
Employment in the *Civil Code of Lower Canada*: Tradition and Political Economy in Legal Classification and Reform

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In codifying the law on employment in 1866, the Quebec codifiers preferred a classification based on contract, as exemplified by the French *Code*, to one modelled on status, as embodied in the *ancien droit* and, though only in part, in the *Louisiana Code*. This classification and the adoption of the specific articles of the Quebec *Code* are discussed in light of the codifiers' attachment to traditional legal scholarship and to liberal theories of political economy. As filtered through the codifiers' intuitive understanding of what would be the better law, the influence of tradition and liberal theories yielded a codification which often departs from the *ancien droit* and whose conservatism has traditionally been exaggerated.

Lors de la codification du louage de services en 1866, les codificateurs ont préféré une classification fondée sur le contrat, comme celle du *Code français*, à une classification basée sur le statut, telle que présente dans l'*ancien droit* et, en partie, dans le *Code louisianais*. Cette classification et l'adoption des articles spécifiques du *Code québécois* sont discutés à la lumière de l'attachement des codificateurs à la doctrine juridique traditionnelle et aux théories libérales d'économie politique. L'influence de la tradition et des théories libérales, telles que filtrées par la perception que se faisaient les codificateurs des réformes désirables, ont produit une codification qui se distingue souvent de l'*ancien droit*, et dont le conservatisme a généralement été exagéré.

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Introduction

The traditional consensus has been that the *Civil Code of Lower Canada* of 1866 is conservative, especially in comparison with the French *Code civil* of 1804 which is usually viewed as highly revolutionary.¹

¹Consider the following selection of comments. F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Montreal: Wilson and Lafleur, 1907) at 23:

Our Civil Code, then, codifies the old French law of Quebec, as modified by statutes, and also codifies, but only as to its broad principles, the commercial law of the province, which is derived from English as well as from French sources.

J. Limpens, "Territorial Expansion of the Code" in B. Schwarz, ed. *The Code Napoleon and the Common-Law World* (New York: New York University Press, 1956) 92 at 99:

The Quebec Code of 1866 is certainly not a direct offspring of the Code Napoleon; it is above all — and the fact is worthy of attention — a codification founded on the Custom of Paris.

R. Taschereau, "Le siècle de la renaissance et son influence sur le droit civil du Québec" (1962) 12 *Thémis* 7 at 16:

[I]ci, nous n'avons pas subi cette influence de 1789, et c'est aux véritables sources du droit national français que nous avons cherché notre inspiration. C'est pourquoi, je pense, nous avons un droit civil français plus historique que les Français eux-mêmes.

The probable origins of this consensus are the instructions to the commissioners for codification to embody in the *Code* only laws actually in force, while suggested amendments had to be stated separately and distinctly with reasons for their proposed adoption,² and the limited preservation of the law before the *Code* came into force.³ This second point causes Mignault to remark that “il n’y a pas, à proprement parler, de droit ancien ni de droit nouveau en cette province.”⁴ Such an approach also gains support from the paucity of declared reforms embodied in the *Code*.⁵

I would suggest, however, that the traditional view overstates the conservatism of the *Code*, and is based on a somewhat naïve understanding of the nature of law, an understanding deriving — one suspects — from an overly formalist view of law and legal reasoning.⁶ On the contrary, it seems apparent that the work of the codification commission was highly creative, and that in the articles of the *Code*, even those where there was no reform

²*An Act Respecting the Codification of the Laws of Lower Canada Relative to Civil Matters and Procedure*, C.S.L.C. 1861, c. 2, s. 6.

³This preservation was effected by arts 2712 and 2714 *C.C.L.C.* The relevant parts of art. 2712 *C.C.L.C.* (art. 2613 in 1866) read as follows:

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

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

In which such laws are contrary to or inconsistent with any provision herein contained;

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

Before being abrogated, art. 2714 *C.C.L.C.* (art. 2615 in 1866) read in part:

If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded

On the significance of these articles, see J.E.C. Brierley, “Quebec’s Civil Law Codification Viewed and Reviewed” (1968) 14 *McGill L.J.* 521 at 556-58; J.W. Cairns, “Comparative Law, Unification and Scholarly Creation of a New *Ius Commune*” (1981) 32 *Northern Ireland L.Q.* 272 at 277-79.

⁴P.-B. Mignault, *Le droit civil canadien*, vol. 1 (Montréal: Whiteford & Théoret, 1895) at 52.

⁵T. McCord, *The Civil Code of Lower Canada*, 3rd ed. (Montreal: Dawson Brothers, 1880) I (Synopsis of the changes in the law), sets out the reforms.

⁶H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 249, states of “formalism”, “conceptualism”, and “mechanical” or “automatic” jurisprudence that: “It is not always clear precisely what vice is referred to in these terms.” I shall here adopt Hart’s own description of the “vice” (at 126) as “an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice [in the application of general rules to particular cases], once the general rule has been laid down.” One thinks of the formal rationality Weber considered the mark of German Pandectist Law: see M. Weber, *On Law in Economy and Society*, ed. by M. Rheinstein, trans. E. Shils (Cambridge, Mass.: Harvard University Press, 1954) at 64 for the “five postulates” of the *Pandektenrecht*. For criticism, see R. Pound, “Mechanical Jurisprudence” (1908) 8 *Colum. L. Rev.* 605.

noted, the commissioners sought to embody their own particular vision of Quebec society.⁷ Furthermore, not only the substantive content of the individual articles, but also the way they acted together to create legal institutions — to use Neil MacCormick's term⁸ — and the classification of those institutions are crucial in gaining an appreciation of the reforming and modernising effect of the *Code*.

The area of law discussed here is that of master and servant or, in the more modern term, employment. In the *Code* it is classified as part of the law of lease.⁹ This follows the French *Code civil* of 1804,¹⁰ and contrasts with, for example, the classification of master and servant in Blackstone's *Commentaries*,¹¹ where it is treated as part of the law of persons.¹² Following Blackstone,¹³ the Louisiana *Civil Code* of 1825, well known as a source for the Quebec *Code*,¹⁴ has a title on master and servant in its first book "Des personnes", while also dealing with the topic as an aspect of lease.¹⁵ This paper will explain both the general classification of employment adopted in the Quebec *Code* and the historical genesis of the actual articles on lease of service. The argument will be developed in five stages. The first part of the paper examines the general approach of the redactors to their task and demonstrates their rejection of any type of strict formalism in determining both the law in force and in deciding on potential reforms. The second part discusses the influence on the codifiers both of liberal theories of political economy and of contemporary jurisprudential thought. The next part explores the traditional approach to lease of service in the civil law. The fourth part examines in detail the work of the redactors in codifying the law on lease of service, showing how the specific articles and general attitude of the redactors derived from an interaction between the traditional sources used by the redactors and their views on political economy. The fifth and concluding part of the paper gives a general assessment of the codifiers' operations in this area of the law, pointing out the tensions between their aims and the state of the existing law.

⁷For fuller treatment, see J.W. Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change*, vol. 2 (doctoral thesis in law, University of Edinburgh, 1980) at 687-717.

⁸D.N. MacCormick, "Law as Institutional Fact" (1974) 90 L.Q. Rev. 102.

⁹Art. 1600ff. *C.C.L.C.*

¹⁰Art. 1708ff. *C.C.F.*

¹¹W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765) at 410.

¹²Sec O. Kahn-Freund, "Blackstone's Neglected Child: The Contract of Employment" (1977) 93 L.Q. Rev. 508.

¹³See J.P. Richert & E.S. Richert, "The Impact of the Civil Code of Louisiana upon the Civil Code of Quebec of 1866" (1973) 8 R.J.T. 501; Brierley, *supra*, note 3 at 541.

¹⁴See Cairns, *supra*, note 7 at 517 and 559.

¹⁵See arts 155-196 (Book I, Title VI), and arts 2643, 2645 and 2716-2721 *C.C.La.*

I. The Commission's Rejection of Formalism

Brierley identifies the motivation underlying the codification of the Lower Canadian law as the desire to solve three legal and technical problems: one resulting from the diversity and confusion of the sources of the law; one of language; and one caused by the absence of any legislative and doctrinal synthesis.¹⁶ The bulk of the private law was of French origin, and codification in France had generally led to a cessation of the reprinting of these sources, with the commentaries on them, making it difficult to use them as sources of Quebec law. To these French sources a considerable amount of provincial legislation and court decisions had been added, while some provisions of English law had been introduced. Furthermore, though many inhabitants were unilingual, some parts of the law were accessible only in French and others only in English.¹⁷ In the face of this confusion, the French *Code* of 1804 and the Louisiana *Code* of 1825 indicated the benefits of codification and offered examples of a synthesis of the law and of a bilingual code.¹⁸ Brierley's research accordingly confirms the reasons for codification stated in the preamble to the 1857 Act which provided for codification.¹⁹

On 4 February 1859, three commissioners for codification were appointed: René-Edouard Caron, puisné judge of the Court of Queen's Bench, and Charles Dewey Day and Augustin-Norbert Morin, both puisné judges of the Lower Canadian Superior Court. On 10 February 1859, Joseph Ubalde Beaudry and Thomas Kennedy Ramsay, both members of the Bar, were

¹⁶*Supra*, note 3 at 533-42.

¹⁷See J.W. Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change*, vol. 1 (doctoral thesis in law, University of Edinburgh, 1980) at 114-32; Brierley, *ibid.* at 533-40.

¹⁸See Brierley, *ibid.* at 540-2.

