

# THE MYSTERY OF THE *MIXITÉ* AROUND THE TITLE OF THE LOUISIANA DIGEST OF THE CIVIL LAWS OF 1808

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## INTRODUCTION

There were three major events in the history of the Louisiana Civil Code in the nineteenth century: (1) the adoption of the first civil code—a Digest of the Civil Laws in 1808 (the Digest); (2) the adoption of the Civil Code of 1825; and (3) its revision in 1870. Nevertheless, when we look at Louisiana legal historical scholarship about these three events, we see that most of the research relates to the history of the Digest of the Civil Laws of 1808. There lies one of the most striking features of Louisiana legal history. Hastily made, slovenly translated and printed, the Digest, which had been in force for just seventeen years, has become a subject of profound academic interest and vigorous debate. In contrast, the Civil Code of 1825—which exceeds the Digest in terms of legislative technique and style of expression, and which became the basis for the revised Civil Code

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of 1870 and, eventually, for the current Louisiana Civil Code—has not attracted as much interest from scholars. This demonstrates that the Digest of 1808 has acquired **symbolic meaning** for the Louisiana legal community.

The interest of scholars in the first civil code is understandable. The Digest marked Louisiana's historical choice in favour of civil law, and allowed for the preservation of the distinctive character of its legal system. The Digest also played an important role in the institutionalisation of the legal system and the development of the legal profession in the state. Furthermore, we do not have enough historical evidence of the history of the Digest's creation, and the evidence that we do have, such as the *de la Vergne* volume, is sometimes contradictory.<sup>1</sup> Another feature of the Digest that attracts scholarly interest is that it is remarkable on the global level. The Digest of 1808 is the first known instance of a codification based on a comprehensive and deliberate reception of the Code Napoléon of 1804.<sup>2</sup> The next codifications based on the Code Napoléon would be the codes and civil laws of Italian lands (the Civil Code of the Kingdom of two Sicilies of 1812, the Civil Laws of Naples—*Leggi Civili*—of 1819, and the Civil Code of Parma and Piacenza of 1820)<sup>3</sup> in Europe, while South and North American countries and territories followed Louisiana's example even later (e.g., the Civil Code of the State of Oaxaca of 1828, the Civil Code of Bolivia of 1831, the Civil Code of the Republics of North and South Peru of 1836,<sup>4</sup> and the Civil Code of Lower Canada of 1866). The

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1. The *de la Vergne* volume is an interleaved copy of the Digest of the Civil Laws of 1808 with manuscript notes authored by the most important redactor of the Digest—Louis Casimir Elisabeth Moreau-Lislet. See John W. Cairns, *The De La Vergne Volume and the Digest of 1808*, 24 TUL. EUR. & CIV. L.F. 31, 33–35 (2009) (citations omitted) (“In 1938, Pierre de la Vergne informed . . . Tulane Law School that his family possessed a volume of the Digest with manuscript notes associated with Louis Casimir Elisabeth Moreau-Lislet . . . . Meanwhile, Professor [Robert] Pascal of Louisiana State University had identified a copy of the Digest in the Library of [LSU] as having marginal notes in Moreau's hand . . . . By this time, two further copies of the Digest with interleaves, similar to the *de la Vergne* volume, had been discovered in the Law Library of the Loyola University of New Orleans . . .”).

2. See Mitchell Franklin, *Some Observations on the Influence of French Law on the Early Civil Codes of Louisiana*, in LE DROIT CIVIL FRANÇAIS: LIVRE-SOUVENIR DES JOURNÉES DU DROIT CIVIL FRANÇAIS 833, 834 (1936).

3. Jean Limpens, *Territorial Expansion of the Code*, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD 92, 97–98 (Bernard Schwartz ed., 1998); Jean-Louis Halpérin, *Deux Cents ans de Rayonnement du Code Civil de Français?*, 46 LES CAHIERS DE DROIT 229, 238 (2005) (Can.).

4. Victor M. Uribe-Uran, *The Great Transformation of Law and Legal Culture: “The Public” and “the Private” in the Transition from Empire to Nation in Mexico*,

aforementioned factors explain why the Digest of 1808 has gradually acquired more importance in Louisiana legal history than other civil codes of the state.

### I. THE TITLE OF THE FIRST LOUISIANA CIVIL CODE

Although the Louisiana Digest was the first civil code based on the French model, it does not bear the title of a civil code. The full title of this code 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.”<sup>5</sup> The “Territory of Orleans” was the name of the future state of Louisiana after the territory was acquired by the United States and split into Upper and Lower Louisiana.<sup>6</sup> Nonetheless, before the promulgation of the Digest no one called it a digest. In all official documents it was called a civil code, including the Resolution of the Louisiana Legislature of June 7, 1806, to appoint two codifiers (James Brown and Louis Moreau Lislet) “to compile and prepare, jointly a Civil Code for the use in this territory” who “shall make the civil law by which this territory is now governed, the ground work of said code.”<sup>7</sup> Only after the Digest was enacted do we see references to it as a digest and as a collection of the laws in force (i.e., a statement of existing laws). This shift was caused by politicians, practicing lawyers, and judges, not by the codifiers themselves or the legislature. Thus, the Resolution of the Louisiana Legislature of March 14, 1822, appointed L. Moreau Lislet, Edward Livingston, and Pierre Derbigny “to revise the civil code.”<sup>8</sup> The draft (*projet*) of the revised Civil Code was

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*Colombia, and Brazil, 1750–1850, in* EMPIRE TO NATION: HISTORICAL PERSPECTIVES ON THE MAKING OF THE MODERN WORLD 68, 92 (Joseph W. Esherick et al. eds., 2006).

5. 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 (1808) [hereinafter A DIGEST OF THE CIVIL LAWS].

6. John T. Hood Jr., *The History and Development of the Louisiana Civil Code*, 19 LA. L. REV. 18, 21 (1958) (“On March 26, 1804, Congress divided the area included in the Louisiana Purchase into two parts, that portion of which is now substantially the State of Louisiana being called the Territory of Orleans.”).

