Plainol Citations by Louisiana Courts: 1959-1966

Joseph Dainow
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I. INTRODUCTION

A. History

A brief statement of Louisiana's historical background is a prerequisite to an understanding and appreciation of the subject matter of this article. Louisiana was first settled by colonists from France in the early part of the 18th century, and the principal laws in force were the French royal ordinances and the Custom of Paris.1 In 1763, after the Seven Years War, France lost Louisiana to Spain, but the French colonists physically resisted Spanish rule until a military force in 1766 imposed Spanish dominion and administration. Spanish political control continued for about forty years, and technically the laws of Spain took the place of the French law. In 1801, Napoleon reacquired Louisiana for France, but before taking possession of the territory it was secretly sold to the United States in 1803. For a three-week period in December 1803, a French administrator took possession for the primary purpose of making the formal transfer to the United States.

The early American administration favored the introduction of the Anglo-American "common law," but there was too much resistance from the inhabitants, and it was decided to let them keep their "civil law." In 1808, there was published "A Digest of the Civil Laws now in force in the Territory of Orleans, with

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*This article brings up to September 1966 a prior report as of June 1965, which was submitted to the VIIth International Congress of Comparative Law (Uppsala, August 1966) within the general topic "Use of Comparative Law in Judicial Decisions." The earlier report was entitled "The Use of English Translation of Planiol by Louisiana Courts"; it was published in 14 AM. J. COMP. L. 68 (1965), and is largely incorporated into the present article with the permission of the Journal.

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1. Hood, The History and Development of the Louisiana Civil Code, 19 LA. L. REV. 18 (1958), 33 TUL. L. REV. 7 (1958); Merrick, Louisiana, Its Law and Their Sources, 3 ALBANY L.J. 268 (1871); 29 AM. L. REGISTER 1 (1890); Dainow, The Louisiana Civil Law, in CIVIL CODE OF LOUISIANA XV (Dainow, 1961 ed.).
alterations and amendments adapted to its present system of
government"—generally known as the Civil Code of 1808.2

The exact and complete identification of this body of civil
law has not been fully established. Many Spanish sources were
used, but the redactors followed the model of the new French
Civil Code of 1804 (generally known as the Code Napoléon).
Although the Louisiana code was promulgated in two official
languages the original version was written in French while the
English was the translation; there was no Spanish text at all.
For the Louisiana Civil Code of 1825, a considerable amount of
additional material was taken from French sources, and here
also the French version was the original text with the official
English version as a translation (not without errors). Again,
there was no Spanish text.

During this period, an issue was raised as to what civil law
was in force in Louisiana immediately prior to its acquisition
by the United States, and the Supreme Court of Louisiana held
that it was the Spanish civil law.3 In view of the long Spanish
regime which preceded these first codification measures in Lou-
isiana, certain historical questions (concerning the extensive use
of French law and the French language) have not been fully
answered and documented.4 Various conjectures have been of-
fered, but they are not within the scope of this article.

Despite the incompleteness of the legal history concerning
Spanish and French sources, and despite the court’s ruling in
the Cottin case, there is an absolute consensus that during this
formative period after 1803 the French legal influence was
clearly predominant. Combined with the continuing predomi-
nance of the French language, the nineteenth century showed
a very strong influence of French culture patterns. The court
decisions reflect intensive legal scholarship and considerable con-
sultation and use of French legal authorities.

The twentieth century brought marked increases in popula-
tion, business, industry, individual mobility, transportation, and
communication. There was a marked decrease in the fluency of
the French language and the use of French legal materials. At

2. Dainow, The Louisiana Civil Law, in CIVIL CODE OF LOUISIANA, xviii-xxii
(Dainow, 1961 ed.); Hood, The History and Development of the Louisiana Civil
4. Dainow, Morveau-Listet’s Notes on Sources of Louisiana Civil Code of 1898,
the same time, there were various influences of the common law in Louisiana's legal development.

Louisiana was a part of a growing new country with many kinds of social and economic problems that called for the same solutions as prevailed elsewhere. Louisiana's judicial decisions were reported and classified along with those of the other states. The practice increased to make more use of cases in lawyers' arguments, in judges' opinions, and in legal education. It was easier to adopt the socially acceptable solution of the common law than to support the interpretation of basic principles without the aid of much doctrinal writing by legal scholars.

This dearth of indigenous doctrinal materials, combined with the language barrier, made for much less use of French sources and civil-law method. Concurrently, during the period of the first third of the present century, the common law offered many convenient reference works and treatises in English as well as the mass of reports and digests with all kinds of facilitating research devices.

During the period of the second one third of this century, beginning in the early 1930's, there was a resurgence or renaissance of active interest in the civil law as Louisiana's rich legal heritage and tradition. This emanated primarily from the law schools, with new emphasis in the instructional programs in the consultation and use of French (also Spanish) legal source materials and references, and especially in the publication of legal journals which emphasized the civil law, its sources and its techniques. In particular, the 40 volumes of the *Tulane Law Review* and 26 volumes of the *Louisiana Law Review* now constitute (and continue to publish) the principal repository of doctrinal and historical materials on the Louisiana civil law.

Another important factor during this period was the establishment in 1938 of the Louisiana State Law Institute, which had as one of its original major objectives the reassertion and the strengthening of the civil law in Louisiana. Its first major project was the Compiled Edition of the Civil Codes of Louisiana.
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which brought together the successive texts of the Louisiana Civil Codes of 1808, 1825, and 1870, with the English and French texts of the first two, along with the corresponding provisions of the 1804 Code Napoléon or the 1800 Projet of the French Civil Code (with English as well as French text). In due course, the Institute completed a compilation of statutes related to the Civil Code (1942); a Criminal Code, which was adopted in 1942; the Revised Statutes, which were adopted in 1950; a Code of Civil Procedure, which went into effect in 1961; and a Code of Criminal Procedure, which was adopted in 1966.

From the very beginning, one of the Institute's chief concerns has been the small amount of doctrinal materials on Louisiana civil law. One method of meeting this problem was a program of English translations to make available and to encourage the consultation and use of doctrinal works on the parent legal system, the civil law of France. The first major project in this category was the translation of the Planiol Civil Law Treatise, which suffered many vicissitudes and delays but which finally appeared in 1959. Three other Institute translations have already been completed; these are Gény, "Méthode d'Interprétation et Sources en Droit Privé Positif" in 1963, and Aubry and Rau's treatises on "Obligations" in 1965, and "Property" in 1966. Additional translation projects now in preparation include Aubry and Rau on "Donations," and Baudry-Lacantinerie on "Prescription." As the utilization of the Planiol translation becomes more frequent and habitual, the Louisiana legal profession will move more easily into the use of the other civil law translations.

From an idealistic point of view, the use of translations is generally objectionable. Not only is some of the original meaning lost in the process, but the whole purpose and significance

7. PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) (6 volumes) (1959) [hereinafter cited as PLANIOL].
of the consultation may be depreciated. It must be granted that the ideal solution is rather a fluency in the foreign language which would result in consulting the original works and many more of them.

A realistic appraisal of the situation reveals the impossibility of French becoming a current language of the Louisiana legal profession. Accordingly, the available choice is not as between using a translation or consulting the French original, but a more limited choice between the use of a translation or having no consultation at all (except by a few experts). On this basis, translations are warranted and desirable; they can prove extremely useful.

The Institute is also trying to sponsor and to encourage the writing of shorter or longer treatises on the various topics of the Louisiana civil law.

It may well be asked why Louisiana has not produced more doctrinal works on its civil law. Two reasons immediately come to mind. Until recently, the number of those in the legal profession (including the law schools) was not sufficient to make any such publication commercially feasible. That is why the law reviews with their university support became the principal outlet for such materials, in small units of leading articles, comments, and casenotes. Secondly, the potential writers are the professors of civil law who have never been numerous enough or free enough from other assignments to do such comprehensive writing.

As we approach the last one third of the current century, the focus in the interest concerning the nature of Louisiana's legal system is shifting. Whereas there had been both open and subtle conflict between the civil law and the common law, each vying, as it were, for the controlling and determinative characteristic of the system, the realization is spreading that there is no question of victory or defeat by the one or the other but rather a combination of both. There is a widening acceptance of the fact that the Louisiana legal system is sui generis, while falling into what might be called a category of "mixed jurisdictions."

There is no longer a debate or dialogue about the ascendancy of the civil law or the common law, but in the face of the lan-
guage gap and the dearth of comprehensive Louisiana doctrinal materials every effort must be made to preserve a maximum of the civil-law heritage and the civil-law method in an atmosphere where it is easier to use the common-law materials and techniques. The most effective single achievement of this sort has been the 1959 English translation of Planiol's "Traité Élémentaire de Droit Civil."