¹⁹The preamble of *An Act Respecting the Codification of the Laws of Lower Canada Relative to Civil Matters and Procedure*, *supra*, note 2, states:

Whereas the Laws of Lower Canada in Civil Matters, are mainly those which, at the time of the cession of the country to the British Crown, were in force in that part of France then governed by the Custom of Paris, modified by Provincial Statutes, or by the introduction of portions of the Law of England in peculiar cases; and it therefore happens, that the great body of the Laws, in that division of the Province, exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin; And whereas the Laws and Customs in force in France, at the period above mentioned, have there been altered and reduced to one general Code, so that the old laws still in force in Lower Canada are no longer reprinted or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them; And whereas the reasons aforesaid, and the great advantages which have resulted from Codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the Codification of the Civil Laws of Lower Canada

appointed secretaries of the commission. Thomas McCord replaced Ramsay as secretary on 25 October 1862.²⁰ On Morin's death in 1865, Beaudry replaced him as commissioner, with the post of secretary being filled by Louis Siméon Morin; but by then the work was essentially finished and the draft code was being examined by the Legislature.²¹

Brierley has shown that Caron acted as *de facto* president of the commission, and that early in 1859 he gave thought to the implementation of the Legislature's instructions.²² Caron first turned his attention to the task of determining what laws were in force in Lower Canada and set out his views in a *Mémoire*, in which there was an exhaustive classified list of the sources of Lower Canadian law.²³ The list included the *Coutume de Paris*, French ordinances and edicts, provincial legislation, juristic writers on French law of the *Ancien régime*, and those, such as Domat, who wrote on Roman law as adapted to France. Despite being mentioned only briefly towards the end of the list, juristic writings turned out to be the most important, and fruitful, source for the *Code*.²⁴

Though the commission was instructed to draw up the *Code* on the basis of the law in force, there inevitably was still an element of choice and discrimination in the primary task of stating the law in force. The commissioners themselves observed in their Second Report that:

[O]n an infinity of points there is uncertainty and difference of opinion. The legislature is silent, the courts do not concur, the authors disagree, and yet in all these cases a decision must be come to ...²⁵

The commission's First Report had already outlined some of the criteria by which decisions would be made on any particular rule as being the law in force:

²⁰Papiers René-Edouard Caron, Archives du Séminaire de Québec, S. 817 at 3-13, 230-31 and 233 [hereinafter *Livre des minutes*]. In citations of these archives, the references to pages or folios will follow those suggested by Brierley, *supra*, note 3 at 575ff. Archival number S. 817 bears a title ("Livre des minutes des procédés de la Commission de la codification des lois à ses réunions régulières, tenues d'après la clause 19 de l'Acte de 1857, Chap. 43"). The other documents are not titled regularly and will be hereinafter referred to as Papiers Caron, followed by the archival number. I have used copies of the microfilms of them available in the Library of the Faculty of Law of McGill University.

²¹See Brierley, *ibid.* at 581-9; see also McCord, *supra*, note 5 at v-vi (Preface to first edition).

²²*Ibid.* at 542-73; McCord, *ibid.* at v-x.

²³See *Livre des minutes*, *supra*, note 20 at 15-24, 16-19; see also the list of sources quoted in Brierley, *ibid.* at 547-52.

²⁴Brierley, *ibid.* at 553 comments: "The vast bulk of actual law to be included in the provisions of the future Code was thus contained in the commentaries of a myriad of French writers of the seventeenth and eighteenth centuries."

²⁵*Report of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters* (Second Report), vol. 1 (Québec: Desbarats, 1865) at 143 [hereinafter Second Report].

The Commissioners would remark that in all cases of doubt and conflicting opinions upon the law, and in the cases of suggested amendments, they have not been governed by the mere weight of authority upon the one side or the other, but have preferred the rules likely to be found practically the most convenient and beneficial.²⁶

The codifiers apparently examined many and varied sources in a search for potential amendments to the law.²⁷ The *Code civil* of France and the Louisiana *Civil Code*, for example, were major sources of possible reform, and Caron believed that the latter, completed after the French *Code*, might well contain provisions suitable for adoption in Quebec.²⁸ The Louisiana *Code* had, after all, been specifically mentioned in the preamble to the 1857 Act, and had been praised in the debates over the codification bill.²⁹ McCord described the amendments as “intended for the most part to improve our law as a system, and to adapt it more perfectly to our present state of society.”³⁰ He added: “They are ... of a nature to harmonize with the ideas of the present day, and to adapt our ancient laws to the changes which since their date society itself has undergone.”³¹ In both stating the existing law and suggesting reform, the codifiers thus were influenced by their perceptions and intuition of what was suitable for Lower Canada. As one would expect of experienced judges, they explicitly rejected any type of naïve formalism or mechanical jurisprudence.

The work of drafting individual books and titles of the *Code* was split among the three commissioners, and it is possible to ascertain which parts were originally drafted in French and which in English. The drafts were translated into the other language by the secretaries, checked by the commissioner who drew them up, and then carefully examined by all three.³² The commission worked using *cahiers*,³³ in some of which each double page was divided into four columns, headed: “Existing Law”, “Corresponding

²⁶*Report of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters* (First Report), *ibid.* at 32 [hereinafter First Report].

²⁷McCord, *supra*, note 5 at XLIII-LI, gives an idea of the range of sources consulted. Brierley, *supra*, note 3 at 552, gives a count of over 350 different sources. A. Morel, “L'apparition de la succession testamentaire: réflexions sur le rôle de la jurisprudence au regard des codificateurs” (1966) 26 R. du B. 499 at 501, gives a count of more than 300 *titres*. For the authorities for specific articles, I have followed McCord in preference to the published reports of the commission because, as he pointed out, *supra* at iii-iv, in the second edition of the reports many of the authorities were given inaccurately.

²⁸See Brierley, *ibid.* at 545. In *Livre des minutes*, *supra*, note 20 at 24, Caron wrote: “Le Code Louisiennais, ayant été fait après l'autre, contient sûrement plusieurs dispositions qui, quoique non comprises au Code Napoléon, devraient cependant être adoptées.”

²⁹See Brierley, *ibid.* at 541-42 n. 54. See also the preamble of the 1857 Act, *supra*, note 19.

³⁰*Supra*, note 5 at II.

³¹*Ibid.*

³²*Ibid.* at viii-ix. See also Brierley, *supra*, note 3 at 537.

³³See Brierley, *ibid.* at 577-80.

Article of the Civil Code of France”, “Proposed Amendment” and “Remarks”.³⁴ In others, a single page was divided into two columns, with one containing the existing law, and the other the reference to the French *Code*, proposed amendments and any remarks.³⁵ The intention was to utilize, as instructed by the Legislature, the expression and wording of the French *Code* in drawing up articles to encapsulate the existing law.³⁶ Caron aptly described the French *Civil code* as “le cannevas sur lequel il faut travailler; il faudra en suivre le plan et les divisions, et, comme règle générale, en adopter même, quant à la rédaction, tous les articles qui nous conviennent.”³⁷ It is obvious that this method, involving comparison with the French *Code*, would cause the commissioners to reflect critically on the existing law, and would mean that, in considering a possible amendment, the French provision would always be the one most convenient and obvious to follow.

II. Liberal Economics and the Commission

Codification came at the high point of nineteenth-century liberalism, and at a time of major reform in Quebec law.³⁸ The mainstay of the Quebec economy was still the export of grain and timber, but there had been some industrialization.³⁹ The largely English-speaking entrepreneurial class had early espoused the doctrines of liberal capitalism, and while in the early years of the nineteenth-century the liberal professions had rejected commercial capitalism,⁴⁰ by 1847 even Louis-Joseph Papineau, the well-known defender of seigneurialism, could declare that he was “disciple dès ma première jeunesse de l'école d'Adam Smith, et de tout temps ennemi de tout

³⁴See, e.g., Papiers Caron, *supra*, note 20, S. 764-774 dealing with obligations.

³⁵See, e.g., Papiers Caron, *ibid.*, S. 776-784 on persons and prescription; S. 788, entitled “De la Vente, Exchange”, has four columns on a double page, but this is the two-column type, with the French and English texts on facing pages. In the surviving *cahiers*, apart from on obligations, the two-column type predominates.

³⁶See Brierley, *supra*, note 3 at 563-64.

³⁷Livre des minutes, *supra*, note 20 at 15.

³⁸See Cairns, *supra*, note 17 at 131-33; Brierley, *supra*, note 3 at 522-23.

³⁹See J. Hamelin & Y. Roby, *Histoire économique du Québec, 1851-96* (Montréal: Fides, 1971) at 161-241; A. Faucher, *Québec en Amérique au XIXe siècle: Essai sur les caractères économiques de la Laurentie* (Montréal: Fides, 1973) at 26-27; S.B. Ryerson, *Unequal Union: Roots of Crisis in the Canadas, 1815-1873*, 2d ed. (Toronto: Progress Books, 1975) 267-68; R. Armstrong, *Structure and Change: An Economic History of Quebec* (Toronto: Gage, 1984) at 189-205.

⁴⁰F. Ouellet, *Histoire économique et sociale du Québec, 1760-1850: Structures et conjoncture* (Montréal: Fides, 1966) at 205-8.

monopole et privilège".⁴¹ The most obvious example of the growth, and triumph, in Quebec of the precepts of liberal capitalism is, of course, the controversy over, and eventual abolition of, seigneurial tenure.⁴²

While industrialisation was slow, it eventually created in Quebec an urban class of wage labourers.⁴³ This resulted in the increasing *contractualisation* of the relationship between master and servant, employer and employee, which moved away from one of domestic dependency.⁴⁴ In 1867, members of the business community of Quebec declared:

Every individual has the right to settle for himself the rate of remuneration for his services; and it is not illegal for a number to agree upon a rate of wages. This is but the full exercise of freedom, and against it there can be no complaint. The employer is left with the choice of submitting or procuring other labour; and, he, too is thus free.⁴⁵

The codification commissioners obviously adopted and endorsed such principles of economic liberalism. In this respect, it is useful to look at their approach to the law of contract.