7. John H. Tucker, *Source Books of the Louisiana Law*, 6 TUL. L. REV. 280, 281 (1932) (“The first legislature . . . by resolution adopted June 7, 1806, appointed James Brown and L. Moreau Lislet, lawyers, to compile and prepare a civil code. The resolution reads . . . ‘[B]oth branches of the legislature shall appoint [Brown and Moreau-Lislet] whose duty it shall be to compile and prepare, jointly a *Civil Code* for the use of this territory.’”) (emphasis added).

8. *Id.* at 286 (“Persuant to a resolution of March 14, 1822, the Legislature appointed L. Moreau Lislet, Edward Livingston, and Pierre Derbigny to remodel the Code of 1808. The resolution reads . . . ‘That three jurisconsults be appointed by the

entitled “Amendments and Additions to the Civil Code of the State of Louisiana Proposed in Obedience to the Resolution of the Legislature of the 14th March, 1822, by the Jurists Commissioned for that Purpose.”<sup>9</sup> In the text of the Digest, where some articles contain references to other articles, it was always referred to as the “code” and never the “digest.”<sup>10</sup> Nevertheless, the code was promulgated under the title of the “Digest of the Civil Laws now in Force in the Territory of Orleans.”

Some scholars believe that this title was deliberately preferred to the term “code,” and that the difference between a digest and a code tells us much about the nature of the first Louisiana codification, about its sources, and about the way it should have been interpreted by Louisiana courts.<sup>11</sup> This Article aims to re-assess both the origin of the title of the first Louisiana civil code, as well as the significance of the “code–digest” distinction for Louisiana legal practice and scholarship.

## II. WHY DOES IT MATTER HOW THE FIRST LOUISIANA CIVIL CODE WAS NAMED?

The specificity of the title was consequently used by legal practitioners and scholars in their arguments. Thus, practicing lawyers and judges in the years following the promulgation of the Digest emphasized that it was a mere collection of the laws in force, and those that were not included in the text of the Digest could be referred to in litigation.<sup>12</sup> This generated frequent

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joint ballot of both houses of the general assembly of this state, to revise the civil code by amending the same on such a manner as they will deem it advisable . . .”).

9. LOUISIANA LEGAL ARCHIVES, 1 A REPUBLICATION OF THE PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825 (1936); 2 A REPUBLICATION OF THE PROJET OF THE CODE OF PRACTICE OF LOUISIANA OF 1825, PUBLISHED PURSUANT TO ACT 286 OF THE LEGISLATURE OF LOUISIANA OF 1936 (1936).

10. For this point I am indebted to Professor John W. Cairns. *See, e.g.*, A DIGEST OF THE CIVIL LAWS, *supra* note 5, at 184, 324, 334, 420, 456 (containing article 154 of Title III, articles 3 and 4 of Title IV, article 1 of Title XII, and article 26 of Title XIX respectively). The French version contains identical expressions “*ce code*” and “*présent code*.”

11. *See* GEORGE DARGO, JEFFERSON’S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 272–73 (Rev. ed. 2009); ATHANASSIOS N. YIANNPOULOS, CIVIL LAW SYSTEM, LOUISIANA AND COMPARATIVE LAW, A COURSEBOOK: TEXTS, CASES AND MATERIALS 59 (2d ed. 1999); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603, 604 (1972); Thomas W. Tucker, *Interpretations of the Louisiana Civil Codes, 1808–1840: The Failure of the Preliminary Title*, 19 TUL. EUR. & CIV. L.F. 57, 124–25 (2004).

12. *See* Tucker, *supra* note 11, at 132–39 (“It must not be lost sight of, that our

references by lawyers, and sometimes application by judges, to Castilian law, which was in force prior to the promulgation of the Digest but was not included in its text.<sup>13</sup> On the academic level, such scholars as Thomas W. Tucker and Professor George Dargo developed a theory of distinction between a “true” code and a simple digest. This theory was used in the famous Pascal–Batiza debate,<sup>14</sup> which concerned the question of whether the Louisiana

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civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.”)

13. The most illustrative of such cases being *John Gravier v. The Mayor, Aldermen, and Inhabitants of the city of New Orleans*, also known as the “Batture controversy,” and *Cottin v. Cottin* (1817). For these and examples of similar cases, see Tucker, *supra* note 11, at 135–39, 150–55; see also JOHN W. CAIRNS, CODIFICATION, TRANSPLANTS AND HISTORY: LAW REFORM IN LOUISIANA (1808) AND QUEBEC (1866), at 463–72 (2015) (containing a republication of the author’s 1980 Ph.D. thesis—John W. Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change* (unpublished Ph.D. thesis, 2 vols., Univ. of Edinburgh, 1980) (on file with the British Library)); ALAIN A. LEVASSEUR, MOREAU LISLET: THE MAN BEHIND THE DIGEST OF 1808, at 250–51 (Rev. ed. 2008) (discussing *Cottin v. Cottin*); DARGO, *supra* note 11, at 133–82.

14. For the arguments of the two authors developed in the debate, see Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 11–12 (1971) [hereinafter Batiza, *Code of 1808*]; Rodolfo Batiza, *Sources of the Civil Code of 1808 Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628, 628–31 (1972) [hereinafter Batiza, *A Rejoinder*]; Robert A. Pascal, *A Recent Discovery: A Copy of the “Digest of Civil Laws” of 1808 with Marginal Source References in Moreau Lislet’s Hand*, 26 LA. L. REV. 25, (1965); Pascal, *supra* note 11; see also Cairns, *supra* note 1 (citations omitted) (“Pascal stated in 1965 that Moreau’s notes demonstrated that the redactors of the Digest considered it a ‘digest of the Spanish laws then in force in Louisiana even though they cast it in the mold of the then new French Code civil.’ [Then], this view was challenged by Professor Batiza of Tulane, when he published an extensive study of the sources of the Digest. This showed that a very substantial proportion of the provisions of the Digest had indeed been directly copied from the French Code and its Projet, and that very little had been copied from Spanish sources.”). Since then many scholars have contributed to the debate. See generally Joseph Modeste Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972); see also Vernon Valentine Palmer, *The French Connection and The Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067, 1073–79 (2003); Athanassios N. Yiannopoulos, *The Early Sources of Louisiana Law: Critical Appraisal of a Controversy*, in LOUISIANA’S LEGAL HERITAGE 87, 87–106 (Edward F. Haas ed., 1983) (“[M]ost legal historians, relying on hearsay, have erroneously assumed that Spanish law prevailed in Louisiana at the time the territory was retroceded to France; and . . . such erroneous assumptions have been effectively refuted by the work of Professor Batiza of the Tulane law faculty.”); CAIRNS, *supra* note 13, at 433–44 (“In some respects, the work of both professors is—I would argue—unhistorical in approach. Professor Pascal finds his view that the Digest is essentially ‘Spanish–Roman’ simply on an assertion, as he