B. Planiol

The history of the Planiol translation project is more fully stated in an article in the American Journal of Comparative Law. Suffice it here to say that the Planiol treatise was chosen for translation by reason of the unanimous acclaim it had received in France and in other countries for its scholarship, comprehensiveness, clarity, readability, simple style, and conciseness of ideas. It combines Roman law and historical perspective with modern developments and comparative law; it also shows a realistic appreciation for the decisions of the courts.

When the Louisiana State Law Institute decided to translate Planiol, the current edition was of 1938 and 1939, and the decision to use this text was not changed even though later editions appeared before much progress had been made on the actual translation. There were two principal reasons: (a) the editions of 1938 (vol. 3) and 1939 (vols. 1 and 2) are the last ones in which the spirit and content and form of Planiol's personal work were preserved; thereafter Ripert made substantial changes and incorporated more of his own ideas, and (b) the newer developments in French law and French legal thought, reflecting the modern evolution in the French social and political structure, are less significant in the understanding and interpretation of the Louisiana Civil Code which is more closely related to the older French texts and traditions.

With the interruption of the war years, the problems incident to translators, and those in getting the translation printed, it was only in October 1959 that the work was actually published by the West Publishing Company in a very fine edition. The translators were Judge Pierre Crabites (vol. 1), Judge Robert L. Henry (vol. 2), and Professor Jaro Mayda (vol. 3); in the final editorial preparation of the manuscript by the then Direc-

tor of Legal Research of the Louisiana State Law Institute, Carlos E. Lazarus, the parts were co-ordinated into a coherent whole.

In anticipation of this Planiol translation, the present writer compiled a complete system of cross-references from the Louisiana Civil Code to the Planiol treatise. The references are to volume and section of the French original, which were preserved in the English translation. These cross-references first appeared in 1952 in the Louisiana Civil Code Annotated as the first item in the cross-references group under each article, and now the whole set is incorporated not only in the Planiol translation but also in other places. This concordance opens the Planiol treatise immediately to an appropriate place of reference as the starting point for inquiry and examination.

In a review of the Planiol Treatise when it appeared in 1959, I used the following opening and closing paragraphs:

"The publication of a single work will sometimes have a slowly reverberating but very far-reaching effect. Such may well be the case for this English translation of Planiol in the future development of the civil law of Louisiana."

"It can hardly be expected that the publication of this Planiol Civil Law Treatise in English will immediately or in the very near future assure to the civil law of Louisiana all its ancestral character and flavor. It would be unrealistic to think of turning time back to the starting point. The present law incorporates the life of the people and cannot be erased. However, just as life moves on, so does a legal system live and breathe. In the evolution and development of the civil law that lies ahead in Louisiana, this English version of the Planiol Civil Law Treatise can have a long-range, pervasive, and healthy influence."

It was the hope and expectation that the Planiol translation would increase and improve the civil-law part of the approach to solution of legal problems by the Louisiana legal profession, and now that seven years have elapsed an attempt can be made to estimate the extent to which this has been realized. Actually, there has never been any period in Louisiana jurisprudence dur-

ing which it can be said that there was no consultation of French and civil law authorities. The present attempt to evaluate the influence of the Planiol translation has the limitation that there is no accurate basis of knowing exactly what would have happened if it did not exist. The fact remains, however, that many lawyers and practically all the appellate judges now regularly consult Planiol in connection with questions which previously would rarely be researched in French or continental materials. Accordingly, without feeling the need to assert or suggest any mathematical comparison, it is interesting and significant to see just what has actually happened since the publication of the Planiol translation.

In proceeding to this examination, it must be realized that the scope of the inquiry is necessarily limited to the reported decisions of the Louisiana appellate courts. How much use has been made of Planiol in the trial courts, in cases which did not go to appeal, is not ascertainable. Nor is account here taken of the very extensive use of the Planiol translation in connection with law school teaching and law review writing as well as other scholarly research in Louisiana. Neither is any attempt made to incorporate another area of influence and significance of this Planiol translation, outside of Louisiana, in English-language territories of civil law or mixed jurisdictions as well as its use for comparative law purposes (especially for teaching and research) in other American states and in English-language countries of the common law or other legal systems.

It was presumably this last-named consideration which motivated the translator's use of some common-law terminology (e.g., "agency" instead of "mandate," or "easement" instead of "servitude"). From a very orthodox civil-law position, this may be regrettable despite its help as a bridge of understanding and communication. In any event, this choice of terminology should not be considered as any serious detraction from the beneficial values of the translation. At the same time, it is hoped that future translations will utilize a minimum of common-law terminology.

The period covered by this article is from October 1959 to

13. Since the judicial reorganization in 1960, a more extensive final jurisdiction has been exercised by the courts of appeal; many applications are made to the Supreme Court for writs of certiorari and review but relatively few are granted.
September 1966. In the state courts, 62 cases were found in which there were 67 citations of Planiol (and sometimes other French authorities). In the federal court cases dealing with Louisiana law problems, a cursory check of about twenty volumes of reports did not reveal any Planiol citations, nearly all the subject matter being in areas for which there could be no occasion to consult French law. Accordingly, this study is restricted to cases in the state courts.

II. THE CASES

In describing these cases and the Planiol citations, there might be some merit in presenting them in chronological order on account of the cumulative effect of their use. An attempt along this line indicated that such an arrangement would produce more length than interest. Instead, a few of the earlier cases will be used to describe and explain some of the Louisiana techniques and methodology, while the main presentation of cases will be grouped by major areas of subject matter.

Since nearly all of the Planiol citations appear in cases dealing with problems of a civil-law nature (as distinguished from the areas of federal law, uniform laws, and public law areas like constitutional law and criminal law which do not have a civil-law source or background), the grouping covers the main areas of the Civil Code as follows: persons, property, successions, obligations, special contracts, and prescription.

A statistical analysis of the different ways in which the Planiol citations are used and an evaluation will be made in subsequent sections of this article.

A. Illustrations of Method and Purpose

The first judicial opinion to cite the new Planiol translation was in the court of appeal case of Washington v. Washington.\(^1\) Claiming to be the widow in necessitous circumstances, the petitioner brought suit against the heirs for $1,000, as provided by article 3252 of the Louisiana Civil Code.\(^2\) The heirs contended

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\(^1\) 116 So.2d 125, 129 (La. App. 1st Cir. 1959), amended and affirmed, 241 La. 35, 127 So. 2d 491 (1961).

\(^2\) "The privileges which extend alike to movables and immovables are the following:

"..."

"Whenever the widow or minor children of a deceased person shall be left in necessitous circumstances, and not possess in their own rights property to the
that the widow should have demanded a separation of patrimony, and that this right had been lost by the three months prescription provided for this action under article 1456 of the Louisiana Civil Code. The defendants' position was supported by an earlier decision in Danna v. Danna, where the widow's right to claim her privilege was held to have prescribed after a lapse of three months. However, the court was much more impressed with an opposite holding in Beck v. Beck, wherein it was held that the prescription of three months did not apply under a factual situation similar to the case at bar. After discussing and quoting from the Beck case, the court added, "See also Planiol Civil Law Treatise, Vol. 3, Part 2, 2170 et seq. Separation of Patrimony."

The chapter in Planiol on this subject sets out a reasonably brief but very clear and complete outline covering (1) the general concept, (2) cases of applicability, (3) forms of the benefit of separation, (4) effects of the benefit of separation, and (5) loss of right to claim separation. The cases for which the separation of patrimony is available do not include the fact situation in question, and from the general description of the institution and its functions, it follows that the case at bar was not within its intended scope.

As cited by the court, the Planiol reference was used not so much as the basis for its decision as an additional make-weight for the court's adoption of the holding and interpretation of the Beck case, rather than the Danna case. If the Planiol position had been different, one can only conjecture what the court would have done; but the mere thought of this issue implies that some importance would have attached to the consultation of Planiol.

amount of One Thousand Dollars, the widow or the legal representatives of the children, shall be entitled to demand and receive from the succession of the deceased husband or father, a sum which added to the amount of property owned by them, or either of them, in their own right, will make up the sum of one thousand dollars, and which amount shall be paid in preference to all other debts, except those secured by the vendor's privilege on both movables and immovables, conventional mortgages, and expenses incurred in selling the property. The surviving widow shall have and enjoy the usufruct of the amount so received from her deceased husband's succession, during her widowhood, which amount shall afterwards vest in and belong to the children or other descendants of the deceased husband."

16. "The suit of separation of patrimony must be instituted within three months from the express or tacit acceptance of the heirs; after the expiration of this term, it is not admitted."

17. 161 So. 348 (La. App. 1st Cir. 1935).