The fine, imperative statement of freedom of contract in article 1134 of the French *Code civil* has no *direct* equivalent in the Quebec *Code*, though

⁴¹Speech (21 December 1847) reproduced in G.N. Tucker, *The Canadian Commercial Revolution 1845-1851* (Toronto: McClelland and Stewart, 1964) at 79. The role of Smith as the apostle of nineteenth-century laissez-faire has recently been reassessed: see, e.g., D. Winch, *Adam Smith's Politics: An Essay in Historiographic Revision* (Cambridge: Cambridge University Press, 1978) at 13-14, 80-81 and *passim*.

⁴²See W.B. Munro, *The Seigneurial System in Canada: A Study in French Colonial Policy* (New York: Longmans, 1907) at 224-51; F. Ouellet, "L'abolition du régime seigneurial et l'idée de propriété" (1954) 14 *Hermès* 22. As Munro noted, in the case of the abolition of seigniorial tenure, the rise of liberalism meshed with ethnic tensions.

⁴³See Hamelin & Roby, *supra*, note 39 at 305-24; Ryerson, *supra*, note 39 at 170-91; R. Tremblay, "La formation matérielle de la classe ouvrière à Montréal entre 1790 et 1830" (1979) 33 *Rev. d'hist. de l'Amérique française* 39. Strikes may be a crude measure of the growth of an industrial labour force. J. Hamelin, P. Larocque & J. Rouillard, *Répertoire des grèves dans la province de Québec au XIXe siècle* (Montréal: Presses de l'École des Hautes Etudes commerciales, 1970) at 9-17 note only 12 strikes from 1843 through 1866. They make the fair comment (at 7) that: "L'histoire des travailleurs québécois au XIXe siècle est encore à écrire." See also R. Tremblay, "La grève des ouvriers de la construction navale à Québec (1840)" (1983) 37 *Rev. d'hist. de l'Amérique française* 227.

⁴⁴P. Ariès, *Centuries of Childhood* (New York: Alfred A. Knopf, 1962) at 396-97; and J.-L. Flandrin, *Families in Former Times: Kinship, Household and Sexuality* (Cambridge: Cambridge University Press, 1979) at 61-64 and 140-45. Both stress that in pre-industrial Europe servants and masters lived in a quasi-familial relationship which went beyond the formalities of contract.

⁴⁵[*Montreal Morning Chronicle* (6 July 1867) at 2, found quoted in Hamelin & Roby, *supra*, note 39 at 310.

article 1022 *C.C.L.C.* is in some ways analogous.⁴⁶ The explanation of the absence of such an equivalent is the very belief of the Quebec redactors in freedom of contract. The original draft of article 1022 *C.C.L.C.* was somewhat closer to the wording of article 1134 *C.C.F.*, but commissioner Day doubted the need for such a provision, because contracts by their nature were binding on the parties to them, so that article 1134 *C.C.F.* belonged to the class of "mere legal truisms".⁴⁷

Study of some examples of substantive provisions of the *Code* confirms the Quebec codifiers to have been no less devotees of contractual liberalism than Portalis and his colleagues. Article 1229 of the French *Code civil* assimilated penalty clauses to stipulated damages. The Quebec commissioners rejected this approach, and explained thus:

The articles ... embrace the subject of obligations with a penal clause. They make no departure from the rules established in the articles of the French code, numbered from 1226 to 1233, except in the omission of the article 1229, declaring the penalty to be compensation for damages suffered from the inexecution of the obligation. The Commissioners think this declaration ... is a confounding of things which are in many respects different, and governed by different rules, and they have therefore rejected it.⁴⁸

Articles 1070 and 1078 *C.C.L.C.* show that the commissioners adopted the rule of the French *Code* that stipulated damages could not be reduced by the courts. They argued thus for the change in the Quebec law:

The evils which arise from regarding certain clauses in contracts as merely comminatory, and therefore not to be enforced, are obvious, and of daily occurrence. Under the jurisprudence which had grown up in France, the courts constantly modified or disregarded clear stipulations in contracts, for the purpose of substitution to the declared will of the parties, an uncertain equity in the settlement of their rights. In this country perhaps the interference has not been carried to the same length; but it is equally objectionable in principle;

⁴⁶Art. 1134 *C.C.F.* states:

Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.
Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise.
Elles doivent être exécutées de bonne foi.

Art. 1022 *C.C.L.C.* states:

Contracts produce obligations, and sometimes have the effect of discharging or modifying other contracts.
They have also the effect in some cases of transferring the right of property.
They can be set aside only by the mutual consent of the parties, or for causes established by law.

⁴⁷For Day's comments, see Papiers Caron, *supra*, note 20, S. 764 at 35a and 36a. For the development of the wording of art. 1022 *C.C.L.C.*, see S. 764 at 35; S. 765 at 30, and on its adoption by the commission, see Livre des minutes, *supra*, note 20 at 36 (24 February 1860), 37 (27 February 1860) and 82 (17 January 1861).

⁴⁸First Report, *supra*, note 26 at 24.

and although sustained by the authority of Dumoulin and Pothier, does not seem to have been derived from the Justinian code, or to have been justified by any positive legislation in France.⁴⁹

Though Morin was not in favour of this change in the law, the view of the majority of the commissioners was embodied in the *Code*. The reason for Morin's objection is unfortunately not stated.⁵⁰ Penalty clauses proper are dealt with in articles 1131 and 1137 *C.C.L.C.*, and the commissioners, with Morin again dissenting, once more recommended that courts should no longer be able to reduce them.⁵¹ The new law became article 1135 *C.C.L.C.*⁵²

A final example concerns lesion. The *ancien droit* had permitted the reduction of contracts for the sale of immoveables on the ground of lesion within a period of ten years.⁵³ This doctrine was ultimately of Roman origin, but modern civilian countries had developed different rules from one another, though one can say that generally certain contracts could be set aside in particular circumstances if one party had been excessively disadvantaged.⁵⁴ In the revolutionary period, the *Loi du 14 fructidor, an III* had abolished the French rules on lesion; but they were reintroduced, after an extensive debate, in the *Code civil*.⁵⁵ The *Code's* rules, however, in comparison with the *ancien droit*, restricted the operation of reduction on the grounds of lesion.⁵⁶ The commissioners followed and even extended this restriction. They recommended that minors should not be restored for lesion if all the relevant solemnities provided by law for the alienation of their property had been carried out.⁵⁷ This proposal, which became article 1010 *C.C.L.C.*, followed article 1314 *C.C.F.* Going beyond article 1313 *C.C.F.*, the Quebec redactors recommended that adults should *never* be able to rescind contracts on the grounds of lesion. This proposal became article

⁴⁹*Ibid.* at 18.

⁵⁰*Ibid.* The crucial proposed amendment became art. 1076 *C.C.L.C.* For its development, see Papiers Caron, *supra*, note 20, S. 766 at 94 and 95a; S. 770 at 10 and 11a; S. 773 at 4 and 4a; and Livre des Minutes, *supra*, note 20 at 46 (5 March 1860).

⁵¹First Report, *ibid.* at 24. The reasons were the same.

⁵²On the development of art. 1135 *C.C.L.C.*, see Papiers Caron, *supra*, note 20, S. 767, at 144, 144a; S. 770 at 55 and 55a; S. 773 at 61 and 61a; Livre des minutes, *supra*, note 20 at 56-7 (28 March 1860) and 88 (23 January 1861).

⁵³See R.-J. Pothier, *Traité des obligations*, Oeuvres de Pothier, ed. by M. Bugnet, vol. 2, 2d ed. (Paris: Plon, Cosse et Marchal, 1861) nos 33-41; R.-J. Pothier, *Traité du contrat de vente*, Oeuvres de Pothier, ed. by M. Bugnet, vol. 3, 2d ed. (Paris: Plon, Cosse et Marchal, 1861) nos 330-71.

⁵⁴See A. Watson, "The Hidden Origins of Enorm Lesion" (1981) 2 J. Leg. Hist. 186; R.W.M. Dias, "Laesio Enormis: The Roman-Dutch Story" in D. Daube, ed., *Studies in the Roman Law of Sale* (Oxford: Clarendon Press, 1959) 46.

⁵⁵See J. de Maleville, *Analyse raisonnée de la discussion du Code civil au Conseil d'Etat*, vol. 3, 2d ed. (Paris: Garnery, 1807) at 355.

⁵⁶*Ibid.* at 116 and 359-64.

⁵⁷See First Report, *supra*, note 26 at 12.

1012 *C.C.L.C.* The commissioners stated that their proposal "may easily be shewn to be more consistent with the circumstances and the state of society in this country than the old rule."⁵⁸ They further stated that:

[T]here seems to be no sound reason upon which in this country, where real property is transferred so easily and made an object of daily speculation, a person in the full exercise of his rights should be relieved from imprudence in this description of contract more than in any other. The rule violates that integrity of contracts upon which the Commissioners throughout the title have been anxious to insist and they have no hesitation in recommending the adoption of the article suggested by them in amendment of the present law.⁵⁹

Commissioner Day upheld the market principle in commenting that the notion that there should be an equality between value of the thing given and that of the thing received was "a mere fiction".⁶⁰ Thus, while the *Code civil* of France has twelve articles on rescission of sales for lesion, the Quebec *Code* has only one.⁶¹

The codification commission obviously sought to shape the law to fit what it perceived as the socio-economic "reality" of Quebec, by adopting rules which favoured freedom and sanctity of contract.⁶² This perception was not based on any profound economic or social study, but was the product of intuitive reaction by the Commissioners to their daily experience. It also agreed with current jurisprudential fashion, and the redactors noted that "it is certain that the doctrine of judicial interference with the plain meaning of contracts is regarded with disfavor by modern jurists."⁶³

⁵⁸*Ibid.*

⁵⁹*Ibid.* See also Papiers Caron, *supra*, note 20, S. 764 at 24a, 25a, 26a, 27a and 28a.