Digest of 1808 was a digest (code) of “Spanish”<sup>15</sup> or French law. Professor Palmer gives an excellent summary of the digest–code debate:

Each side has battled over this point because if in the redactors’ own minds they felt restricted to producing a digest, this would suggest they intended simply to replicate the existing Castilian law and not deviate from it. To claim that the product was in reality a code would imply that the drafters exercised some choice over the content and could borrow, adapt and invent provisions as they pleased . . . .<sup>16</sup>

The contradistinction between a “true” code and a mere digest was used to prove that, if the 1808 enactment was a digest of the laws in force, and if it was Castilian (or “Spanish–Roman”<sup>17</sup> in Pascal’s terminology) law that was in force, then the Digest was a collection of “Spanish” laws.

The strongest proponent of the theory of a mere digest–“true” code contradistinction is Tucker. In his 1972 LL.M. thesis, Tucker claimed to have proved “that the 1808 ‘code’ was not a code at all, but purported to be a mere digest of the Spanish laws, which retained their subsidiary force,”<sup>18</sup> and that “[t]he 1808 Digest was never received as a code, as a self-sufficient statement of the law, and there is little evidence that it was ever intended to be a code.”<sup>19</sup> The affirmation that the Digest was never received as a code can be considered correct if we specify that the Digest was never received as a code by Louisiana **courts**. Although Tucker deduces this conclusion mostly from judicial

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has not provided (as yet) any research to uphold his thesis . . . . Professor Batiza has analysed the individual articles of the code and has concluded that the code is basically of French origin.”); DARGO, *supra* note 11, at 271–86.

15. Although Louisiana legal historical scholarship unanimously uses the adjective “Spanish” for the law applied in the territory when it was a Spanish colony, Professor Cairns is correct when he points out that Spain did not have a unified legal system at the time, and that the law applied in Louisiana was the law of Castile and the legislation promulgated specifically for the Indies. See CAIRNS, *supra* note 13, at 46–47. Furthermore, Vernon Palmer adopts Cairns’s approach and speaks about Castilian law as well. See Palmer, *supra* note 14, at 1069. I will use “Spanish” in quotation marks when assessing views of Louisiana scholars, and “Castilian” in my own reasoning.

16. Vernon Valentine Palmer, *The Recent Discovery of Moreau Lislet’s System of Omissions and Its Importance to the Debate over the Sources of the Digest of 1808*, 49 LOY. L. REV. 301, 304 & n.14 (2003).

17. Pascal, *supra* note 11, at 605.

18. Tucker, *supra* note 11, at 125.

19. *Id.* at 165.

interpretation of the Digest by Louisiana courts after its enactment, he believes that this was also the attitude of the codifiers and the state legislature.

Also, Tucker founded his distinction between a code and a digest solely on whether an enactment repeals previous laws or maintains them as a subsidiary source of law. This understanding of the difference between the two was further developed by Dargo:

A Digest is a summary or compilation of pre-existing law designed to make that law known and available. A code, on the other hand, replaces prior law and itself becomes the definitive and final statement of the law for purposes of adjudication. Despite some formal resemblances to a modern civil code, therefore the Digest of 1808 lacked the essential element of a genuine work of code law.<sup>20</sup>

Dargo also believes that a code does not recognize custom as a source of law, while a digest does.<sup>21</sup> These two points bring Dargo to the conclusion that to describe the Digest as “the civil code of 1808’ . . . is misleading. There is little doubt that the enactment of a digest rather than a code was the intention of the Louisiana legislature.”<sup>22</sup>

From the standpoint of the digest–code distinction, Tucker and Dargo arrive at the conclusion that the 1808 Digest was different from “true” codes such as the Code Napoléon, the Civil Code of Lower Canada of 1866, or the Louisiana Civil Code of 1825.<sup>23</sup> Tucker also used the digest–code theory in the Pascal–Batiza debate to prove that the 1808 Louisiana enactment was a collection of “Spanish” laws.<sup>24</sup> Thus, these scholars believe that the Louisiana codifiers deliberately created a mere collection of civil laws without much reform with the intention of keeping in force pre-existing laws after the codification.

In his 1980 Ph.D. thesis, Professor John Cairns used logical

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20. DARGO, *supra* note 11, at 272.

21. *Id.* at 274 (“The *Digest* itself, in its preliminary title, recognized custom as a source of law: ‘Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence acquired the force of a tacit and common consent.’ Since modern civil codes are based upon legislative positivism this provision contravened a fundamental requirement of code law.”).

22. *Id.* at 272–73.

23. *Id.*; Tucker, *supra* note 11.