18. 181 So. 635 (La. App. 2d Cir. 1938).
At this point, it is relevant to inject the question whether it was appropriate to consult French sources with reference to the problem in the principal case. The defendants' contention put in issue the applicability of the separation of patrimony. This subject is dealt with in articles 1444-1464 of the Louisiana Civil Code. The Concordance Table and the Compiled Edition of the Civil Codes of Louisiana show immediately that these provisions correspond to articles 878-881 of the *Code Napoléon*. While the Louisiana Code has more articles than the French (this is found in many places, making 3556 articles in the Louisiana Civil Code as compared with 2281 in the *Code Napoléon*) the basic concept and its applicability are the same.

Incidentally, on a secondary issue which no longer has any practical importance, it may be noted that the length of the prescriptive period was changed in Louisiana. The first Louisiana Civil Code of 1808\(^\text{19}\) followed the *Code Napoléon*\(^\text{20}\) almost literally in providing a three-year prescription with regard to movables, and permitting the action with regard to immovables as long as the property is in the hands of the heir. This was changed in the Louisiana Civil Code of 1825\(^\text{21}\) to fix the prescriptive period at three months for any kind of property, and thus it has been carried into the present Code.\(^\text{22}\) In the 1822 Report of the Commissioners (generally referred to as the "Projet") the change is explained as follows: "We have thought best to abridge the time in which this extraordinary privilege of the separation of patrimony can be exercised, in order not to place too long a space between the opening of the succession and the time when the heir can freely dispose of the effects composing it."\(^\text{23}\)

The first decision of the Louisiana Supreme Court to cite the Planiol translation was *Gueno v. Medlenka*.\(^\text{24}\) The naked owner (remainder-man) and the usufructuary (life estate) both executed oil, gas, and mineral leases on the property, and the case presented for decision the following questions: (a) what are their respective interests in the undiscovered oil, gas, and other

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20. French Civil Code art. 880.
23. *Additions and Amendments to the Civil Code of the State of Louisiana, Proposed in Obedience to the Resolution of the Legislature of the 14th of March 1822, by the Jurists Commissioned for that Purpose* (New Orleans 1823), reprinted as *Louisiana Legal Archives* 198 (1937).
fugacious minerals, and (b) which one, if either, had the right to lease the property for the purposes of exploration and production.

Article 552 of the Louisiana Civil Code provides: "The usufructuary has a right to the enjoyment and proceeds of mines and quarries in the land subject to the usufruct, if they were actually worked before the commencement of the usufruct; but he has no right to mines and quarries not opened." It is a well-established interpretation that exploration for oil and gas is mining.25

The Louisiana Civil Code of 1808 did not contain a corresponding provision, but on the recommendation of the 1822 Report of the Commissioners26 an addition was adopted as article 545 of the Civil Code of 1825. In its basic concept and essential elements, this was the same as article 598 of the Code Napoléon; and it has been continued without change as the present article 552 of the current Revised Civil Code of 1870.

With the aid of this bridge to cross over into the French sources, the court in the principal case not only consulted the Planiol treatise but actually relied on substantial quotations of its text as the exclusive ratio decidendi in reaching the following conclusions.

(1) The usufructuary has no right to minerals which may be obtained from the land (for the first time) after the commencement of the usufruct. Planiol explains that what is extracted from a mine is not a product of the soil but the soil itself, and the exploitation of a mine leads inevitably to its exhaustion. The usufructuary's right to continue an operation already in existence is an exceptional right by express codal provision, but he may not start such an operation.27

(2) The naked owner has the right to search for the minerals during the existence of the usufruct and reduce them to his possession. Planiol's discussion of article 598 of the French Civil Code and of the French law of April 21, 1810 (concerning government permits for any mineral exploitation), clearly indicates

26. 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 52 (1937).
27. 1 PLANIOL no. 2794.
that the usufructuary's right is limited to continue the operation of mines and quarries already opened at the time the usufruct commences; the naked owner has the right to open new mines during the usufruct even though he needs a government permit under the 1810 law.\textsuperscript{28}

Accordingly, the court sustained as valid and enforceable the mineral lease granted by the naked owner and authorized an entry upon the land for exploration and production purposes.

The availability of the Planiol translation has also encouraged a more general consultation of French sources, as illustrated in the case of \textit{Daum v. Lehde}.\textsuperscript{29} Subsequent to an agreement for the sale of a piece of property but prior to the consummation of the sale itself, there was substantial fire damage to the improvements on the property. The prospective purchaser brought suit for specific performance, and one of the alternative demands was to have the defendant complete the sale for the original price, with delivery of the property in its fire-damaged condition together with the insurance money received on account of the fire loss. This claim was based upon article 2220 of the Louisiana Civil Code, which reads as follows:

"When the thing is destroyed, rendered unsalable, or lost, without the fault of the debtor, he is bound, if he has any claim or action for indemnification, on account of that thing, to make over the same to the creditor."

Since there was no previous judicial interpretation of this article in relation to a similar fact situation, and since this provision is verbatim the same as article 1303 of the \textit{Code Napoléon}, reference to the French sources was both appropriate and useful. In dismissing the plaintiff's contention, and holding that the clause "claim or action for indemnification" does not include insurance money, Chief Justice Fournet of the Louisiana Supreme Court relied exclusively on French authorities. In addition to Planiol, these consisted of Colin & Capitant (1953), Bousquet (1805), and one case (1873).\textsuperscript{30}

\textsuperscript{28} 1 \textit{Planiol}, nos. 2795, 2819, 2827.
\textsuperscript{29} 239 La. 607, 119 So. 2d 481 (1960).
\textsuperscript{30} 2 \textit{Planiol}, no. 628; 2 \textit{Colin et Capitant, Cours élémentaire de droit civil français} 406, § 588 (2d ed. 1953); 3 \textit{Bousquet, Explication du Code civil 370} (1805); Douai, 3 Jan. 1873; see 3 \textit{Fuzier-Herman et Darras, Code civil annoté} 240, art. 1303 (1806), in \textit{Daum v. Lehde}, 239 La. 607, 613-14, 119 So. 2d 481, 483 (1960).
An unusual use of the Planiol citation occurred in the case of *Kreppin v. Demarest*. The question at issue hinged upon the validity of a pledge for which there must be a delivery of the thing pledged into the possession of the creditor or of a third person agreed upon by the parties. A decision of the Louisiana Supreme Court, not long before, upheld a pledge where the thing (an insurance policy) was found among the effects of the deceased pledgor, upon the theory that the debtor held the property for the account of the creditor and that as between the parties possession by the creditor is not necessary. In the case at bar, the court of appeal was not willing to go this far, and, in support of its reluctance, it quoted the critical observations (about the Louisiana Supreme Court decision) already published in two local law reviews plus the statement from Planiol that there can be no pledge without delivery.

Even in cases where there is ample direct authority in the Louisiana Civil Code and the decisions of the Louisiana courts, it is not without significance to find the Planiol citation as well. The mere fact of its inclusion is evidence that it was considered worthwhile consulting and citing. This occurred in the case of *Hidalgo v. Dupuy*, where the issue involved the interpretation of Louisiana Civil Code article 2093 concerning obligations *in solido* (which corresponds verbatim to article 1202 of the Code Napoléon). The court held that a negligent car driver and his liability insurer are solidary obligors without express stipulation to that effect; consequently, the interruption of liberative prescription as against the insurer also interrupted prescription against the driver. After citing five Louisiana cases the court added "See also" three more Louisiana cases, and the Planiol reference was included for corroboration.

The reverse process was followed in *Succession of Williams* for the interpretation of Louisiana Civil Code article 1707 concerning accretion in the event of the predecease of one legatee under a conjoint legacy. After pointing out that this article is

31. 120 So. 2d 301 (La. App. Orl. Cir. 1960).
32. LA. CIVIL CODE arts. 3152, 3162 (1870).
34. 2 PLANIOL no. 2401 (discussion of FRENCH CIVIL CODE art. 2076).
35. 122 So. 2d 639 (La. App. 1st Cir. 1960).
36. 2 PLANIOL nos. 736, 741.
37. 124 So. 2d 924 (La. App. 4th Cir. 1960).
the same as article 1044 of the French Civil Code, and quoting from Planiol, the court stated:

"After reading these articles and the comment of Planiol we cannot escape the conclusion that our Codal article and the article of the Code Napoleon have application only when one of the conjoint legatees dies before the death of the testator."

Following this conclusion, the court cited and discussed six Louisiana cases to the same effect as well as other local references.

### B. Arrangement by Subject Matter

There is an unavoidable measure of arbitrariness in this kind of classification. Many cases involve more than one issue. For present purposes, this is not important. Neither is the decision on the substantive issue of special significance. Looking primarily at the point in connection with which Planiol was cited, the 62 cases divide themselves into the following groups: persons and family, 8; property, 7; successions, 10; obligations, 18; special contracts (sale, lease, pledge, etc.), 10; prescription (liberative and acquisitive), 5.