⁶⁰See Papiers Caron, *ibid.*, S. 764 at 26a.

⁶¹See art. 1561 *C.C.L.C.* and arts 1674-1685 *C.C.F.* Art. 1561 *C.C.L.C.* merely refers to the earlier articles on obligations:

The rules relating to the avoiding of contracts for cause of lesion are declared in the title *Of Obligations*.

This statement of the law necessitated the amendment of two draft articles on sale, 62 and 74: see Papiers Caron, *supra*, note 20, S. 786, *verso* at C and Ea. See also S. 788 at 45 and 54, where the emergence of the final version of art. 1561 *C.C.L.C.* becomes evident. In *Livre des minutes*, *supra*, note 20 at 246, draft art. 62 is adopted on 15 December 1862 with the proposed amendment (*i.e.* art. 1545 *C.C.L.C.*). Curiously enough, approval of draft art. 74 (art. 1561 *C.C.L.C.*) seems to have been accidentally omitted from entry in the minutes.

⁶²*Report of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters* (Fourth Report), vol. 2 (Québec: Desbarats, 1865) at 16 [hereinafter Fourth Report] describes a provision as "consistent with the principle of maintaining the integrity of contracts, observed throughout by the Commissioners in the course of their work." It adds (at 18): "These articles [on the right of redemption] . . . harmonize with the system of adhering to contracts and preventing the modification and enlargement of them by the courts." In Papiers Caron, *supra*, note 20, S. 764 at 5a and 6, the rejection of articles based on 1101-1107 *C.C.F.* was suggested by Day not only because they were unnecessary definitions, but also because they might restrict which contracts could be made. See also Brierley, *supra*, note 3 at 569-70.

⁶³First Report, *supra*, note 26 at 18.

III. The Civilian Background

The law on master and servant in the codes of France and Quebec ultimately derived from Roman law, in which the hiring out of labour for gain was one aspect of the general law on hire, governed by a contract known as *locatio conductio*.⁶⁴ Modern commentators usually divide this contract into three types ("the trichotomy"): *locatio conductio rei*, *locatio conductio operis faciendi*, and *locatio conductio operarum*.⁶⁵ In this form the trichotomy is a product of modern commentaries, rather than a Roman classification.⁶⁶

Locatio operis faciendi appears to have been the object of greater juristic attention than *locatio operarum*, and Crook suggests that in ancient Rome, because of both slavery and the system of patron and client, "the sphere of the hired free worker at a wage ... is very restricted."⁶⁷ Though this probably exaggerates the restricted operation of *locatio operarum*, it was certainly the case that upper class Romans despised the worker, because he was hired for money. The liberal arts could not be the subject of letting and hiring, although in some of the liberal professions it became possible to receive an *honorarium* as their work came to be regarded as mandate (a supposedly gratuitous contract). The matter of the nature of the reward earned by members of the liberal professions is rather confused;⁶⁸ but for our purposes, it is important to note the generally menial nature of *locatio operarum* in Roman law. The relationship between the parties in the contract of *locatio conductio operarum* was one of formal equality;⁶⁹ but in practice, the hired worker may well have been in an inferior position. In an agricultural household, for example, the hired worker was described as being "in the position

⁶⁴See J.A.C. Thomas, "Locatio and Operae" (1961) 64 Bull. ist. dir. rom. 231 at 233 and 239-40.

⁶⁵See W.W. Buckland, *A Text-Book of Roman Law*, 3d ed. (Cambridge: Cambridge University Press, 1963) at 498-506. *Locatio conductio rei* is where the lessor (*locator*) places a thing at the disposal of the lessee (*conductor*); *locatio conductio operis faciendi* is where the lessor lets out a task to be done by the lessee; *locatio conductio operarum* is where the lessor is employed by the lessee.

⁶⁶F. Schulz, *Classical Roman Law* (Oxford: Clarendon Press, 1951) at 544, describes the trichotomy as "a product of continental legal scholasticism". F.J.M. Olivier-Martin, "Des divisions du louage en droit romain" (1936) 15 Rev. hist. dr. fran. étr. 419 at 467-74, credits Voet with its invention.

⁶⁷J. Crook, *Law and Life of Rome* (Ithaca: Cornell University Press, 1967) at 195.

⁶⁸See A. Watson, *The Law of Obligations in the Later Roman Republic* (Oxford: Clarendon Press, 1965) at 109-10. On mandate and *honoraria*, see Buckland, *supra*, note 65 at 515. For some work no reward could be collected: D.50.13.1.4 and 5 (professors of philosophy and of law). See also Thomas, *supra*, note 64 at 240-47; Crook, *ibid.* at 203-5; compare D.19.2.38.1 in which Paul seems to class advocates among those who lease out their services.

⁶⁹See Buckland, *ibid.* at 504-5.

of a slave",⁷⁰ while in some circumstances at least, the hirer appears to have had rights of chastisement.⁷¹ The nature of Roman society likely produced the result that the hired worker was always of a relatively low status.⁷²

Two conflicting approaches to servants may be traced in the French juristic writings of the *ancien droit*: one deriving from the Roman contract of *locatio conductio*,⁷³ the other treating the servant as a familial dependant of his master. The first approach is exemplified by a treatise of Pothier,⁷⁴ the second by one of Pocquet de Livonnière.⁷⁵ In general, little juristic attention seems to have been devoted specifically to lease of service in the *ancien régime*.

In the *Traité du contrat de louage*, Pothier stated that there were two types of *louage*: *louage des choses* and *louage des ouvrages*.⁷⁶ *Louage des ouvrages* corresponds to the *locatio operis faciendi* of the trichotomy. Pothier discussed lease of personal service (*louage des services*) as an aspect of *louage des choses*. Furthermore, the specific rules set out by Pothier on *louage des services* are few in number and scattered through the provisions on *louage des choses*.⁷⁷

⁷⁰D.7.8.4pr. and D.43.16.1.18.

⁷¹The case of the "apprentice" would suggest this: see D.9.2.5.3 and D.19.2.13.4. Whether the contract should be classed as *operis faciendi* or *operarum* is unimportant. The boy's father had an action on lease (*actio ex locato*). It is stated that the cobbler as lessee (*conductor*) had a right of chastisement (*levis castigatio*).

⁷²The evidence presented by Crook, *supra*, note 67 at 192-98 would support this.

⁷³On the history of the reception of this contract, Olivier-Martin, *supra*, note 66 is invaluable.

⁷⁴R.-J. Pothier, *Traité du contrat de louage*, Oeuvres de Pothier, ed. by M. Bugnet, vol. 4, 2d ed. (Paris: Plon, Cosse et Marchal, 1861).

⁷⁵G. Pocquet de Livonnière, *Règles du droit françois*, 4th ed. (Paris: Le Mercier, 1744).

⁷⁶Pothier, *Traité du contrat de louage*, *supra*, note 74, preface.

⁷⁷The *Traité du contrat de louage*, *ibid.*, has 391 numbered sections dealing with *louage des choses* of which only 18 deal with *louage des services* (nos 10, 12, 40, 165-77, 193 and 372). The greater number of these (nos 165-77) concern the *Application* [of the principles of remission of rent] *au louage des services des ouvriers et serviteurs*, and concern the legal effects of *force majeure*, or a servant quitting or being dismissed before the end of the period of service; no. 10 distinguishes between lease of menial services and contracts of mandate; no. 12 states that the contract between a chaplain and the person whom he serves is not lease, but innominate; no. 40 states that where workmen are hired by the day and no wage stipulated, the usual wage for the time and place are to be paid; no. 193 deals with a master's liability for the *culpa* of his servants; and no. 372 with tacit relocation of lease of services. Note that this is a relatively crude way of estimating the proportion of the treatise devoted to lease of services, as the sections are not of equal length. T.W. Tucker, "Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes" (1969) 44 *Tulane L. Rev.* 264 at 273, suggests that Pothier's slight treatment of lease of service is the result of the economic insignificance of the contract. This must be qualified as the contract was regulated by public authority. What influenced Pothier most was undoubtedly the academic tradition deriving ultimately from Roman law.

Pothier followed Roman law in restricting *louage* to lowly services, thus excluding the liberal arts:

Observez ... qu'il n'y a que les services ignobles et appréciables à prix d'argent qui soient susceptibles du contrat de louage, tels que ceux des serviteurs et servantes, des manoeuvres, des artisans, etc.

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

C'est pourquoi le contrat qui intervient entre un avocat et son client ... n'est pas un contrat de louage, mais un contrat de mandat.⁷⁸

Olivier-Martin points out that, for example, neither Cujas nor Bartolus had thus distinguished between *operae liberales* and other *operae*.⁷⁹

The statement of Pothier, however, seems to represent the more accepted view of the law, though Cujas's near-contemporary, Etienne Pasquier, scorned the exclusion of the services of advocates from the contract of *louage* as "une hypocrisie de droict inventée par les jurisconsultes, pour auctoriser leur science."⁸⁰

Pocquet de Livonnière's *Règles du droit françois* are arranged in four books, at a general level, according to a variation on the tripartite Roman division of persons, things and actions, but with the addition of a fifth book after actions.⁸¹ He treated servants in a section entitled "De la Puissance des Maîtres", in the first book of his work, thus categorising the relationship between masters and servants as analogous to those between fathers and children or husbands and wives. Pocquet treated being a *serviteur* as having a particular status, and what for him was important was the *serviteurs* were under the authority of, and dependent on, their *maîtres*. He obviously did not consider the relationship between them merely to be one of a contract

⁷⁸*Ibid.*, no. 10; see also no. 12.

⁷⁹Olivier-Martin, *supra*, note 66 at 456.