24. *See* Tucker, *supra* note 11, at 125.

and legal-historical arguments to convincingly show that the theory of the digest–code contradistinction is (1) wrong, and (2) irrelevant to the Pascal–Batiza debate on the nature of Louisiana’s codification.<sup>25</sup> Cairns points out the absence of a strict difference between the meaning of “digest” and “code” in Louisiana at the time of its first codification, which resulted in interchangeable use of the words<sup>26</sup> and the contemporary use of “code” in Europe for any collection of laws.<sup>27</sup> Moreover, Cairns shows that recognition of custom as a source of law or preservation of a pre-codification law in force is not incompatible with the idea of a modern civil code, and he gives examples of codes that recognize either or both ideas.<sup>28</sup>

As for judicial interpretation of the Digest as a mere collection of existing (i.e., Castilian) laws, Cairns clearly demonstrates that this cannot be used as an argument to prove that the Digest was not a code.<sup>29</sup> Also, the fact that Castilian law was used as a subsidiary source of law after the promulgation of the Digest is not proof that the Digest itself was a collection of “Spanish” laws. First, the way in which the **courts** treated the Digest in 1812–1825 does not indicate the intentions of the **legislature** and the **codifiers** to create a complete code.<sup>30</sup> Second, although the 1825 Code is a true code, according to Tucker and Dargo, the courts treated it no better than the Digest and continued to apply Castilian law despite article 3521 that had repealed old law.<sup>31</sup> Third, the revival of Castilian law after the 1808 codification came as a great surprise to some Louisiana civilians, which means that it was unexpected and, thus, unintended during the codification.<sup>32</sup> Fourth, it was exactly because the codifiers and many lawyers were unhappy with the revival of Castilian law in the courts that article 3521 of the 1825 Code stipulated that:

[T]he Spanish, Roman and French laws, which were in force

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25. See CAIRNS, *supra* note 13, at 61–73.

26. However, my own research shows that “code” was more commonly used.

27. CAIRNS, *supra* note 13, at 63 (“No significance should be ascribed to the use of the word ‘digest.’ It is obvious that at this period the two words ‘code’ and ‘digest’ could be used interchangeably.”).

28. *Id.* at 64–65 (discussing the Swiss Civil Code of 1912, the Code Napoléon of 1804, and the Civil Code of Lower Canada of 1866).

29. *See id.* at 66–71.

30. *Id.* at 66.

31. *Id.* at 67–69.

32. *See* CAIRNS, *supra* note 13, at 66.

in this State, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code.<sup>33</sup>

Nevertheless, even after the enactment of the new Code, the courts continued their efforts to apply Castilian law, which resulted in the legislature's 1828 promulgation of two more acts abrogating all pre-existing laws and articles of the Digest with clearly specified exceptions.<sup>34</sup> This means that the courts were treating the Digest of 1808 and the Code of 1825 in the same manner without making any subtle distinction between a digest and a code.

Thus, the fact that the first civil code of Louisiana was entitled a digest does not mean that it was not a true code. Many scholars agree<sup>35</sup> that the 1808 Digest was a modern civil code that was not different from the French, German, Swiss, or Quebec civil codes. Hood believes that “[a]lthough the compilers described their work as a digest of the laws then in force, it actually was a complete civil code . . . .”<sup>36</sup> Professor Batiza expressed a similar idea, writing that “[t]he Code of 1808 . . . in scope, structure, and drafting technique, is an authentic civil code in the western tradition inaugurated by the Code Civil des Français in 1804, rather than a digest.”<sup>37</sup> Cairns agrees with this view, stating “it would seem correct to define the 1808 redaction, officially entitled, *A Digest of the Civil Laws now in Force in the Territory of Orleans*, as a code in the Romanistic civilian tradition.”<sup>38</sup>

Although scholars have already established that the title “Digest” is not indicative of the nature of the 1808 Louisiana enactment and, thus, cannot be used in debates over the intentions of its drafters or its actual sources, one question still

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33. CAIRNS, *supra* note 13, at 68 (quoting Louisiana Civil Code of 1825, art. 3521).

34. *Id.*

35. See, e.g., *id.* at 61–73; Batiza, *Code of 1808*, *supra* note 14, at 4–5; Franklin, *supra* note 2; Tucker, *supra* note 7, at 280–84.

36. Hood, *supra* note 6, at 25.

37. Batiza, *A Rejoinder*, *supra* note 14, at 630.

38. CAIRNS, *supra* note 13, at 61.

remains unanswered: why and how was the 1808 redaction named “A Digest of the Civil Laws now in Force in the Territory of Orleans,” given that it had always been called a civil code? This Article attempts to provide an answer to that question.

### III. TRACING THE ORIGINS OF THE TITLE OF THE LOUISIANA DIGEST

#### A. IN WHAT LANGUAGE WAS THE TITLE COINED?

In my effort to establish the origin of the title of the Digest of 1808, I decided to compare the English and French titles in order to identify the source language of the title and to decide where to look for sources of its author’s inspiration—whether those were French or English legal texts.

To my great surprise, I discovered that the Digest had a title page in English only. If we look at the title page of the Digest in French on the web site of the Center of Civil Law Studies at Louisiana State University, which digitized the famous *de la Vergne volume*, we see a blank page in the manuscript and the title in French in the digitized version with a note saying:

La page de titre n’apparaît qu’en anglais dans l’édition de 1808. La présente reprend le titre complet du Digeste tel qu’il est donné dans la version française de l’Acte qui pourvoit à la promulgation du digeste des lois civiles actuellement en force dans le territoire d’Orléans (1808 La. Acts 121).<sup>39</sup>

Moreover, there is inconsistency in the use of the title in both languages. The table of contents is entitled “Index of the titles of laws contained in the **Digest**,” while the French version reads “*Table des Titres des Lois contenus dans le Digeste de la Loi Civile*.”<sup>40</sup> Also, the heading above the preliminary title reads: “A Digest of the Civil Law/*Digeste de la loi civile*,” with “law/*loi*” in the singular form, while in the Act providing for the promulgation of the Digest the plural form—“civil laws/*lois civiles*”—is used. There is also another title page between the alphabetical table of

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39. “In the 1808 edition the title-page is in French only. The present page reproduces the full title of the Digest as it is given in the French version of an ‘Act providing for the promulgation of the Digest of the Civil Laws now in force in the Territory of Orleans’ (1808 La. Acts 121).” See DIGESTE DES LOIS CIVILES ACTUELLEMENT EN FORCE DANS LE TERRITOIRE D’ORLÉANS, AVEC LES CHANGEMENTS ET AMÉLIORATIONS ADAPTÉS À SON PRÉSENT SYSTÈME DE GOUVERNEMENT (1808), <http://digestof1808.law.lsu.edu/?uid=1&tid=1&ver=fr#a1>.