1. **Persons and family.** In *Scott v. La Fontaine,* a mother instituted suit for damages on account of the death of her minor child. Recovery in Louisiana law is limited to lawful parents, and in this case the child was illegitimate. The court held that a purported legitimation of the child by notarial act almost one year after the death was of no effect. Louisiana Civil Code article 201, and the corresponding *Code Napoléon* article 332, permit the legitimation of "deceased children who have left issue" for the benefit of the grandchildren. In denying the possibility of posthumous legitimation where there was no issue, the court established this interpretation of the Louisiana code article on the basis of Planiol's explanation and comments about the corresponding French provision. No other authorities were cited.

In *Lambert v. Lambert,* the husband brought an action in disavowal on the grounds of remoteness and the physical im-

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38. 3 *Planiol* no. 2859.
39. 124 So. 2d 924, 926 (La. App. 4th Cir. 1960).
40. 148 So. 2d 780 (La. App. 4th Cir. 1962), writ denied, "no error of law;"
41. 148 So. 2d 780, 782 (La. App. 4th Cir. 1962); 1 *Planiol* no. 1554.
42. 164 So. 2d 661 (La. App. 3d Cir. 1964).
possibility of cohabitation at the time of conception because the child was born to his wife 216 days after her return from California where she had spent five months. The medical evidence indicated that the child had had a normal gestation period of nine months. According to the Civil Code articles 184-189, the presumption of paternity covers a gestation period of 180 days at the beginning of a new marriage and 300 days after the dissolution of a former marriage. The court applied this same range so as to require proof of remoteness during the full period of 300 days to 180 days before the birth. This express rule of Code Napoléon article 312 (par. 2) was not carried into the Louisiana Civil Code, although all the principles concerning paternity and disavowal did come from that source. In adopting this meaning for the Louisiana code provision — despite the medical evidence and the trial court's ruling in favor of the husband — the court relied on Planiol's historical explanation of the policy to favor legitimacy. In corroboration, the court also cited the opinion of a Louisiana doctrinal writer that, for disavowal, remoteness must exist during the entire period from 300 to 180 days before birth.

A more frequent kind of use for the citation of Planiol has been to supplement or corroborate Louisiana and other authorities to the same effect. In an interdiction case, the undercuratrix was allowed to participate in a suit for termination of the interdiction on the basis of articles of the Louisiana Civil Code and Code of Civil Procedure. The court continued, "In addition, counsel . . . cites . . . Planiol." This formula assumes no responsibility, but its inclusion is not without significance. For the question of good faith in a putative marriage case, the court relied on earlier Louisiana decisions, one of which is emphasized by requoting excerpts from Marcadé and the Planiol French original (prior to the appearance of the English translation). In another case, the court held that a married woman, running for elective office against her judicially separated husband, cannot use his name preceded by "Mrs.,” but must use her own name, Mrs. Laura Verret Wilty (instead of Mrs. Vernon

43. Id. at 664-65; 1 PLANIOL nos. 1376-1377, 1431.
44. SAUNDERS, LECTURES ON THE CIVIL CODE 46 (1925).
45. Interdiction of Polmer, 141 So.2d 696 (La. App. 1st Cir. 1962).
46. Id. at 702; 1 PLANIOL no. 1865.
47. Succession of Davis, 142 So.2d 481, 485 (La. App. 2d Cir. 1962).
J. Wilty, Jr.). The concurring justice cited a number of Louisiana authorities and referred to Planiol\(^{49}\) to show that Louisiana follows the civil-law doctrine in contrast to the common-law fiction of merger of personalities. However, there is no reference to another Planiol section\(^{50}\) which recognizes also that “a universal right exists to designate a married woman by her husband’s name” as well as the right to use her own name.

An unusual and significant use of Planiol was made in the case of *Romero v. Leger*,\(^{51}\) where a majority of the Third Circuit Court of Appeal held that in a divorce suit the wife cannot obtain from the husband an *advance* from community assets for the payment of court costs and attorney fees, finding no statute or code article to support such a claim. While the minority judge entered a concurring opinion because he felt it was appropriate to follow an old decision of the Supreme Court, he really expressed a dissent on the merits of the issue. In support of his position, he cited Planiol,\(^{52}\) whose conclusion (in favor of allowing costs of suit) is based upon several French cases dated between 1889 and 1933. As pointed out by the concurring judge, there is no policy reason not to include necessary legal expenses along with necessary food and lodging in the allowance to a wife who is suing for separation or divorce. Furthermore, he considered that it was only fair and equitable for the wife’s court costs to be advanced from the community assets just as the husband would naturally draw his legal expenses from the same source in which they each own a one half interest. The use of the Planiol translation in this way, in opposition to the Louisiana jurisprudence, undoubtedly contributed to the legislative correction of this imbalance in the next regular session of the legislature.\(^{53}\)

A recent case\(^{54}\) demonstrates how the legal profession is acquiring the habit of looking for help in Planiol. A notarial act of adoption had not been registered and the court held that the adoption was invalid and without effect. The claimant urged Planiol’s\(^{55}\) comment and the French civil code articles that lack

\[\text{References:}\]

\(^{49}\) 245 La. 145, 172, 157 So. 2d 718, 727 (1963); 1 Planiol no. 390.

\(^{50}\) 1 Planiol no. 392.

\(^{51}\) 133 So. 2d 897 (La. App. 3d Cir. 1961).

\(^{52}\) Id. at 899; 1 Planiol no. 1249.

\(^{53}\) La. Acts 1962, No. 178, amending LA. CIVIL CODE art. 155 (1870) made the wife’s legal expenses a liability of the community.

\(^{54}\) In re d’Asaro, 167 So. 2d 391 (La. App. 4th Cir. 1964).

\(^{55}\) Id. at 394, 396; 1 Planiol no. 1595.
of registration did not entail the complete nullity of the adoption. However, since the matter of adoption is purely statutory in Louisiana as elsewhere, the court rejected the French developments and followed the Louisiana statutes and jurisprudence, which are more consistent with the laws of other American states.

The production of oil in Louisiana has not only created new interest in old forgotten properties, but it has also brought to the surface more than the physical minerals. In *Hibbert v. Mudd*, the ownership of land and the validity of a mineral lease depended upon whether it was legally possible to acknowledge the illegitimate children of a miscegenous union. The majority of the court of appeal held that this was not possible by reason of Civil Code article 204, which precludes acknowledgment of "children whose parents were incapable of contracting marriage at the time of conception." The dissenting judge cited Planiol in support of the proposition that a statute should not be applied mechanically when the circumstances of its legislative history do not show an intent to reach the question on which the present case hinges. Without engaging in the actual merits of the issue (which have not yet been finally decided), suffice it to say that Planiol's argument strikes a dominant civil law key in asserting that the law should not be mechanically interpreted to defeat its own purpose of social welfare, and that the logical method should be tempered by considerations of utility and equity.

(2) *Property.* Of the cases in this group, one (involving the mineral rights of the usufructuary and naked owner) is fully treated in an earlier part of this article. Another deals with a problem of expropriation and held unconstitutional a Louisiana statute which purported to vest ex parte eminent domain power in a state agency. In addition to the state constitution, the court cited state and federal court cases and other authorities. The help supplied by the Planiol citation could not have been very great, but as a general reference it supported the doc-

57. 1 Planiol nos. 216, 224
58. 1 Planiol no. 224.
61. Id. at 540, 159 So. 2d at 147; 1 Planiol no. 2443.
trine that payment in advance seems to be an attribute of the civil law. A third case involved a question of co-ownership in indivision between the surviving parent and children in a succession proceeding, and Planiol was cited as a general reference to clarify and to apply the characteristics of undivided ownership. Another use of Planiol as a general reference was made in *Giroir v. Dumesnil* in connection with identifying the essential attributes of usufruct.

After two trials and two appeals, the case of *Acadia-Vermilion Rice Irrigating Co. v. Broussard* was still not settled. In the first reported decision, one issue turned on the classification of a servitude of aqueduct through a canal between two levees, and the court cited Planiol in reaching its conclusion that such a servitude is "continuous" as well as apparent, and therefore can be acquired by prescription under Civil Code article 765. This and related code articles are derived from French sources, and in the second appeal Planiol was cited again in connection with the question of determining when a servitude is used or possessed adversely to the servient property owner, and when there is merely a precarious use by sufferance or permission which would not satisfy the requirement of possession for prescription.

*Columbia Gulf Transmission Co. v. Fontenot* was an expropriation case, and on an incidental problem of servitudes the court quoted Planiol to support its interpretation of Civil Code articles 796 and 798 that partial non-use of a servitude for the prescriptive period of ten years "has the same extinctive effect

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63. Id. at 381; 1 Planiol no. 2497.
65. 1 Planiol no. 2775.
67. 1 Planiol nos. 2894-2899.
68. 185 So. 2d 908 (La. App. 3d Cir. 1966).
69. 1 Planiol nos. 2955-2956.
70. 187 So. 2d 455 (La. App. 3d Cir. 1966).
71. LA. CIVIL CODE art. 796 (1870): "The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner. "By mode of servitude, in this case, is understood the manner of using the servitude as is prescribed in the title."
72. Id. art. 789.
as total non-use and that it diminishes the servitude to the extent that no use had been made of it.”