⁸⁰E. Pasquier, *L'interprétation des Institutes de Justinian* (Paris: Videcoq Ainé and A. Durand, 1847) at 693.

⁸¹Pocquet de Livonnière, *supra*, note 75 divided his work into five books: "Des Personnes" and "Des personnes qui sont sous la puissance d'autrui"; "De la Différence des Biens"; "Des divers moyens d'acquérir"; "Des Contrats, Obligations, & Actions"; and the fifth book contains six chapters entitled "Des Cessions et Transports", "De la Garantie", "De la Discussion", "De l'Exponse ou Déguerpissement, & du Délaissement par Hypothèque", "Des Retraits", and "Des Cessions de biens, Répis, Lettres d'Etat, Banqueroutes".

between free and equal individuals.⁸² Pocquet's account, however, is no more detailed than that scattered through Pothier's treatise.

Pocquet's approach had a precedent in Pasquier's *L'interprétation des Institutes de Justinian*,⁸³ and one can readily appreciate that the use of the institutional structure in a modern work would easily have led to a treatment of master and servant as part of the law of persons, not only on the analogy with the Roman law of slavery, but also because it made sense socially.⁸⁴ Thus, Adam Smith is generally looked upon, perhaps misleadingly, as the advocate of *laissez-faire*; but in his lectures to his students in the University of Glasgow, he is reported as having stated that family relationships were threefold: "between Husband and Wife, Parent and Child, Master and Servant."⁸⁵ Smith's lecture on this third relationship dealt with the history of slavery, its abolition in Christian Europe, and finally with modern servants.⁸⁶

⁸²*Ibid.* at 35 (1.2.1):

Nous reconnoissons dans notre Jurisprudence quatre sortes de Puissances, la paternelle, la maritale, celle des Tuteurs & Curateurs sur leurs Pupilles, & autres confiés à leurs soins, & celle des Maîtres sur leurs serviteurs.

The detailed rules on master and servant are set out at 54-58 (1.2.37 to 1.2.46). Pocquet started by stating that slavery was abolished in France, except for black slaves coming from America with their masters who had the intention of returning (1.2.37 and 1.2.38). He next mentioned that under some coutumes there were still serfs (1.2.39). In his rule 1.2.40 he stated (at 55-56):

A cela près, en France, tous les hommes sont libres; les Serviteurs doivent à leurs Maîtres le respect, l'obéissance en choses raisonnables; sont obligés de veiller à la conservation de leur vie, de leur honneur & de leur biens; sont sujets à une correction modérée: mais au surplus ils sont libres pour leurs personnes & pour leurs biens.

Next he stated that in a dispute between master and servant over conditions or wages, the master was believed on oath (1.2.41), that it was forbidden to suborn another's servants and to receive them without their master's permission (1.2.42), that servants had to serve the full year of their engagement, unless there were just cause not to (1.2.43), and that if they married without permission they lost their wages, which were to be given to the poor (1.2.44). The next rule (1.2.45) set out prescriptive periods for claiming wages, while the last (1.2.46) stated that (at 58):

Les Maîtres ne sont tenus du fait ou de la faute de leurs Serviteurs, qu'en deux cas,
1. S'ils leur ont donné ordre. 2. Pour les fautes par eux commises dans le genre du négoce, où ils ont coutume de les employer.

It may be noted that Pocquet scarcely deals with specific contracts, referring readers generally to Roman law: *ibid.* at 401 (4.2.1).

⁸³*Supra*, note 80 at 64-66.

⁸⁴See P.A. Merlin, *Répertoire universel et raisonné de jurisprudence*, vol. 7, 4th ed. (Paris: Garnery, 1813) at 573-75. The author acknowledged lease of services as part of *louage*, but he preferred to deal there with *locatio operis*, dealing with lease of personal service under *domestique* — see, in the same collection, vol. 4, 4th ed. (Paris: Garnery, 1812) at 2-8; and *ouvrier* — see, in the same collection, vol. 8, 4th ed. (Paris: Garnery, 1813) at 849-53. His discussion of *domestique* was far removed from formal contract.

⁸⁵A. Smith, *Lectures on Jurisprudence*, ed. by R.L. Meek, D.D. Raphael & P.G. Stein (Oxford: Clarendon Press, 1978) at 438.

⁸⁶*Ibid.* at 450-56.

It is obvious that in the account of modern servants Smith primarily had in mind domestic servants.⁸⁷ Smith's discussion of the division of labour in the *Wealth of Nations*, and opposition to restrictions on labour, clearly indicate that he was aware of an alternative, more contractual approach.⁸⁸ Smith's pupil, John Millar, followed him in treating master and servant as an aspect of the law of persons in his lectures on Scots law and English law.⁸⁹ That the founder of political economy and his distinguished pupil could analyse in this way the legal relationship of employment suggests how obvious and "natural" this approach must have seemed until at least 1800. In any case, in different countries, writers of institutional works often treated master and servant as part of the law of persons.⁹⁰

⁸⁷*E.g.*, *ibid.* at 456, he stated: "there is a peculiar connection between master and servant."

⁸⁸A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. by R.H. Campbell, A.S. Skinner & W.B. Todd, vol. 1 (Oxford: Clarendon Press, 1976) at 13-24, discussed the division of labour in the making of pins and coats in "manufactures"; Smith further criticised the restrictions on the free circulation of labour resulting from the apprenticeship-system and the privileges of trade incorporations (at 135-46). Consider Smith's remark (at 146):

It would be indecent, no doubt, to compare either a curate or a chaplain with a journeyman in any common trade. The pay of a curate or chaplain, however, may very properly be considered as of the same nature with the wages of a journeyman. They are, all three, paid for their work according to the contract which they may happen to make with their respective superiors.

Compare *Traité du contrat de louage*, *supra*, note 74, no. 12. The legal problem discussed by Pothier and robustly dealt with by Smith still arises: see *President of the Methodist Conference v. Parfitt* (1984), [1984] Q.B. 368, [1984] 2 W.L.R. 84; and *Davies v. Presbyterian Church of Wales* (1986), [1986] 1 W.L.R. 323, 1 All E.R. 705 (H.L.), both discussed in S.E. Woolman, "Capitis Deminutio" (1986) 102 L.Q. Rev. 356.

⁸⁹See the following notes of John Millar's lectures on Scots law, Glasgow University Library, MS General 347 (1775-76), MS General 178 (1783), MS General 181/1-3 (1789-90), MS Murray 83-87 (1789-90), MS General 1078 (1792). In all of these, lecture 7 is devoted to Master and Servant. In the printed *Heads of the Lectures on the Law of Scotland, in the University of Glasgow* ([Glasgow]: Dunlop and Wilson, 1789) bound in at the front of MS Gen. 181/1 and MS Murray 83, at 3, in the scheme of the first lecture, it is stated:

Rights arise, either from the state of *persons*, or of *things*. Rights arising from the state of persons may be reduced to such as proceed from the connection of husband and wife — of parent and child — of master and servant — of guardian and pupil or minor.

The seventh lecture, "Master and Servant", is described as follows:

View of the circumstances which have contributed to limit or abolish domestic slavery in Europe. — Condition of negro-slaves imported into Scotland. — Of colliers and salters. — Of ordinary domestic servants. — Of apprentices.

The origin in the structure of Smith's lectures is obvious. In a set of Millar's lectures on English law from the session of 1800-1801, Glasgow University Library, MS General 243, we find that the eighth lecture deals with the poor laws and master and servant. With only little variation, Millar is following the scheme of his lectures on Scots law.

⁹⁰See, *e.g.*, J. Erskine, *Principles of the Law of Scotland: In the Order of Sir George Mackenzie's Institutions of that Law* (Edinburgh: Hamilton, Balfour and Neill, 1754) vol. 1 at 102-3 (1.7.38-39).

The scant treatment of master and servant in both Pothier and Pocquet does not demonstrate, however, that the relationship was largely uncontrolled. As in Europe generally, in France the trade guilds had regulated apprenticeship and the employment of journeymen,⁹¹ and the attempt of the Crown to suppress the guilds in February 1776,⁹² was a resounding failure, with the Parlement de Paris refusing to register the edict produced by the new economic policy. All that eventually happened was the reorganization of the guilds of Paris.⁹³ Though the position is complex, one may say generally that the French Crown regulated industry and employment in industry by special royal ordinances, more as a matter of policy than of formal law.⁹⁴ This undoubtedly reinforced the slight juristic treatment of employment.

In the *nouveau droit* there occurred the same division, with a detailed regulation of employment as a matter of policy alongside a few, more formal, legal provisions. Thus, the *Loi du 22 Germinal, an XI*, which regulated industry, contained provisions on employment and apprenticeship.⁹⁵ The French *Code civil*, on the other hand, though it already had some articles which had a bearing on master and servant,⁹⁶ essentially dealt with em-

⁹¹See F.J.M. Olivier-Martin, *Histoire du droit français des origines à la Révolution* (Paris: Montchrestien, 1948) at 170-76, 619-23 and 627-32.

⁹²See P.A. Merlin, *Répertoire universel et raisonné de jurisprudence*, vol. 3, 4th ed. (Paris: Garnery, 1812) at 226-29 (*corps d'arts et métiers*), quoting the preamble of the *édit de suppression des jurandes*, which suppressed the guilds of Paris.

⁹³See Olivier-Martin, *supra*, note 91 at 629-32.

⁹⁴*Ibid.* at 619-23 and 627-32. For an excellent, detailed account, see M. Sonenscher, "Journeymen, the Courts and the French Trades 1781-1791" (1987) 114 *Past and Present* 77.

⁹⁵See P.A. Merlin, *Répertoire universel et raisonné de jurisprudence*, vol. 1, 4th ed. (Paris: Garnery, 1812) at 309 (*apprenti*); M. Planiol, *Traité élémentaire de droit civil*, vol. 2 (Paris: Cotillon, 1900) no. 1882.