40. A DIGEST OF THE CIVIL LAWS, *supra* note 5, at ii–iii.

contents and the preliminary title, which is again only in English and reads “Digest of Civil **Law**” (singular form).<sup>41</sup>

The absence of the French version of the title page and the inconsistency in the use and translation of the title has two implications. First, the idea of entitling the new enactment a digest came not from its drafters; otherwise the terminology would have been consistent and they would have had a title page in French since they provided the full translation of the whole text of the code. This also signifies that the title was contrived at the very last moment before the promulgation, after the draft of the code had already been written. Second, this is a clear indication that the title was coined in English and then translated into French. The absence of the title page in French helps to identify the source language, which is, in this case, English, while the whole text of the Digest was initially written in French and then translated into English.

This said, the comparison of the title in the two languages reveals other indications of the English–French translation. Let us compare the two titles: “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,” and “*Digeste des lois civiles actuellement **en force** dans le territoire d’Orléans, avec les changements et **améliorations** adaptés à son présent système de gouvernement.*” The two words in bold, in my opinion, indicate that the title was translated from English into French.

First, although the expression “*en force*” was still used in nineteenth-century legal French, it was becoming obsolete (at least in continental European French) and was used infrequently, being gradually replaced by “*en vigueur*,” which is the only possible modern French translation of “in force.”<sup>42</sup> For instance, out of the four civil codes of Francophone Swiss cantons, three (the Civil Code of the Canton of Fribourg (1834–1850), the Civil Code of the Republic and Canton of Neuchatel (1853–1855), and the Civil Code of the Canton of Valais (1843–1855)) used only “*en vigueur*.” Only one Swiss civil code—of the Canton of Vaud (1821)—used both expressions, though “*en vigueur*” was used twice (“*d’après les lois alors en vigueur*” and “*la loi en vigueur au*

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41. A DIGEST OF THE CIVIL LAWS, *supra* note 5, at 1–3.

42. “*En force*” is even marked as an Anglicism in the famous Quebec translation program “Antidote” when used to translate “laws in force.”

moment . . . .”) while “*en force*” was used only once (“*la loi qui était en force au moment . . . .*”).<sup>43</sup> “*En vigueur*” is also the only expression used by a French lawyer, Fortuné Antoine de Saint-Joseph, in his *Concordance entre les codes civils étrangers et le Code Napoléon* in 1840 in translations of foreign civil codes into French. On the contrary, the expression “*en force*” was clearly preferred (if not the only one that was used) in Quebec legal French in the nineteenth-century. For instance, the term was used seven times by George-Etienne Cartier (one of the founding fathers of the Canadian Federation and one of the political figures who put significant effort into the codification of the civil law in Quebec)<sup>44</sup> in his speech concerning the enactment of the civil code in the Parliament of the United Province of Canada in 1865.<sup>45</sup> It is also the only expression used in the text of the 1866 Civil Code itself. The use of the term “*en force*” in Quebec could be explained both by the influence of English as the second official language of law and by the preservation of an old French form. Similarly, the Louisiana translators of the title of the Digest could have made a similar choice for the same reasons.

Second, “*amélioration*” is not a French legal term that is normally used in legislative drafting (nor is it in English). Besides, it is inexact: amendments are not necessarily ameliorations. Moreover, this might not be a translation problem at all, but is more likely to be a typographical error. The translator probably intended to make a literal translation of “alterations” as “*altérations*” into French, but either he misspelled it or the printer erred and printed it as “*ameliorations*.” This said, the literal translation as “*altération*” would not have been correct either because the term has a negative connotation in French in the sense of deterioration or falsification (e.g., “*altération d’un climat politique*” or “*l’altération d’un*

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43. I am indebted to Francophone professors Morin, Moréteau, Normand, and Issalys, as well as Ph.D. student Mathieu Juneau for their insightful comments about possible use of the expression “*en force*” in nineteenth-century legal French.

44. For his biography, see BRIAN J. YOUNG, *GEORGE-ETIENNE CARTIER: MONTREAL BOURGEOIS* (1981); ALASTAIR SWEENEY, *GEORGE-ETIENNE CARTIER: A BIOGRAPHY* (1976).

45. George-Étienne Cartier, Speech at Parliament of the United Province of Canada (Feb. 7, 1865) (“*Quand on discutait le Code Napoléon au corps législatif français, Benjamin Constant essaya de ridiculiser cette oeuvre, en disant qu’elle ne contenait rien de romain, et que ce n’était que la rédaction en articles du droit déjà en force.*”). The English translation: “When the Code Napoléon was discussed in the French legislature, Benjamin Constant tried to ridicule this work by saying that it contained nothing Roman and that it was nothing more than a redaction of articles already in force.”

*passeport*").<sup>46</sup>

Thus, the absence of the title page of the Digest in French and the comparison of the title in two languages demonstrate that it was translated from English into French.

### B. A COMMON LAW DIGEST?

Knowing that English was the source language, while French was the target language, of the translation of the Digest's title, one could pose another legitimate question: is it possible that the author(s) of the Digest's title was/were inspired by the common law tradition rather than by the civilian–Roman concept of a digest as is traditionally found in Louisiana legal historical scholarship? Should we look for the roots of the title not only in civilian tradition and the French language, but also in the English language and common law? If this hypothesis is true and the title comes from the common law tradition, then there was already some, albeit formal, *mixité* in the title of the Digest of 1808.

My bibliographic research has revealed that there were several common law digests with titles similar to that of Louisiana's in the United States at the time:

- A **Digest of laws** of the United States of America: being a complete system, (alphabetically arranged) of all the public acts of Congress **now in force** from the commencement of the federal government, to the end of the third session of the Fifth Congress, which terminated in March 1799, inclusive (Baltimore: W. Pechin, 1800–1802);
- A **digest of the laws** of the state of Georgia: from its first establishment as a British province down to the year 1798, inclusive, and the principal acts of 1799: in which is comprehended the Declaration of Independence; the state constitutions of 1777 and 1789, **with the alterations and amendments** in 1794 (Philadelphia, 1800);
- A **digest of the laws** of Maryland; being an abridgment, alphabetically arranged, of all the public acts of Assembly **now in force**, and of general use, from the first settlement of the state, to the end of November session 1797, inclusive, with references to the acts at large (Baltimore, 1799);

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46. These examples are taken from Antidote Thesaurus.