(3) Successions. Among the cases in this group are some very significant uses of the Planiol translation. In fact, the first reference to the Planiol translation involved the claim of a widow in necessitous circumstances where the court used Planiol in support of departing from one of its own prior decisions; this case has been fully discussed above.

Humble Oil & Refining Co. v. Boudoin was a case with many complex and interwoven facts and issues; there were several judgments including reversals. The application for a second rehearing before the Third Circuit Court of Appeal was refused, but two judges dissented. Concerning questions of warranty as applied against the heir who accepts unconditionally, a dissenting judge relied principally on Planiol along with articles of the Louisiana Civil Code and Code of Civil Procedure. In addition to this dissent—it may be noted in passing—there were critical doctrinal observations about the final majority judgment.

Six of these succession cases include seven instances in which Planiol is cited (a) as the exclusive authority for decision or (b) as the primary reference with supplementation of Louisiana authorities to the same effect. The former includes one case where Planiol indicated that the rules of revocation for ingratitude of a donee are not applicable to unworthiness of an intestate heir.

The latter group includes a reference in this same case where Planiol supports the conclusion that the husband who killed his wife and later committed suicide was not unworthy because there had been no conviction in a criminal proceeding. In this category, there is also the case involving accretion by a surviving

73. 1 Planiol no. 2979. Evidently the court did not accept the distinction made by the French Court of Cassation and described in the latter part of the same paragraph of Planiol.
75. 154 So. 2d 239 (La. App. 3d Cir. 1963), writ refused, “no error of law,” 245 La. 54, 156 So. 2d 601 (1963).
76. 154 So. 2d at 254; 2 Planiol nos. 1476, 1480, 1482, 1484.
79. 163 So. 2d at 428; 3 Planiol no. 1748.
80. 163 So. 2d at 427; 3 Planiol no. 1738.
co-legatee, which is covered in the earlier part of this article. In Pitre v. Pitre, the French interpretation of lesion in partitions as propounded by Planiol (and six other French commentators) was applied to the situation of a voluntary property partition after divorce. When the original partition was set aside, the husband tendered the supplemental value, but the court of appeal was uncertain whether this method to avoid a new partition was in accordance with Civil Code article 1408 and the Planiol interpretation of the French counterpart. Accordingly, the court of appeal certified questions of law to the Supreme Court, where the Planiol quotation was relied upon for the decision that the correct interpretation of Civil Code article 1408 did not enable the husband to ignore or circumvent the prior judgment which had rescinded and annulled the original partition and which had become final. In another case, the civil law technique of analogy and the views expressed in Planiol (and three other French works) directed the application of the rules limiting the delegation of authority by testamentary executors to a problem concerning a testamentary attorney.

Succession of Bendily involved the validity of an olographic will. One digit in the date was unclear, consisting of a 3 and a 5 superimposed together. Louisiana Civil Code article 1588 (and the corresponding Code Napoléon article 970) provides that an olographic will must be entirely written, dated, and signed by the testator. The court's conclusion that the will was not valid on account of failure to meet the requirement of certainty as to date is based upon the interpretation of prior Louisiana cases, in particular one 1945 decision of the Louisiana Supreme Court which cited and quoted from twelve different French authors to the same effect, including the then current treatise of Planiol.

81. Succession of Williams, 124 So. 2d 924 (La. App. 4th Cir. 1960), discussed in text accompanying notes 37-39 supra.
82. 162 So. 2d 430 (La. App. 3d Cir. 1964), writs granted, 246 La. 597, 165 So. 2d 486 (1964), and judgment of court of appeal affirmed on ground of constructive fraud (no citation of Planiol) in 247 La. 594, 172 So. 2d 633 (1965).
83. 162 So. 2d 430, 431 (La. App. 3d Cir. 1964); 3 PLANIOL no. 2423.
85. LA. CIVIL CODE art. 1408 (1870): "The defendant in the suit for rescission may stop its course and prevent a new partition by offering and giving to the plaintiff the supplement of his hereditary portion, either in money or in kind, provided the rescission is not demanded for cause of violence or fraud."
86. 3 PLANIOL no. 2430.
88. Succession of Zatarain, 138 So. 2d 163 (La. App. 1st Cir. 1962).
89. Id. at 167; 3 PLANIOL no. 2814.
90. 132 So. 2d 693, 696 (La. App. 1st Cir. 1961).
91. Succession of Buck, 208 La. 556, 23 So. 2d 215 (1945).
& Ripert. The court in the present case might have cited the new Planiol translation, but did not do so; the numerous citations quoted from the 1945 decision were compiled before the translation was available. In any event, the French sources were used to confirm and corroborate the existing interpretation of the Louisiana jurisprudence; the court here used the supporting effect of French authorities in reversing a trial court decision which had treated the will as valid.

In Successions of Webre, there were several issues (including simulation and prescription) but the only Planiol citation appeared in a footnote as a general reference for the principle that collation arises from an obligation or duty imposed upon the heir by law. The right to enforce this duty is restricted to the co-heirs, and since this constitutes a personal action it would be subject to the general liberative prescription of ten years.

(4) Obligations. As might well be expected, the largest number of Planiol citations occurred within the broad scope of obligations, which is the most technical and abstract as well as the most fundamental branch of the civil law. To indicate more specific topical distribution of the cases in this group, there are 2 cases involving solidary obligations, 3 which deal with terms and conditions, 2 with aspects of extinction of obligations, 2 on civil responsibility, 3 on res judicata, 2 on quasi-contract and simulation, also single cases on offer and acceptance, stipulation pour autrui, recovery of the undue, future things, nullities, and the classification of a cause of action.

Looking at these cases from the functional use of the Planiol reference, there are 9 in which Planiol is cited by way of supplement to Louisiana (and other) authorities as compared with

92. 3 Planiol no. 2692.
93. 247 La. 461, 172 So. 2d 285 (1965), reversing and remanding, 164 So. 2d 49 (La. App. 4th Cir. 1964), discussed in text accompanying note 149 infra.
94. 247 La. 461, 473, 172 So. 2d 285, 289 (1965); 3 Planiol nos. 2211, 2214.
3 in which Planiol (and other French works) seems to be the primary source of reliance with supplementation of Louisiana cases.\(^9\) In 2 cases Planiol\(^9\) and Pothier,\(^8\) respectively, are cited to confirm and corroborate the prior Louisiana jurisprudence so as to preclude a change in the interpretation. In two cases, Planiol is relied on together with Louisiana (and other) authorities.\(^9\) There are also 6 cases in which the decision relies even more substantially or exclusively on Planiol and other (French and Louisiana) doctrinal materials.\(^10\)

The facts and detailed issues in each of these cases would become too tedious for this article. In many instances, there is the preliminary establishment of the similarity between the Louisiana and the French civil code provisions, and “for this reason, we have found of unusual interest the comments of Planiol”\(^101\) and other commentaries to clarify the meaning or fix the correct interpretation. Of particular interest, mention may be made of the following ways in which the Planiol reference was used.

**Great American Indemnity Co. v. Dauzat\(^102\)** involved the claim for recovery of a payment which was allegedly not due. The pertinent Louisiana Civil Code articles 2301 *et seq.*, being similar to *Code Napoléon* articles 1376 *et seq.*, and there being “no

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\(^9\) Tolbird v. Cooper, 243 La. 306, 313-19, 143 So.2d 80, 83-85 (1962); Teche Concrete, Inc. v. Moity, 168 So.2d 347, 353 (La. App. 3d Cir. 1964). *Citations*

\(^10\) Great American Indemnity Co. v. Dauzat, 157 So. 2d 308, 310-11 (La. App. 3d Cir. 1963); Humble Oil & Refining Co. v. Lewis, 245 La. 490, 513 n.3, 159 So. 2d 32, 327 (1963), affirming 150 So. 2d 796 (La. App. 3d Cir. 1963); Welsh v. Myatt, 164 So. 2d 393, 394 (La. App. 2d Cir. 1964), *Citations*

\(^101\) Murphy v. Fidelity Cas. Co. of New York, 138 So.2d 132, 137 (La. App. 2d Cir. 1962).

Louisiana cases directly applicable to the issues here involved," the court continued "we have therefore turned to Planiol."

In the case with the problem about a stipulation pour autrui, a concurring opinion included Planiol as a reference in support of pointing up one aspect not dealt with in the majority decision, namely, that even if a stipulation pour autrui had been completed by the third person's acceptance, this constituted acceptance also of the provisions of the contract whereby certain rights of modification had been reserved.