⁹⁶Art. 109 *C.C.F.* states:

Les majeurs qui servent ou travaillent habituellement chez autrui, auront le même domicile que la personne qu'ils servent ou chez laquelle ils travaillent, lorsqu'ils demeureront avec elle dans la même maison.

Art. 1384 *C.C.F.* states:

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

....

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

....

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

See also art. 2271 and 2272 *C.C.F.* on the prescription of servants' and workers' wages, discussed below.

ployment in only three articles in the contract of lease.⁹⁷ The title on lease had a total of one hundred and twenty-four articles. Article 1708 *C.C.F.* stated that there were two types of lease, *louage des choses* and *louage d'ouvrage*. Though superficially identical to Pothier's two-fold analysis, this was different in that *louage des services*, in Pothier's terms, was dealt with as an aspect of *louage d'ouvrage* rather than *louage des choses*. Olivier-Martin has suggested that the division of *louage* in the French *Code* was influenced by Domat,⁹⁸ and this is convincing, though such a division was not unknown.⁹⁹

The redactors of the *Code civil* were evidently not influenced by the modern trichotomy. Though the structure of the French *Code* was based on the institutional model,¹⁰⁰ its redactors did not follow the practice of some institutists of including general provisions on master and servant in the book on persons.¹⁰¹ The codifiers stressed the *contractual* aspect of the relationship between master and servant, and organized accordingly their treatment of the topic in the *Code*.

⁹⁷Art. 1779 *C.C.F.* stated (at the relevant time):

Il y a trois espèces principales de louage d'ouvrage et d'industrie:

1. Le louage des gens de travail qui s'engagent au service de quelqu'un;
2. Celui des voituriers, tant par terre que par eau, qui se chargent du transport des personnes ou des marchandises;
3. Celui des entrepreneurs d'ouvrages par suite de devis ou marchés.

Art. 1780 *C.C.F.* states:

On ne peut engager ses services qu'à temps, ou pour une entreprise déterminée.

....

Before being abrogated in 1868, art. 1781 *C.C.F.* stated:

Le maître est cru sur son affirmation:

Pour la quotité des gages,

Pour le paiement du salaire de l'année échue,

Et pour les à-comptes donnés pour l'année courante.

There were a further 18 articles essentially dealing with, in the language of the trichotomy, *locatio conductio operis faciendi*: arts 1782-1799 *C.C.F.*

⁹⁸Olivier-Martin, *supra*, note 66 at 466. See also J. Domat, *Les lois civiles dans leur ordre naturel* (Paris: Nicolas Gosselin, 1713) at 53 (1.4 "remarques" and 1.4.1.1), who states:

Le louage en general, & y comprenant toutes les especes de baux, est un contrat par lequel l'un donne à l'autre la jouissance ou l'usage d'une chose, ou de son travail pendant quelque temps, pour un certain prix.

⁹⁹See G. Noodt, *Opera Omnia ab ipso recognita, aucta, emendata, multis in locis, atque in duos tomos distributa*, vol. 2 (Leyden: J. vander Linden, 1724) at 421 (*Commentarius ad Digesta seu Pandectas* on D.19.2).

¹⁰⁰See C. Chêne, *L'enseignement du droit français en pays de droit écrit (1679-1793)* (Genève: Droz, 1982) at 290-303.

¹⁰¹Except art. 109 *C.C.F.* which is explained on other grounds.

IV. The Codification of the Law on Employment

Though the codification commission must have been aware of the institutional treatment of master and servant found in Blackstone, Pocquet de Livonnière and the *Civil Code* of Louisiana, there is no evidence to suggest that they ever considered following it. They instead simply adopted the approach of the French *Code*, and included all the major provisions on employment in "Of lease and hire", the seventh title of the third book of the *Code*.¹⁰² Its first chapter, consisting of articles 1600-1604 *C.C.L.C.*, contains general provisions. The third chapter is "Of the lease and hire of work", its first section containing one general provision, article 1666 *C.C.L.C.*, and its second having five, articles 1667-1671 *C.C.L.C.* The remaining sections of this chapter deal with carriers and work by estimate and contract, and we shall not be concerned with them here, as they exclusively concern *locatio operis faciendi*.

A. Rejection of the Trichotomy

By the date of codification in Quebec, academic Roman lawyers were familiar with the trichotomy of *locatio conductio*,¹⁰³ which would have been known to the redactors through, for example, Ortolan's work on Justinian's *Institutes*.¹⁰⁴ Articles 1600 and 1602 *C.C.L.C.* show, however, that the commission did not adopt this tripartite division, as indeed their organization of the title also would suggest. Article 1600 *C.C.L.C.* provides that:

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

This contrasts with article 1708 of the French *Code*, which stated that there were two sorts of contract of lease, that of "choses" and that of "ouvrage", and with the only Lower Canadian doctrinal account of lease and hire dating from before the *Code*, Gorrie's brief synopsis, which, obviously following both Pothier and the *Code civil*, stated that: "Lease or hire is a Synallagmatic contract, to which consent alone is necessary, and by which one party gives

¹⁰²Fourth Report, *supra*, note 62 at 22 explained that the translations of the French *Code civil* and the Louisiana *Code* had demonstrated that both "lease" and "hire" were necessary to translate *louage* and *locatio*, "lease" alone being insufficient.

¹⁰³Olivier-Martin, *supra*, note 66 at 467, comments that "vers 1830-1840 toute la doctrine allemande et française connaissait les trois louages."

¹⁰⁴J.L.E. Ortolan, *Explication historique des Instituts de l'empereur Justinien*, vol. 2, 4th ed. (Paris: Joubert, 1847) at 260. The redactors cited Ortolan for art. 1668 *C.C.L.C.* See below, text accompanying notes 153-54.

to another, the enjoyment of a thing, or his labour, at a fixed price.”¹⁰⁵ In their Fourth Report, the commissioners merely noted that they had improved on the wording of article 1708 of the French *Code*.¹⁰⁶ The original draft had read:

The contract of lease or hire may be either of things or of work.¹⁰⁷

In one of the drafts, by deletion and interlineation this has been amended to the enacted form.¹⁰⁸ The change in wording from two alternative contracts to a contract with more than one object seems to have been prompted, first, by study of Troplong’s *Traité du louage*,¹⁰⁹ here cited as a source in the draft, though not given as one by McCord.¹¹⁰ Troplong commented on the French *Code*’s article that these two contracts “identiques par le genre, se distinguent cependant l’un de l’autre par leur objet et se gouvernent par des règles spéciales.”¹¹¹ The Quebec codifiers’ inclusion of a *third* object, work and things combined, derives from their reading of Marcadé’s *Explication du Code Napoléon*.¹¹² Following the French *Code civil*, the Quebec *Code* has four chapters in title seven, dealing respectively with general provisions, lease of things, lease of work and lease of cattle or shares (*bail à cheptel*). Article 1711 *C.C.F.* subdivided its two types of lease into several forms, one of which was *bail à cheptel*.¹¹³ Marcadé criticised this:

¹⁰⁵A. Gorrie, *A Synopsis of the Laws of Letting and Hiring or the Contract of Lease in Lower Canada* (Montreal: Lovell and Gibson, 1848) at 5. This work is more the length of a pamphlet than a book. While Gorrie cites Pothier rather than the French *Code civil* for his proposition, I mention both because in the over-all structure of his work, *louage des services*, in Pothier’s term, is dealt with, following the French *Code*, as part of lease of work generally, rather than of things, so that the structure of Gorrie’s study is an amalgam of that of Pothier’s *Traité*, with that of the title “Du louage” of the *Code civil*. Thus, his account of lease and hire of things is structured similarly to Pothier (though in the substance omitting *louage des services*) while his account “Of the Letting Out of Labor or Industry” resembles in structure the *Code civil*, though it may be noted he does not deal with *bail à cheptel*. Gorrie was a notary public and registrar of the County of Terrebonne.

¹⁰⁶Fourth Report, *supra*, note 62 at 22.

¹⁰⁷Papiers Caron, *supra*, note 20, S. 789 at 1; S. 790 at 1.

¹⁰⁸Papiers Caron, *ibid.*, S. 790 at 1.

¹⁰⁹R. Troplong, *De l’échange et du louage*, t. 1-3, Le droit civil expliqué suivant l’ordre des articles du Code, vols 9-11 (Paris: Charles Hingray, 1840).

¹¹⁰See Papiers Caron, *supra*, note 20, S. 789 at 1; S. 790 at 1.

¹¹¹R. Troplong, *De l’échange et du louage*, t. 1, Le droit civil expliqué suivant l’ordre des articles du Code, vol. 9 (Paris: Charles Hingray, 1840) at 54.

¹¹²V. Marcadé, *Explication théorique et pratique du Code Napoléon*, vols 1-6, 5th ed. (Paris: Cotillon, 1859).

¹¹³Art. 1711 *C.C.F.* states:

Ces deux genres de louage se subdivisent encore en plusieurs espèces particulières:
On appelle *bail à loyer*, le louage des maisons et celui des meubles;
Bail à ferme, celui des héritages ruraux;
Loyer, le louage du travail ou du service;
Bail à cheptel, celui des animaux dont le profit se partage entre le propriétaire et

[I] se met ensuite en contradiction avec cette donnée, puisque, au lieu de placer le bail à cheptel dans l'un des deux chapitres précédents, il le range dans un chapitre particulier et en fait une troisième classe indépendante.¹¹⁴

He thought it appropriate to treat *bail à cheptel* as a third class of lease and hire, because it presented a “nature toute particulière” not only as “tout à la fois louage de choses et louage d’ouvrage” but also as closely related to the contract of partnership.¹¹⁵ Marcadé was cited here neither in the draft nor in McCord’s list of sources; but the redactors were familiar with his account of lease and used it extensively.¹¹⁶ They also rejected article 1711 of the French *Code civil*,¹¹⁷ to replace it with article 1603 *C.C.L.C.*, which deals solely with lease of cattle on shares.¹¹⁸ Given that article 1601 *C.C.L.C.* concerned lease of things, and article 1602 *C.C.L.C.* lease of work, the origin of article 1600 *C.C.L.C.* is obvious, especially since none of the other sources cited in the draft or by McCord has similar wording.¹¹⁹

This rejection of the trichotomy is further confirmed by article 1602 *C.C.L.C.*:

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

Article 1710 *C.C.F.* had stated:

celui à qui il les confie.