- A **digest of the laws** of Maryland. Being a complete system (alphabetically arranged) of all the public acts of Assembly, **now in force** and of general use. From the first settlement of the state, to the end of November session, 1803, inclusive . . . (Washington, 1804);
- An abridgment of the laws of Pennsylvania: being a complete **digest** of all such acts of assembly, as concern the commonwealth at large . . . (Philadelphia, 1801).<sup>47</sup>

Thus, it is clear that at the time when the Louisiana Digest was promulgated there were several collections of federal and state laws in the United States that used the identical words and expressions: “digest of the laws,” “now in force,” and “with the alterations and amendments.”

Nevertheless, the wording “Digest of laws (law) now in force” is not an American invention. It is widely present in British common law as well, including the then British territories of Newfoundland and Jamaica:

- A **digest of the laws** relating to the game of this kingdom: containing all the statutes **now in force** respecting the different species of game; including those which have been made for the preservation of sea and river fish: the whole illustrated with the best and most approved judicial determinations thereon, brought down to the present time, collected from the law reporters: to which is added, a choice collection of precedents of indictments on the different statutes; together with warrants, deputations, &c. (London, 1776);
- A **digest** of the laws of England by the Right Honourable Sir John Comyns. The fourth edition, corrected, and continued to the present time, by Samuel Rose. In six volumes (London, 1800);
- A **digest** of the whole law **now in force** relating to volunteer corps in Great-Britain (London, 1803);
- An abridgment of The laws of Jamaica, being an alphabetical **digest** of all the public acts of Assembly **now in force**, from the thirty-second year of King Charles II to the thirty-second year of His present Majesty King George III. [1681–1792] inclusive (St. Jago de la Vega, Jamaica, 1802);

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47. In all common law digests' titles the emphasis is mine.

- **Digest of the laws** of Newfoundland: comprehending the Judicature Act and Royal Charter, and the various acts of the local legislature in amendment of the same: with notes and comments, illustrative and explanatory of the practice and decisions of the courts thereon (St. John's, Newfoundland, 1847).

Moreover, in the legislative technique of the common law tradition, the verb “to digest” (i.e., to arrange laws) was widely used in the seventeenth and eighteenth centuries. Some titles of collections of laws contain the word “to digest” rather than the noun “digest,” although the noun was more popular:

- The lawes [sic] of Virginia **now in force**. Collected out of the Assembly records, and **digested** into one volume (London, 1662);
- A collection of all the public and permanent acts of the General Assembly of Kentucky which are **now in force**: arranged and **digested** according to their subjects: together with acts of Virginia relating to land titles, the recovery of rents, and the encouragement of learning, never before printed in this state: to which are prefixed a table explanatory of technical terms and a summary of criminal law (Frankfort, 1802);
- The statutes of the Mississippi Territory, revised and **digested** by the authority of the General Assembly (Natchez, Miss., 1807);
- The statutes at large concerning the provision for the poor: being a collection of all the Acts of Parliament relating thereto, **now in force**: to which is added, a table of all the said Acts, **digested** into alphabetical order (s.n., 1755);
- An abridgement of all the English and Irish statutes **now in force**, or use, relating to the revenue of Ireland: continued to the end of the session here and in Great-Britain, in the 7th year of His present Majesty King George III: alphabetically **digested** under proper heads, with reference to the acts at large: and a table of the principal matters (Dublin, 1769);
- An abridgement of all the statutes **now in force**, relating to the duties on salt and herrings: **digested** under the following heads . . . to which is added, under the head of beef and pork, an abstract of the laws that prohibit the importation of beef and pork from Ireland, and other foreign parts (London,

1774).

Whether the title of a collection of laws contains “to digest” or “digest,” there is an almost ubiquitous pattern in the use of the expression “now in force,” which is also found in the Louisiana Digest.

Additionally, in American common law states, various digests were published after the promulgation of the Louisiana Digest:

- A **digest** of the laws of South-Carolina [sic], containing all such acts, and parts of acts, of a general and permanent nature, as are **now in force** . . . . (Columbia, 1814);
- A **digest** of the laws of the state of Connecticut: in two volumes (New-Haven, Connecticut, 1822–1823);
- A **digest** of the laws of the State of Alabama: containing the statutes and resolutions **in force** at the end of the General Assembly in January, 1823 (New York, 1823);
- A **Digest** of the several laws **now in force** to organize, govern and discipline the militia of the state of Missouri (Fayette, Mo., 1829);
- A **digest** of the laws of the state of Georgia; containing all statutes and the substance of all resolutions of a general and public nature, and **now in force**, which have been passed in this state, previous to the session of the General assembly of Dec. 1837 (Athens, Ga., 1837);
- A **digest** of the laws of the state of Florida, from the year one thousand eight hundred and twenty-two, to the eleventh day of March, one thousand eight hundred and eighty-one, inclusive (Tallahassee, Fla., 1881);
- A **digest** of the laws of the state of Texas: containing laws **in force**, and the repealed laws on which rights rest, carefully annotated (Galveston, Tex.; New York, N.Y.; Washington, D.C., 1866);
- The **digest** of the existing commercial regulations of foreign countries, with which the United States have intercourse; as far as they can be ascertained: prepared under the direction of the secretary of the Treasury, in compliance with a resolution of the House of representatives, of 3d March, 1831 (s.n., 1833);

- **Digest** of the laws and ordinances of Cincinnati, of a general nature, **now in force** (Cincinnati, 1842);
- **Digest** of all the laws and resolutions **now in force** in the State of Georgia: on the subject of public education and free schools (Milledgeville, Ga., 1832);
- A **digest** of the laws of New Jersey (Philadelphia, 1855). Even Confederate states during the Civil War attempted “to digest” their laws by promulgating A **digest** of the militia laws of Tennessee, **now in force**, with a synopsis and index: also an appendix containing the permanent constitution and Articles of War of the Confederate States, &c. (Memphis, 1861).