An interesting and a different kind of a use of Planiol was made in Davis v. LeBlanc, where the issue centered on the question whether a judgment creditor was entitled to automatic interest under a statute which established this right for judgments "sounding in damages ex delicto." To classify the nature of the cause of action in the present case, the court cited some Louisiana decisions and also Planiol's comments about the older doctrine in France which distinguished between contractual and delictual fault — without, however, referring to Planiol's further comments three sections later which refute the distinction in favor of the more recent concept that there is unity of fault rather than a dualism. Nevertheless, while this unity concept may serve well some of the modern problems of responsibility, it will not help resolve questions of liberative prescription where there are different periods for actions ex contractu and ex delicto; furthermore, in the present case, the decision is limited to the interpretation of the phrase "ex delicto" in a Louisiana statute where the intention obviously was to draw a distinction.

Another interesting use of Planiol was made in the case of Teche Concrete, Inc. v. Moity, where simulation was found in the defendant's establishment of a corporation and in a lease agreement between the defendant and the corporation. In addition to Louisiana doctrinal materials and cases in support of its decision, the court also utilized the "prête-nom" concept, cit-

103. Id. at 310-11; 2 PLANIOL nos. 835 et seq.
105. Id. at 817, 174 So. 2d at 641; 2 PLANIOL nos. 1247, 1261.
106. 149 So. 2d 252 (La. App. 3d Cir. 1963).
108. 149 So. 2d 252, 254 (La. App. 3d Cir. 1963); 2 PLANIOL no. 873.
109. 2 PLANIOL nos. 876-877.

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ing the Planiol treatise as the first and the most comprehensive of the references in this connection. Simulation and use of the prête-nom concept were also the basis of decision in Lafleur v. Guillory. The court found there was simulation in the acquisition of property by a son who was really acting as prête-nom for his father, as evidenced by the son's counter-letter; the decision made significant use of Planiol in holding that the father was the real purchaser and that the property fell into the community prior to its partition after a divorce.

In Quinette v. Delhommer, there was a problem of res judicata, and on the question of who were the ayants cause, or successors, of the parties of record, according to civil law doctrine, Planiol was cited along with Pothier and a series of Louisiana cases. In Nelson v. Walker, the majority held that a community property settlement, after separation and before divorce, which contained a waiver of the wife's right to claim alimony, was contrary to a prohibitory law and against public policy, and therefore was an absolute nullity; the dissenting judge cited Planiol in support of his opinion that the property transfer was only a relative nullity and therefore susceptible of ratification and prescription.

A basic problem of offer and acceptance, involving the revocation of an offer prior to notification of its acceptance, was at issue in Wagenvoord-Broadcasting Co. v. Canal Automatic Transmission Service. In asserting the receipt theory of acceptance, the court quoted Planiol as its first authority. It is noteworthy that with reference to the duration of irrevocability of an offer, the same decision quoted from (1) a Toullier extract cited in a prior Louisiana case and (2) a law review comment which in turn relied most extensively on French authorities.

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111. 168 So. 2d 347, 353 (La. App. 3d Cir. 1966); 2 Planiol nos. 1189, 1198, 2271, 2272.
112. 181 So. 2d 323 (La. App. 3d Cir. 1965), writ refused, “result is correct,” 248 La. 1099, 184 So. 2d 24 (1966).
113. Quotations from 2 Planiol nos. 1186, 1189, 2260, 2268(2), and citation of nos. 1186-1190.
114. 247 La. 1121, 176 So. 2d 399 (1965).
115. 2 Planiol no. 54A(4).
116. 189 So. 2d 54 (La. App. 1st Cir. 1966).
118. 2 Planiol nos. 1438, 1439.
119. 176 So. 2d 188 (La. App. 4th Cir. 1965).
120. 2 Planiol no. 984.
122. Pascal, Duration and Revocability of an Offer, 1 La. L. Rev. 182 (1938).
(5) Special Contracts. A respect for doctrine even as against judicial decision was asserted in two cases which hinged on the validity of a pledge. In 1960, the Orleans (Fourth Circuit) Court of Appeal\(^1\) refused to accept a 1956 holding of the Louisiana Supreme Court\(^2\) that as between the parties delivery of possession to the creditor is not necessary; the lower appellate court found support in Planiol and in the critical observations of two law professors published in local law reviews. This case was discussed above.\(^3\)

Perhaps even more significant was a similar pledge case four years later before a different court of appeal.\(^4\) As between the 1956 decision of the Louisiana Supreme Court and the 1960 decision of another coordinate appellate court, the language in the former was disapproved and the latter was followed with extensive quotations including the professors' comments and the Planiol treatise to the effect that without delivery there can be no pledge. In this manner, what might have become a trend started by the 1956 Supreme Court decision was deflected by the lower appellate courts with the aid of doctrinal support.

Of the four cases dealing with problems of sale, an interesting use of Planiol was made in *Steib v. Joseph Rathbone Land Co.*\(^5\) One party contended that the transaction was a sale with right of redemption (*vente à réméré*), but the court dismissed this view upon finding that the facts of this transaction did not meet the necessary attributes of a sale with right of redemption as enumerated and described by Planiol.\(^6\) In *Womack v. Sternberg*,\(^7\) the dissenting Justice cited Planiol (and other French works) in three contexts: (1) that an exchange of properties is really two sales,\(^8\) with the ensuing legal consequences, (2) that punitive damages are not permitted in the civil law,\(^9\) and (3) that the French practice of judicial discretion to fix the time for

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125. See text accompanying notes 31-34 supra.
128. 163 So. 2d 429, 433 (La. App. 4th Cir. 1964); 2 PLANIOL no. 1592.
129. 247 La. 566, 172 So. 2d 683 (1965), annulling damages and remanding 162 So. 2d 429 (La. App. 4th Cir. 1964).
130. 247 La. 566, 586, 172 So. 2d 683, 689 (1965); 2 PLANIOL no. 1658.
131. 247 La. 566, 586, 172 So. 2d 683, 690 n.2 (1965); 2 PLANIOL no. 247.
evaluating damages for breach of contract is preferable to the rigid rule of the time of the breach which was being enforced by the majority in this case. The two other sales cases simply used the Planiol citation as a general reference for the subjects of lesion beyond moiety and promise of sale.

In one lease case, the lessor refused the tenant’s request for permission to sublease and then the lessor rented other premises to the same person. In the tenant’s suit for cancellation of his lease and for damages, the court held that the lessor cannot “unreasonably, arbitrarily or capriciously” refuse his consent where there is no express prohibition to sublease. The only authority cited by the court was Planiol, where this view is set out on the basis of three cases in the French jurisprudence. Two other lease cases dealt with lease of services: in one case, Planiol was cited as a general reference for a discussion about “work by the job or contract”; and in the other, the decision to place the burden of loss on the owner for rain damage caused in the middle of a construction job, was based primarily on the Louisiana jurisprudence, but the court added that the result was in accord with both the French commentators and the common law, giving several citations of each. While it is safe to say that the French references did not affect the decision, it is a useful indication of a growing habit to consult them in appropriate situations.

132. 247 La. 566, 590, 172 So. 2d 683, 691-92 (1965); Dalloz, Code Civil Annoté 458, art. 1149 n.4 (1958); 3 Fuzier-Herman, Code Civil Annoté 268, art. 1149 n.9 (1936); 7 Planiol et Ripert, Traité pratique de droit civil français 185, no. 856 (1954); 2 Ripert et Boulanger, Traité élémentaire de droit civil de Planiol 260, no. 744bis (4th ed. 1952).


134. Bornemann v. Richards, 245 La. 851, 859, 161 So. 2d 741, 744 (1964), reversing 153 So. 2d 456 (La. App. 4th Cir. 1963). The accuracy of this decision has been questioned, and the possibility of its being based directly on French authorities has been suggested, but these issues are not within the scope of the present article. See The Work of the Louisiana Appellate Courts for the 1963-1964 Term — Sales, 25 La. L. Rev. 325, 326-28 (1965) and Note, 25 La. L. Rev. 569 (1965).


136. 154 So. 2d 625, 627 (La. App. 4th Cir. 1963); 2 Planiol no. 1752, n.42.


138. 242 La. 73, 79, 194 So. 2d 880, 882 n.3 (1961); 2 Planiol nos. 1897-1901.


140. 162 So. 2d 171, 176 n.4 (La. App. 4th Cir. 1964); Dalloz Rép., Duvergier, Pothier, Guillouard, Troplong, Domat.
In Union Producing Co. v. Schneider, an instrument purporting to be a compromise was unenforceable because not all the interested parties had participated in the agreement. The whole unit of Planiol on compromise is cited for a general discussion of the subject; and a more specific citation of Planiol is given in support of distinguishing a previous decision of the Louisiana Supreme Court where the document contained all the signatures involved in the disputed property interest. Although both of these Planiol citations are introduced by the formula "e.g.," the latter is relied on substantially for the principle that compromise is declarative and not translative — as applied in the court's decision.

