865, well after the colonizing phase of Roman law had drawn to a close, the influence of American law upon Louisiana law began to accelerate. Louisiana lawyers, cut off from traditional doctrinal nourishment and bereft of Spanish, French, and Latin, increasingly followed paths of their counterparts in other states.

The continuing vitality of Roman juristic method in Louisiana law attests more to the classical Roman jurists’ extraordinary gift for problem solving than to any antiquarian predisposition of Louisiana lawyers to embrace Roman law for reasons of aesthetics or tradition. By training, Louisiana lawyers, like American lawyers generally, have been a pragmatic lot. Their attachment to venerable, time-honored ways results from a sense that those old ways still work better than inventions of more recent vintage.\textsuperscript{201} As earlier implied, the choice of Louisiana decisions for this study has been eclectic: the dramatic allure of a decision, its historical appeal for Louisiana lawyers, and even its eventual resolution in the United States Supreme Court have sometimes influenced the selection more than subtleties of judicial method. Like great archaeological excavations, legal systems touched by Roman law are fascinating and inexhaustible. A survey more comprehensive and systematic than this one might attach greater importance to certain cases for their Roman inspiration alone.

Lest lament or apologize for tardiness in having waited until the eve of a new millennium to begin assessment of Louisiana’s debt to Roman law, let us recall several points. First, the pragmatism of Louisiana lawyers has sometimes compelled them to mute unique features of Louisiana law. Expediency alone has cautioned them to avoid an unwavering policy guided by “\textit{vive la difference},” for

\textsuperscript{200} \textit{117 La. at 998, 42 So. at 480.}

Louisiana today, unlike California and New York, is commercially too feeble to dictate application of her unique laws to most transactions. Many Louisiana lawyers, in their effort to enter the mainstream of American legal culture and to blend indistinguishably with lawyers elsewhere, have consciously or unconsciously ignored or downplayed distinctive European aspects of our legal culture, including the influence of Roman law upon local law. After all, early American settlers, having had their fill of European culture, did not welcome reminders of old world institutions they had fled.

Second, until rather recently, American scholars virtually ignored the evolution of American law, even if the legal artifacts in question had a purely domestic provenance. Surely debts to European law, when they were reluctantly acknowledged, were to be understated. Third, although American law schools gave Roman law considerable attention a century ago, today the subject is virtually a black hole in the constellation of subjects in the American legal curriculum. Fourth, as the Romans taught us, the moment is always right to excavate and to plumb the depths of our collective experience. The history of Roman law and civilization is rich in momentous accidents. Roman law began its second life as the *ius commune* of Europe thanks to a vigilant scholar’s chance rediscovery of Justinian’s legislation in Italy.\(^2\) In the nineteenth century, a similar vigilance led the German scholar Niebuhr, working in the cathedral library at Verona, accidentally to detect a version of Gaius’ Institutes beneath a text of St. Jerome.\(^3\) Until the last century, pasture covered some of the most important Roman monuments and ruins, including the Roman forum in Rome.\(^4\) Except for an occasional stone fragment in a landscape of trees and flocks, the Roman district a short walk away from the Coliseum was a

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203. *Id.* at 35.
204. Roman tour guides and guidebooks routinely make this point. Here is a typical entry on the Roman Forum extracted from a current tourist guide:

> The Clivus Palatinus leads from the domestic extravagances of the Emperors down into the Forum, the Civic center of ancient Rome. This area, once used as a burial ground by the original inhabitants of the surrounding hills, was drained by an Etruscan Kin in the 6th Century B.C. Until excavation began in the last century the Forum, buried under eight meters (25 feet) of dirt, was known as the “Campo Vaccino” because contadini tended their herds among the ruins. Today it reveals a stupendous array of ruined temples, public buildings arches and shops.

Insight Guide Italy 94 (1989). Though far less picturesque than the above, the Michelin travel guide confirms the dates of the excavation as the nineteenth and twentieth centuries. Michelin, Guide to Italy 167 (1989). To be sure, the rustic charm of the site has not vanished utterly. Of the Palatine, the Insight editors remark that:

> even the investigations of archaeologists cannot deprive this location of its wild charm. It is the last remaining place in Roman where you can find a landscape as it might have been drawn by Piranesi or Claude Lorraine. Roses, moss, bright poppies, growing amidst the crumbling bricks and shattered marble give this location a romantic rather than an imperial splendor.

*Id.*
bucolic scene that owed more to Virgil's eclogues than Justinian's *Digest* and Gaius' *Institutes*. These important historical accidents should inspire us to continue the exploration of the legal site in Louisiana, for many fascinating delights remain to be uncovered by rigorous research.

Non tamen sine usu fuerit introspicere illa primo aspectu levia ex quis magnarum saepe rerum motus orientur.  

205. "Still it will not be useless to study those at first sight trifling events out of which the movements of vast changes often take their rise." P. Cornelius Tacitus, *The Annals and the Histories* 72 (Alfred J. Church & William J. Brodribb trans., 1952).