Although I may have missed some digests of law published in the common law world,<sup>48</sup> the titles that I have collected clearly show that in Great Britain and its territories, as well as in American common law states, there was an established tradition of naming their collections of law in such a way. Elements of this tradition are clearly present in the Louisiana Digest.

Thus, the above analysis shows that the words “digest” and “now in force” in the title of the Louisiana Digest come from the common law legal technique of publishing collections of law, while the words “with the alterations and amendments” come from the Digest of Laws of the State of Georgia—the only digest that contains such an expression and published in a state geographically close to Louisiana. There was also a tradition in the common law of putting into the title a description of the system of government, the subject matter of the collected laws, or the dates, which is present in the Louisiana title as well. This said, to such a common law title an important qualification—“digest of **civil** laws”—was added, which brought a civilian component into this common law title, making it mixed.

Moreover, if we look inside the Louisiana Digest and the Digest of the Laws of the United States of America, we will notice a striking similarity in the layout and structure of the two digest-books.

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48. There could be other digests before and after Louisiana’s codification.

## Figure 1

U.S. Digest

A  
**D I G E S T**  
 OF THE  
**L A W S**  
 OF THE  
**United States OF America.**  
 BEING  
 A Complete System,  
*(Alphabetically arranged)*  
 OF ALL THE  
 Public Acts of Congress now in force—  
*From the commencement of the Federal Government, to the  
 end of the third Session of the fifth Congress, which  
 terminated in March 1799,  
 inclusive.*

—\*—  
 By THOMAS HERTY,  
 Editor of an Abridgment of the Laws of Maryland.

—\*—  
 B A L T I M O R E :  
 Printed for the EDITOR, by W. PECHIN.

1800.

Louisiana Digest

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.

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NEW-ORLEANS:

PRINTED BY BRADFORD & ANDERSON, PRINTERS TO THE TERRITORY.

BRADFORD & ANDERSON

1808.

The U.S. Digest also contains an index which closely resembles the Louisiana Digest's "table of contents alphabetically arranged." Professor Palmer justly affirms that "[t]his user-friendly feature may have been un-French but it was very American and indicative of codification with a common [law] touch."<sup>49</sup>

## Figure 2

U.S. Digest

# INDEX.

*THE general heads are designated by Italics; the letter p. denotes the page, and the letter a. the article.*

### A

- ACCESSARIES.**—To piracy or felony, how punished. p. 66. a. 11.  
**Accountant of the navy.**—His appointment and duty. p. 386. a. 6. his salary. p. 403. a. 45.  
**Accountant of the war department.**—His salary. p. 403. a. 45. his appointment & duty. p. 541. a. 5. 10.  
**Adjutant-General.**—Appointment of. p. 337. a. 30. one to be appointed in each state, his duty. p. 350. a. 6.  
**Admeasurement of vessels.**—Under 20 tons. p. 38. a. 26. fees for. p. 39. a. 34. to be obtained before registered. p. 443. a. 6.  
**Ad valorem rates of duty.**—How estimated. p. 222. a. 61.  
**Agents for protecting citizens in foreign parts.**—Appointment of, duty and compensation. p. 450. a. 10. 11. 12.  
*Aliens.* p. 9.  
*Alien Enemies.* p. 11.  
**Ambassador.**—Process against, void. p. 70. a. 25, 26. Exception. a. 27. violation of his person or passport, how punished. a. 28. See *Ministers public*.  
**Apothecary General.**—Appointment of, duty and compensation. p. 329. a. 1. &c.  
**Apportionment.**—Of direct tax among the states. p. 456. a. 1.  
**Appraisers.**—Mode of appraising damaged goods, his oath & other duties. p. 213. a. 52. If goods taken on a *ieri facias*, how to proceed. p. 312. a. 68, 70.  
**Armouries.**—Established; and compensation to its officers. p. 13. a. 2, 3, 4.  
*Arms and Ammunition.* p. 12.  
**Arrest.**—Who exempt from. p. 328. a. 5. p. 342. a. 50.  
*Arsenals and Magazines.* p. 13.  
**Artillerists & engineers.**—A corps of, formed. p. 333. a. 3, 4, 5, 6, 11. An additional regiment engaged for 5 years. p. 336. a. 24.  
*Arts promoted.* p. 14.  
**Assayer of the mint.**—His appointment, duty, compensation &c. p. 353. a. 1, 6, 24, 25.  
**Assessors.**—Principal and assistants, how appointed and their oath, to have instructions framed to value and enumerate houses, &c. p. 332. a. 7, 8. to distribute their districts into divisions, and require lists of lands to be delivered, &c. p. 333. a. 9, 10, 11, 12. how to proceed when persons neglect to give lists, p. 334. a. 14, 15, after collecting lists to value and assess lands, &c. and class them in lists, penalty on non-performance of duties, p.

49. Palmer, *supra* note 14, at 1075.

## Louisiana Digest

**TABLE OF CONTENTS,**  
**ALPHABETICALLY ARRANGED.**

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## A.

- Absence, absent persons.* Curatorship of absent persons, page 14. Provisional possession of their heirs, 16. Effects of absence respecting the rights of the absentee, 20. Respecting his marriage, *ibid.* Respecting his children, *ibid.*
- Acceptance* of a succession, 160. Of a donation, 220.
- Accession* effects of, 102. With respect to immoveables, 104. With respect to moveables, 106.
- Accretion*, limits of this right in testamentary successions, 250.
- Acknowledgment* of illegitimate children, 48.
- Acts.* How their form and force are governed, 4. Authentic acts, 304. Acts under private signature, 306. Recognitive and confirmative acts, 308.
- Adoption* is abolished, 50.
- Age* of majority and minority, 10.
- Aleatory contracts* 260 and 420.
- Agreements* see *covenants*.
- Alluvion*, 106.
- Annuity* or rent charge, 408. Life and perpetual annuities 408. See *loan*.
- Antichresis*, a sort of pledge. See *pledge*.
- Apprentices*, their obligations and duties, 36. 38.
- Ascendants.* Maintenance which they owe to their descendants, 54.—When their tutors, 60. In what manner they succeed 150. Legal portion or legitime which they ought to leave to their descendants on their estate, 212, 214. When they may disinherit them, 256—*or* make partition among them, 252.
- Assignment* see *transfer*.
- Auction.* Sale at auction. See *sale*
- Authority.* Paternal authority, its effects and limits, 52.
- Authorisation.* See *wife*.