(6) Prescription. In liberative prescription (statute of limitations), the periods designated for the loss of a right of action vary considerably so that much of the litigation in this area centers on the classification of the nature of the cause of action. Thus, actions resulting from offenses and quasi offenses (torts) are prescribed in one year, actions under certain enumerated contracts prescribe in three or five years, and ten years is the prescriptive period for all personal actions not expressly provided for. Sometimes the judicial classification of the action seems to be more a matter of policy as to particular result than analysis of legal concepts.

In Reserve Ins. Co. v. Fabre, more than one year but less than ten years had elapsed when suit was instituted. The insurance company had paid for certain car accident damages, and in due course brought this suit against the borrower of the car whose negligence had caused the accident. The court dismissed the contention that the action was ex delicto (one-year prescription) and held that it was ex contractu (ten-year prescription) because the insurer's action was based upon its subrogation to the car owner's right under the contract of loan which placed a duty of care on the borrower. For a discussion of the distinction between contractual fault and delictual fault, the court

141. 131 So. 2d 133 (La. App. 2d Cir. 1961).
142. Id. at 138; 2 PLANIOL nos. 2285-2301.
143. 131 So. 2d 133, 139 (La. App. 2d Cir. 1961); 2 PLANIOL nos. 2295, 2296.
144. LA. CIVIL CODE art. 3536 (1870).
145. Id. arts. 3538-3539, 3540-3543.
146. Id. art. 3544.
cited and quoted Planiol\textsuperscript{48} as the principal reference (along with Laurent and Dalloz' Codes Annotés).

Another case\textsuperscript{49} involved the classification of a claim for collation in a succession which the court held to be a personal action and therefore subject to the ten-year prescription. Although there is no reference to Planiol, the court placed considerable reliance upon two local law review items\textsuperscript{50} which cite several French treatises prior to the Planiol English translation.

In *acquisitive prescription* (adverse possession), most of the basic principles follow the French pattern so that doctrinal consultation is in order. A significant case of this sort was *Southern Natural Gas Co. v. Naquin*,\textsuperscript{51} where the court found no other direct authority and "applying the explanation of the law as expressed by Planiol"\textsuperscript{52} held that a co-owner in indivision is a precarious possessor as to the other co-owners and cannot prescribe against them.

In one case,\textsuperscript{53} the court quoted from Planiol\textsuperscript{54} (along with Louisiana and common law authorities) to support the conclusion that acquisitive prescription covers the situation of a possession which may have been based on a title or deed which has been lost or not based on any writing at all.

In another case,\textsuperscript{55} the court cited Planiol\textsuperscript{56} as a general reference on the subject of tacking (joining) of successive possessions by different persons as distinguished from the continuation by a universal heir of the decedent's possession. The facts of this case were very involved and the litigation resulted in several judgments at different levels, including reversals, and it has

\textsuperscript{148} 243 La. 982, 900, 149 So. 2d 413, 416 (1963); 2 Planiol no. 873; cf. Davis v. LeBlanc, 149 So. 2d 252 (La. App. 3d Cir. 1963), discussed in text accompanying notes 106-109 supra.

149. Successions of Webre, 164 So. 2d 49 (La. App. 4th Cir. 1964), reversed and remanded for the purpose of establishing certain elements of evidence, 247 La. 461, 172 So. 2d 285 (1965), discussed in text accompanying notes 93-94 supra.


151. 167 So. 2d 434 (La. App. 1st Cir. 1964), *write refused*, "no error of law;" 246 La. 884, 168 So. 2d 263 (1964).

152. 167 So. 2d 434, 439 (La. App. 1st Cir. 1964); 1 Planiol no. 2313.


154. 162 So. 2d 419, 423 (La. App. 2d Cir. 1964); 1 Planiol no. 2645.


156. 245 La. 324, 342-43, 347-48, n.1, 158 So. 2d 179, 186, 188 n.1 (1963); 1 Planiol nos. 2673-2674.
been discussed in local doctrinal commentaries.\(^{157}\) Whether more extensive consultation of Planiol (and other French works) and analysis of the legal concepts, especially precarious possession, might have resulted in a different decision, is not within the scope of this study.

III. STATISTICAL ANALYSIS

For the period between October 1959 (when the Planiol translation became available) and September 1966, the reported decisions of the Louisiana courts are contained in volumes 237-249 of the Louisiana Reports (Supreme Court only) and in volumes 112-189 of the Southern Reporter, Second Series (Supreme Court and courts of appeal). There are a number of ways in which the pertinent information can be classified and analyzed, and there is nothing sacramental about the patterns herein utilized; what follows is an attempt to make an objective presentation in relation to the purpose of the inquiry.

(1) Number of citations. The Planiol translation became available in October 1959, and the first decision to cite it was handed down on November 16, 1959. Sixty-two cases were found to contain citations to Planiol (and sometimes also to other French works) and, with citations for more than one issue in some of the cases, there is a total of 67 citations which were examined. No attempt was made to obtain exact data on the preceding seven-year period, or any other recent similar period, for the purpose of comparison; nor can it be said that there is likely to be found any such period of time during which there were absolutely no citations to French doctrinal materials in the Louisiana judicial decisions. However, it is safe to say that since the turn of the century such references had been rare rather than frequent.

(2) Subject Matter. A classification of the cases according to subject matter would ordinarily be made on the basis of the holding or \textit{ratio decidendi} of the essential or critical issue of the decision. However, for the present purposes, the subject matter classification has been made in terms of the issues in connection with which the Planiol reference was made. Furthermore, to follow the civil law framework and to minimize the sig-

significant categories, the cases were arranged in 6 groups according to the principal divisions of the Civil Code. Thus, the 62 cases included 8 in the field of persons and family, 7 in property, 10 in successions, 22 in obligations, 10 in special contracts, and 5 in prescription. The subdivisional groupings are indicated in the description of the cases. Comments are reserved for the concluding section of this article.

(3) Courts. The appellate courts of Louisiana include the Supreme Court and the courts of appeal. Prior to 1960, there were the First Circuit Court of Appeal, the Second Circuit Court of Appeal, and the Orleans Court of Appeal. With the 1960 judicial reorganization, there came into being the First, Second, Third, and Fourth Circuit Courts of Appeal, the last one replacing the Orleans Court. The expanded intermediate appellate courts not only met the increasing need at that level but they also became the courts of last resort for many kinds of cases in order to alleviate the burden on the Supreme Court.

Without going into the relative total volume of cases in each of these courts or the possible differences in the distribution of subject matter, it may be noted that the 62 cases and 67 Planiol citations covered in this analysis include all the Louisiana appellate courts and are divided among them as follows: Supreme Court, 19 cases with 22 citations; First Circuit, 6 cases with 6 citations; Second Circuit, 7 cases with 9 citations; Third Circuit, 19 cases with 19 citations; and Fourth Circuit, 11 cases with 11 citations.

(4) Judges. The Supreme Court has a bench of 7 Justices, the First Circuit Court of Appeal has 5 judges, the Second Circuit has 4, the Third Circuit has 5, and the Fourth Circuit has 6. This makes a total of 27. However, during the period covered, more than this number of persons have actually served on these courts because there have been replacements on account of death, retirement, resignation, term expiration, and sometimes the service of a person as judge pro tem. This inclusive total comes to 36,158 of whom some only served for relatively short periods.

Without considering (or researching) the possibility that some judges may be writing the opinions in cases of certain sub-

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158. According to lists in front of Southern Reporter volumes. These do not always include all the short ad hoc assignments which, however, do not materially affect the significance of the analysis.
ject matter which may be conducive to the use of Planiol references (or the opposite), and noting that the Planiol citations examined were found not only in the court's majority but also in some concurring (3) and dissenting (5) opinions, the 67 Planiol citations were distributed among the judges in the following manner.

In the Supreme Court, ten Justices served during the period covered. Three Justices served a relatively short time, leaving the court by reason of death, resignation, and expiration of a temporary assignment, respectively. The seven Justices presently on the court have all cited Planiol: two Justices each did so 8 times, one made 2 references, and the other four each made one.

Among the Circuit Court judges there were two deaths, one retirement, and quite a few temporary assignments. The Planiol citations are found in the following distribution: one judge accounted for 11 citations, another judge for 6, one judge for 3, seven judges for 2 each, and ten judges one each. One opinion was per curiam.

An observation of more than passing interest is that in March 1964, the writer spoke on the same subject of this article at a conference of the judges of the Louisiana courts of appeal, at which time there had been reported 34 Planiol citations in 32 cases for the period of October 1959 to February 1964 and covering volumes 112-160 of the Southern Reporter, Second Series. The present report covers only about 30 additional months (to September 1966) and 29 more volumes, but the Planiol citations now total 67 in 62 cases.