Les devis, marché ou prix fait, pour l’entreprise d’un ouvrage moyennant un prix déterminé, sont aussi un louage, lorsque la matière est fournie par celui pour qui l’ouvrage se fait.

Ces trois dernières espèces ont des règles particulières.

¹¹⁴V. Marcadé, *Explication théorique et pratique du Code Napoléon*, vol. 6, 5th ed. (Paris: Cotillon, 1859) at 418.

¹¹⁵*Ibid.*

¹¹⁶Note the similarity of the wording used by Marcadé, *ibid.*: “tout à la fois louage de choses et louage d’ouvrage”, with that of art. 1600 *C.C.L.C.*: “les choses et l’ouvrage tout à la fois”. For art. 1602 *C.C.L.C.*, the redactors cited the very next section of Marcadé’s treatise.

¹¹⁷See Fourth Report, *supra*, note 62 at 22.

¹¹⁸Art. 1603 *C.C.L.C.* states:

The letting out of cattle on shares is a contract of lease or hire combined with a contract of partnership.

¹¹⁹The drafts and McCord cite: D.19.2.22.1; J. Cujas, *Paratitla in Libros Quinquaginta Digestorum, seu Pandectarum Imperat. Iustiani* (Paris: apud Ioannem Iost, 1658) at 137-38 (19.2); J. Voet, *Elementa Iuris secundum ordinem Institutionum in usum domesticæ exercitationis digesta*, 2d ed. (Leyden: apud Henricum Teering, 1705) at 151-52 (3.25.1); art. 1708 *C.C.F.*; and Pothier, *Traité du contrat de louage*, *supra*, note 74, preface and no. 1. The drafts cite the former passage of Pothier, and McCord the latter. It is likely that the citation in the drafts is the intended one: see Papiers Caron, *supra*, note 20, S. 789 at 1 and S. 790 at 1. The drafts, in addition, also cited Troplong.

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

The more precise Quebec article does not reflect provincial practice,¹²⁰ but is drawn, according to the draft minutes, from Marcadé and Troplong.¹²¹ As well as Marcadé and Troplong, the redactors cited the Digest,¹²² Cujas,¹²³ and Rousseaud de la Combe.¹²⁴ This last source did provide some authority from the *ancien droit*, though his passage seems to have been written with lease and hire of things in mind.¹²⁵ The redactors stated that they explained the proper use of terms to avoid confusion;¹²⁶ but there is a departure from the regular practice of the *ancien droit*, and on one of the drafts a member

¹²⁰Gorrie, *supra*, note 105 at 5-6 and 19-31 gives no evidence of such a usage.

¹²¹Papiers Caron, *supra*, note 20, S. 786 verso at Aa-1: "Who is lessor & lessee Day follows Marcadé & Troplong." See Marcadé, *supra*, note 114 at 419-24 and 570. The first of these references contains Marcadé's argument, and at 570 Marcadé wrote:

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

Troplong, *supra*, note 111 at 237 wrote:

Ainsi, d'après la saine intelligence de notre article, on doit tenir pour certain que désormais c'est l'ouvrier qui est vraiment locateur, et que celui qui le paie, est le véritable locataire et conducteur.

It is worth noting that while Marcadé thought the ascription of terms derived from the nature of the contract (see, *supra* at 419-24 and also 517), Troplong thought this to have been introduced by the *Code*.

¹²²D.19.2.22.1.

¹²³*Supra*, note 119 at 137-38.

¹²⁴G. du Rousseaud de la Combe, *Recueil de jurisprudence civile du pays de droit écrit et coutumier*, 2d ed. (Paris: Le Gras, 1746) at 429 wrote:

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

¹²⁵*Ibid.* Rousseaud's use of term *bailleur* strongly suggests that he was thinking specifically of *louage des choses*. See Pothier, *Traité du contrat de louage*, *supra*, note 74, no. 1; and Marcadé, *supra*, note 114 at 419:

[D]ans le louage d'une chose, celui qui procure cette chose se nomme *bailleur*, *locateur*, *propriétaire* et l'autre *bailliste*, *locataire*, *preneur*, *fermier* quelquefois *louager*, *louandier*, *occupeur*, puis dans le bail à métairie, *metayer*, *colon partiaire*; dans le louage d'ouvrage, celui qui fournit son travail se nomme *entrepreneur*, *ouvrier*, *domestique* et génériquement *locateur*, celui qui reçoit et paye ce travail se dit *maître*, *propriétaire* et génériquement *locataire* ou *conducteur*; enfin, dans le cheptel, celui qui fournit le troupeau est le *locateur* et en reçoit les différents noms, celui qui nourrit et soigne ce troupeau est le *locataire*, il en prend les différentes appellations et aussi celle de *cheptelier*.

¹²⁶See Fourth Report, *supra*, note 62 at 22.

of the commission has noted that their proposed article was contrary to the views of Domat and Pothier,¹²⁷ neither of whom was cited as an authority.

While in their general provisions on lease the redactors have departed to some extent from their model, they did so only to improve on it. At bottom, they have preserved the treatment of the French *Code* and the practice in the province,¹²⁸ with the additional integration of the anomalous *bail à cheptel* into the general definition to provide a better foundation for the organization, if not the conceptual basis, of the title. What is important is the continuation of the French *Code's* conflation of *locatio operarum* and *locatio operis faciendi*.

B. The Scope of Lease of Service

The draft minutes show that at the commission's meeting on 30 December 1862, the question arose of whether *mandat salarié* should be included in lease. The point was reserved "as being very important, the distinction running through all our books."¹²⁹ The commission considered this suggestion seriously, and in one of the drafts on lease a leaf has been inserted on which is written: "The contract of mandate, when not gratuitous ... and when not subjected to particular rules ... is governed by those which

¹²⁷Papiers Caron, *supra*, note 20, S. 790 at 3 cites Pothier, *Traité du contrat de louage, supra*, note 74, no. 392:

La partie qui donne à l'autre l'ouvrage à faire, s'appelle le *locateur, locator operis faciendi*; celle qui se charge de le faire, s'appelle le *conducteur, conductor operis*.

The passages cited from Domat, *supra*, note 98 are at 53 (1.4.1.1 and 2) and 60 (1.4.7.1). The first of these (1.4.1.1) has been quoted, *supra*, note 98; the second (1.4.1.2) is as follows:

Celui qui baille une chose à jouir, s'appelle le bailleur ou le locateur; & on donne ces mêmes noms à celui qui donne à faire quelque ouvrage ou quelque travail: celui qui prend une jouissance par un louage ou une ferme, s'appelle le preneur ou le conducteur, de même que celui qui entreprend un travail ou un ouvrage, qu'on appelle aussi entrepreneur. Mais dans les louages, ou prix faits du travail & de l'industrie, les ouvriers ou entrepreneurs tiennent aussi en un sens lieu de locateurs; car ils louent & baillent leur peine.

The third (1.4.7.1) is as follows:

Dans les baux à prix fait, & autres louages du travail des ouvriers, le bailleur est celui qui donne l'ouvrage ou le travail à faire; & le preneur ou entrepreneur est celui qui entreprend le travail ou l'ouvrage.

¹²⁸See Gorrie, *supra*, note 105 at 6:

There are two species of letting and hiring; that of things, and that of labor or industry. To let out a thing, is a contract by which one of the parties binds himself to grant to the other the enjoyment of a thing, during a certain time, for a certain stipulated rent or hire, which the other agrees to pay him To let out labor or industry is a contract by which one of the parties binds himself to do something for the other, in consideration of a certain price agreed upon between them.

¹²⁹See Papiers Caron, *supra*, note 20, S. 786 verso at Aa-1, and for the date, see Livre des minutes, *supra*, note 20 at 252-54.

apply to lease or hire." This is presumably a draft article, and underneath it is scribbled: "In Mandate / A definition not founded on gratuitousness / or postpone the whole till mandate."¹³⁰ In their Sixth Report, the commissioners stated that the distinction between non-gratuitous mandate and hire of personal services was insubstantial and not the result of the paying of a price or of the nature of the service. The fundamental rules of both contracts were derived from Roman law, and the codifiers noted that the distinction was founded on social differences among the Romans and upon the fact that arts and professions were exercised by free people (hence "liberal") while slaves carried out other work. The liberal arts were compensated by a voluntary *honorarium*, the non-liberal by a fee or price. The commissioners considered that this distinction, because founded only on shifting conditions of social rank, could never be fixed or universal. As to which contract would be classified as mandate and which as lease of services they thought this would vary according to the nature of any society, as indeed was exemplified by the way mercantile business had come to be considered honourable, though aristocratic societies had considered it to be disreputable. They further remarked that jurists inevitably disagreed as to which professions were properly to be regulated by mandate and which by lease and hire. For any practical purpose, the redactors thought that mandate and lease and hire of services were identical, but they noted that only one code, that of Austria, had classed as lease and hire all services for which payment was made.¹³¹ In their Fourth Report, the commissioners had already explained that, though it was difficult to define the difference between mandate and lease and hire of work, and they had been tempted to assimilate the two, they had nonetheless desisted, because the contracts, from Roman times, had continuously been kept separate, resulting in the distinction being so interwoven into doctrine and jurisprudence that unforeseen difficulties

¹³⁰Papiers Caron, *ibid.*, S. 789 at 7a-1.