## B.

- Bankruptcy.* See *surrender and respite*.
- Bastards.* Who are bastards, 8. Their distinction from natural children, 48. *Incestuous and adulterous bastards*, who are so called 44. Are absolutely incapable of succeeding their natural father and mother 136. And of receiving from them more than mere maintenance, *ibid* and 212. Are entitled to that maintenance when in need 56.
- Bet*, 420.
- Blood.* Consanguinity of the whole and of the half blood and of its effects, 152, 154.
- Brothers.* Three kinds of brothers or sisters, 152.
- Buildings.* Intermedial works for certain buildings, see *services*. Undertakings to build by the job, see *job*.

Thus, it is clear that the layout and the structure of the Louisiana Digest was inspired by similar U.S. digests, while the title was borrowed from the Georgian Digest.

### CONCLUSION

The story of the creation of the title of the Louisiana Digest leads to the conclusion that it was coined at the very last moment before its promulgation and publication by some Anglophone outside the codification commission. This explains why the French translation is inaccurate, why the title page in French is missing, and why there is inconsistency in the use of the title in both languages in the text of the Digest. The fact that the title was conceived at the very last moment and was not within the intention of the drafters is also confirmed by the fact that, throughout the text of the enactment, the word "digest" is only used in page headers, while the text itself uses only the word "code" ("this code" or "present code").<sup>50</sup>

The fact that practicing lawyers and judges started to refer to Castilian laws in their pleadings can now be partially explained. Many of them were trained in a common law tradition, and interpreted the title of the Louisiana Digest, and consequently its content, in the way they would interpret, say, the Georgian Digest. They considered it a mere collection of pre-existing laws; because the law in force was Castilian, it could still be applied even after the codification.

Yet, the title of the Digest and its interpretation by the courts do not mean that the drafters themselves intended to create a mere collection of existing laws, and to maintain the previous laws in force as a supplementary source of law. The April 5, 1808, letter from Claiborne, the Louisiana governor at the time, to President Madison contains a phrase that has been used by the partisans of the digest-code dichotomy, such as Dargo,<sup>51</sup> as an argument that the 1808 enactment was designed as a mere digest: "The 'Civil Code' alluded to in my last letter," wrote Claiborne, "is nothing more, than a 'Digest' of the Civil Laws now in force in this Territory."<sup>52</sup> For Dargo, this statement meant that "the governor also distinguished between a code and a

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50. See, e.g., A DIGEST OF THE CIVIL LAWS, *supra* note 10.

51. DARGO, *supra* note 11, at 272.

52. Letter from W.C.C. Claiborne, Governor of La., to James Madison, U.S. Sec'y of State (Apr. 5, 1808), in 4 OFFICIAL LETTER BOOKS OF W.C.C. CLAIBORNE: 1801-1816, at 168 (Rprnt. ed. 1972) [hereinafter Letter from Claiborne to Madison].

digest.”<sup>53</sup> In my opinion, this phrase is taken out of context and cannot lead to the conclusion that Governor Claiborne was aware of the digest–code contradistinction. The purpose of the letter in general was to justify and explain why civil law was preserved in Louisiana and was not replaced by common law. Claiborne writes further in his letter (and this passage is not cited by Dargo):

I see much to admire in the Civil Law, but there are some principles, which ought to yield to the common Law Doctrine;—Indeed it has with me been a favorite policy to assimilate as much as possible the Laws and usages of this Territory, to those of the states generally;—but the work of innovation, cannot be pursued hastily, nor could it be prosecuted to advantage or with safety until the existing Laws were fully presented to our views.<sup>54</sup>

Thus, Claiborne calls the 1808 Code “nothing more, than a ‘Digest’ of the Civil Laws now in force in this Territory,” not to contrast it with a “true” civil code, but to say that it was an important step before the introduction of common law, rather than an act of preserving the civil law. This letter should be read in the light of civil versus common law rivalry, not in terms of the contrast between an innovative code and a mere collection of pre-existing laws. When read in this context, the statement cannot be used in the digest–code debate. It is quite possible that it was Claiborne himself who coined the title of the 1808 Digest.

In sum, the foregoing analysis shows that the title of the Louisiana Digest does not reveal the codifiers’ intention to create a mere collection of pre-existing laws, leaving the laws outside the Digest still in force. At least, not to the extent that is usually stated in Louisiana legal-historical scholarship. Such a title is the result of a hasty political decision without legal technical subtleties being borne in mind. There is no specific connotation in the word “digest,” as opposed to “code,” that would allow for any credible conclusions about its nature and content or about the intentions of its drafters. Whoever coined the term “digest” did not think about it in terms of a digest–code contradistinction, but rather wanted to show that it was a collection of laws of a state within the Union, and sought to hide the elements of innovation, law reform, and the fact of the preservation of civil law in the

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53. DARGO, *supra* note 11, 272.

54. Letter from Claiborne to Madison, *supra* note 52, at 169.

territory. According to the title, the Louisiana Digest is not a unique civilian code but one of many American common law digests, although its content reveals a true civilian codification. This said, I believe that the use of a common law style title for the Louisiana Digest is a misleading misnomer. If common law digests are, indeed, collections of pre-existing laws without substantial revision, the Louisiana Digest is a comprehensive codification of the civil law of the state that contains a revision of both the form and the substance of the law in force. The Louisiana Digest is not a simple compilation of existing laws, but a new comprehensive piece of legislation that contains a substantial degree of reform and innovation. The true intention of the drafters in 1808 was to create a civil code in the Romanist legal tradition. That is why it is not surprising that the codifiers changed the title to "The Civil Code of the State of Louisiana" in 1825.

Although the mixed title of the Digest did not bring *mixité* into the substance of Louisiana civil law, its promulgation significantly mixed up legal practice, research, and scholarly debates on the history and nature of Louisiana's first codification.