It may also be noted that seven of the judges who were then (March 1964) on the appellate courts and who had not previously included any Planiol citations in their opinions, did so afterwards.

(5) Use of the Planiol citations. An examination of the cases containing citations to Planiol (and sometimes to other French works) discloses several differences in the manner and purpose of using this reference. A classification of these different kinds of use can not be as objective as the mathematical distribution of numbers, but neither is there likely to be more than minor variation among different readers. In any event, on the
basis of the way in which opinions are written and references included, the following classification has been adopted for a tabulation of the 67 citations covered in this analysis.

The largest category comprises the 38 (56.5%) instances in which Planiol is cited along with Louisiana and other authorities. To make this more meaningful, these are subdivided into (a) 17 where Planiol is cited as an addition or supplement to other references which are mostly Louisiana authorities, (b) 10 citations of Planiol as the first authority and supplemented by Louisiana cases, etc., (c) 5 instances in which Planiol seems to be introduced for the purpose of confirming or corroborating the Louisiana jurisprudence thereby precluding a possible modification or change, and (d) 6 cases where the court seemed to rely on a combination of the Planiol and Louisiana and possibly other authorities. Here again, there may well be differences among readers as to whether there is any significance to these four (or more or less) subdivisions; and the distinction between (a), (c), and (d) is sometimes hard to identify. However, there is a difference between the (a) type use of the Planiol when it is part of a “see also” reference, after a number of Louisiana authorities, and the (b) type citation of Planiol (often with quotation) as the first reference, with the Louisiana cases or other materials in the “see also” group. The (c) and (d) subdivisions are sometimes suggested by the context and the manner of expression in relation to the decision on the point involved.

The next largest category comprises the 16 (24%) instances in which the judge appeared to rely deliberately on Planiol for his decision (or dissent). In 6 of these cases there is very substantial reliance, while in 10 instances the citations to Planiol (and sometimes to other French works) appear as the exclusive references for the particular decision or interpretation.

A third major group consists of the 8 (12%) situations in which Planiol is cited as a general reference for the principle or institution being considered.

A fourth group contains 4 (6%) instances in which Planiol is cited to support a position opposed to the existing Louisiana jurisprudence.

And there is also 1 (1.5%) instance where Planiol is cited to describe the French position which was rejected as being inapplicable in Louisiana.
IV. Evaluation and Conclusion

To estimate the significance of the number of references to Planiol and other French works after 1959, there ought to be the same accurate data for the time before 1959. These data were not researched, but it was not considered necessary for the present purposes. So many members of the local profession have been reading all the Louisiana judicial decisions that their unanimous testimony has been accepted as satisfactory evidence of the paucity of such references. The exact number is not important enough to warrant the time and effort that would be required to establish it. The same witnesses attest to the fact that since 1959 here has been a vigorous and steadily increasing movement in this direction. The judges themselves are the first to confirm this fact. Furthermore, there is the statistical evidence that in 30 months from April 1964 to September 1966 there were approximately as many (33) Planiol citations in about one-half of the time, as there were (34) in the first 54 months after the appearance of the Planiol translation from October 1959 to March 1964. In other terms, these figures show that during the first 4½ years the citations appeared at the rate of 7.5 per year, whereas during the 2½ years which followed the citation rate increased to 13.2 per year. Since the whole purpose of the translation was that it be used, the evidence establishes a successful record together with a cumulative effect. It is becoming a dangerous calculated risk for an attorney not to check Planiol before submitting his case to court.

The analysis of the subject matter shows the kind of distribution which might well have been expected. One half (32) of the cases (with 36 Planiol citations) are in the fields of obligations and special contracts. Successions give rise to litigious disputes and account for 10 cases (with 11 references), whereas over the years there has been less litigation over property concepts as reflected by 7 Planiol citations. In the field of persons and family law, there has been a fair amount of legislation which established new principles and directions different from the French law, but there were still 8 references to Planiol. As for prescription, both liberative and acquisitive, the Louisiana jurisprudence has pretty well established the guidelines so that there were only 5 Planiol references. The abstract and technical nature of the innumerable legal problems in obligations and special contracts will probably continue to make this
the field in which there will be the greatest use of Planiol and other French works. In any event, it can hardly be said that the subject matter distribution is very important except that the areas of obligations and special contracts are likely to remain among the most litigious of private law and the multiplication of references to Planiol and other French works is likely to continue.

All the appellate courts have been citing Planiol. The Supreme Court's leadership with 22 references is not only an example which other courts may well seek to emulate but attorneys are very likely to make careful note of this fact and prepare their briefs accordingly. Likewise, a similar effect may well follow from the facts that two very prominent Justices of the Supreme Court have each made 8 references, while two of the outstanding court of appeal judges have included 11 and 6 citations, respectively. The Circuit Court which showed the fewest Planiol references is the one which, during the period covered, had the most changes (2 deaths) and temporary assignments (2).

Twenty-seven appellate judges have cited Planiol and other French works during the period covered. Of the remainder, two died and one resigned not long after the appearance of the Planiol translation, and some were on temporary assignments. From these figures, it is not presumptuous to draw the extremely significant conclusion that the Louisiana appellate judges, both individually and as a body, favor and encourage the use of Planiol in working out solutions for our legal problems in appropriate cases.

The evaluation of the actual uses of the Planiol citations has been incorporated in the description of the cases and in the statistical analysis. The classification and distribution of these uses covers the fairly comprehensive range that might have been expected. Attorneys will emphasize Planiol as much as possible to support their arguments, or try to minimize its relevance when Planiol leans the other way. The law schools, not only in Louisiana but also in other states and English language countries, are already making considerable use of the Planiol translation in connection with instructional programs and comparative law research, and this is bound to increase.

As far as the courts are concerned, it must be kept in mind
that judges must follow the time-honored requirement of giving reasons and authority for their decisions. If the question is a new one in Louisiana on an issue concerning which the civil codes of France and Louisiana are similar, it is now unlikely that reference to Planiol will be overlooked or omitted. If the case involves a problem on which the Louisiana interpretations have not been consistent, the reference to Planiol may help stabilize the situation one way or the other. If there is a gap in the Louisiana law on a subject for which the general source was French, the chances of following Planiol must be very good. If the Louisiana jurisprudence has answered the question in litigation, the Planiol position to the same effect may be useful in precluding a change in the Louisiana interpretation. On the other hand, if the established Louisiana interpretation produces a result which is no longer socially desirable, the availability of a Planiol position (along with the French jurisprudence) to the contrary, may well assist a Louisiana court in moving towards a change. In one case the Supreme Court relied principally on Pothier and Planiol to reverse a decision of the court of appeal and distinguish as inapplicable the Louisiana cases on which it had rested.

Judges reach for the decisions which conform to the law and at the same time produce the socially desirable results, in a wide range of situations. Whether it be the one extreme or "making new law" and needing some authority to support the conclusion, or whether it be the other extreme of having to apply the law that is clear and free from any possibility of ambiguity despite its harshness (*lex dura lex*), there is room for, and likely to be an increasing use of the Planiol translation by the Louisiana courts.

By way of conclusion, two observations may be made. One is that there are many ways in which the comparative law method may be utilized in judicial decision. The use of materials from a legal system other than one's own and the information about the experience and solutions of other systems can clarify issues and show up distinctions in a convincing manner. New solutions may be adopted from other sources if the results are socially desirable and compatible with local legal institutions. Even more effective is the consultation of the history and interpretation as well as the subsequent developments in

the legal system in which the local law has many of its own roots. The English translation of Planiol serves not only all of these possibilities but at the same time it encourages and facilitates inquiry into other French authorities in the original, by providing an access bridge together with direction.

The final observation is perhaps the most significant one. This comparative method of the use of Planiol by the legal profession and the courts in Louisiana is reviving and re-establishing the habit of civil-law method and technique in dealing with legal problems. For some time, the lawyers and judges had been indulging heavily in the common-law method of citing cases, Corpus Juris, American Jurisprudence, and so forth. This will undoubtedly continue in some measure; however, the proportion will change with the leavening effect of considering more doctrinal materials and giving them a more active part in the decision-reaching process, and by looking with more penetration in the existing principles for solutions by analogy and more imaginative interpretation. Along with the new and increasing use of Planiol, the courts are also giving more consideration to the local doctrinal materials in the Louisiana law reviews; a number of the decisions in this survey relied exclusively on a combination of French and Louisiana doctrine.

With the amount of general law, uniform law, and general common law which is operative in Louisiana, it has become what might be called a "mixed jurisdiction." In recent times, the common-law methods and influences may have had a greater role than was their due. Now, with the use being made of French and Louisiana doctrinal materials, with more civil-law translations available and in preparation, and with more Louisiana civil-law treatises being planned, there is new assurance and strength in the preservation and development of the civil-law aspect in the mixed jurisdiction of the Louisiana legal system.