¹³¹*Report of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters* (Sixth Report), vol. 3 (Québec: Desbarats, 1865) at 6-8 [hereinafter Sixth Report]. Art. 1163 *A.B.G.B.* states — see J.M. Chevalier de Winiwarter, trans., *General Civil Code for all the German Hereditary Provinces of the Austrian Monarchy* (Vienna: Rudolph Lechner, 1866):

The provisions given here are also applicable to lawyers, physicians, and surgeons, factors, provisors, artists, contractors and other persons, who have expressly or taciturnly stipulated for a salary, an appointment or otherwise a reward for their trouble, as far as no special provisions exist in regard to the matter.

In Sixth Report, *supra* at 8, the redactors cited Marcadé, *supra*, note 114 at 519, and noted that he repeated (at n. 1) the opinion of Troplong that the dispositions of the *A.B.G.B.* were all one would have expected from a country which enforced military discipline by blows. Both Marcadé and Troplong clearly opposed the Austrian view. For the draft of the general views on mandate, see Papiers Caron, *ibid.*, S. 800 at 1-5. The discussion seems to owe something to J.-J. Clamageran, *Du louage d'industrie, du mandat, et de la commission en droit romain, dans l'ancien droit français et dans le droit actuel* (Paris: A. Durand, 1856) nos 301-4, who is cited both in the draft and the printed report.

and inconvenience might arise from disturbing it. They therefore had decided to adhere to the rules of the *ancien droit* reproduced in the French *Code*.¹³² While nothing may have come of the proposal, it shows the redactors to have been willing to extend the range of the contract of lease of work beyond menial services, and to leave the distinction between it and mandate ambiguous and shifting. This is confirmed both in the working papers and the enacted *Code*.

The draft general article on lease of work, article 61,¹³³ was enacted as article 1666 *C.C.L.C.*:

- The principal kinds of work which may be leased or hired are:
1. The personal service of workmen, servants and others;
 2. The work carriers, by land and by water, who undertake the conveyance of persons or things;
 3. That of builders and others, who undertake works by estimate or contract.

The French text renders "workmen" as "ouvriers" and "servants" as "domestiques" (the provisions on carriers and builders relate to *locatio operis faciendi* and will not be dealt with further). Article 1779 *C.C.F.* stated that the first principal kind of work which may be leased or hired is "le louage des gens de travail qui s'engagent au service de quelqu'un."¹³⁴ While the commissioners simply noted in their report that their article corresponded in character to article 1779 *C.C.F.*,¹³⁵ from the draft minutes we can see it to have been the object of discussion.¹³⁶ The commission considered whether they should add "gens de travail" to the expressions used in the *Code*. Morin argued strongly against doing so, suggesting they needed a term going beyond "others", but which would not trespass into mandate, such as "employé". He disapproved of "gens de travail" even in the French text "as tending to express the old distinction between intellectual & mechanical labor which it is not desirable to adopt as between mandat & louage." It was decided to retain the draft's phrase "and others" as saving the commission "from the appearance of adopting any of the distinctions".¹³⁷ The departure from the wording of the French *Code* was the result of a conscious decision, in contrast with that *Code*, and that of Louisiana, to broaden the scope of lease of service. The specific wording of article 1666 *C.C.L.C.* may also owe something to Gorrie's *Synopsis*. At the start of his

¹³²See Fourth Report, *supra*, note 62 at 28-30.

¹³³Papiers Caron, *supra*, note 20, S. 789 at 46; S. 790 at 69. It may be noted that in S. 789, but not S. 790, "service" reads "services", but with the final "s" struck out.

¹³⁴Art. 1779 *C.C.F.* quoted, *supra*, note 97. Art. 2716 *C.C.La.*, in relevant part virtually identical to art. 1779 *C.C.F.*, translates "gens de travail" as "laborers".

¹³⁵Fourth Report, *supra*, note 62 at 30.

¹³⁶Papiers Caron, *supra*, note 20, S. 786 *verso* at Aa-11. In Livre des Minutes, *supra*, note 20 at 261 it was noted on 8 January 1863 that draft art. 61 was "discuté et adopté".

¹³⁷Papiers Caron, *ibid.*, S. 786 *verso* at Aa-11.

third chapter, "Of the Letting Out of Labor or Industry", obviously influenced by the French *Code*, he wrote:

Labor may be let out in three ways:

1st. Laborers, servants, apprentices, journeymen, seamen, clerks and secretaries, &c., may hire their services to another person.

2nd. Carriers, porters, forwarders and affreighters, may let out their services for the conveyance of persons or of effects;

3rd. Workmen may hire out their labor, industry or talents, to make buildings or other works, or by undertaking jobs of work.¹³⁸

Among the doctrinal writers, both Faribault and Mignault are of the opinion that this section of article 1666 *C.C.L.C.* comprehends more than domestic servants, manual labourers and the like.¹³⁹ The draft minutes confirm this to have been the redactors' aim.

As well as differing from the French and Louisiana codes, article 1666 *C.C.L.C.* necessarily departed from the *ancien droit* as represented by Pothier.¹⁴⁰ There is, however, some precedent in Gorrie's *Synopsis*, which suggests that the redactors recognised the general, growing importance of contracts of employment in the economy of Lower Canada. They may also have taken into account the extensive statutory regulation of employment in the Province,¹⁴¹ though not mentioned in connection with article 1666 *C.C.L.C.*

C. *The Duration of the Contract*

The nature of lease of service in the *Code* of 1866 can be gathered from articles 1667 to 1671, which constitute the section "Of the lease and hire of the personal service of workmen, servants and others".¹⁴² These articles provide fairly minimal regulation. Article 1667 *C.C.L.C.* is the almost direct enactment of draft article 62:

¹³⁸Gorrie, *supra*, note 105 at 19-20.

¹³⁹Mignault, *supra*, note 4 at 368-69; L. Faribault, *Traité de droit civil du Québec*, vol. 12 (Montréal: Wilson et Lafleur, 1951) at 289-90. Mignault points out that this is supported by arts 2260-2262 *C.C.L.C.* on prescriptive periods. Compare arts 2271-2272 *C.C.F.* and arts 3499 and 3503 *C.C.La.*

¹⁴⁰See Pothier, *Traité du contrat de louage*, *supra*, note 74, no. 10.

¹⁴¹See Gorrie, *supra*, note 105 at 20-25.

¹⁴²These correspond to arts 1780-1781 *C.C.F.* in the section entitled "Du louage des domestiques et des ouvriers", and to arts 2717-2721 *C.C.La.* On the sources of the *C.C.La.* articles, see R. Batiza, "The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance" (1971) 46 *Tulane L. Rev.* 4 at 113; R. Batiza, "The Actual Sources of the Louisiana Project of 1823: A General Analytical Survey" (1972) 47 *Tulane L. Rev.* 1; Cairns, *supra*, note 7 at 540-42.

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

It may be prolonged by tacit renewal.¹⁴³

The first paragraph of this article embodies the same rule as article 1780 *C.C.F.*,¹⁴⁴ though perhaps with more precise wording; the second paragraph has no equivalent in the French *Code*, though Marcadé and Troplong had stated that tacit renewal would apply.¹⁴⁵ The rule on renewal is found in the *ancien droit*, and in Lower Canada before the *Code*.¹⁴⁶ Some of the authorities cited by the redactors stressed that one could not lease out one's services in perpetuity.¹⁴⁷ This last was the issue which concerned the commission in its discussion. The redactors considered the effect of excessively long contracts for lease of service, and agreed that "the intention of the article is to prevent servitude for life, & the Court would consider whether the contract was made in view of servitude for life or otherwise."¹⁴⁸ The Fourth Report merely noted that there had been an addition to the provision of the French *Code*.¹⁴⁹

Draft article 63, enacted as article 1668 *C.C.L.C.*, has no equivalent in either the French or Louisiana codes. It provides:

¹⁴³See Papiers Caron, *supra*, note 20, S. 789 at 47; S. 790 at 70, though "service" was originally "services" in both, and the final "s" has been deleted.

¹⁴⁴See *supra*, note 97.

¹⁴⁵Marcadé, *supra*, note 114 at 527; R. Troplong, *De l'échange et du louage*, vol. 3, *Le droit civil expliqué suivant l'ordre du Code*, vol. 11 (Paris: Charles Hingray, 1840) at 120.

¹⁴⁶See Pothier, *Traité du contrat de louage*, *supra*, note 74, no. 372; Gorrie, *supra*, note 105 at 25.

¹⁴⁷In Papiers Caron, *supra*, note 20, S. 789 at 47; S. 790 at 70, the following authorities were cited: Pothier, *ibid.*, nos 371-72; Troplong, *supra*, note 145; G. du Rousseaud de la Combe, ed., *Oeuvres de M. Antoine d'Espeisses, avocat et jurisconsulte de Montpellier, où toutes les plus importantes matières du droit romain sont méthodiquement expliquées et accommodées au droit français*, vol. 1 (Lyon: Chez les Frères Bruysset, 1750) at 92 (1.2.6); and Clamageran, *supra*, note 131, nos 111-12. McCord gives the same authorities, excluding Clamageran and adding D.35.1.71.1 and 2, and citing only no. 372 of Pothier. The passages of Pothier and Troplong dealt with tacit renewal, that of d'Espeisses stated that "[L]'homme libre ne peut pas louer ses oeuvres à perpétuité", those of Clamageran dealt with the effects of a purported *louage de services* in perpetuity, and the Digest texts dealt with conditions in legacies infringing liberty. The relevant art. of the *C.C.F.* was given by the drafts and McCord as 1780, *supra*, note 97. On art. 1780 *C.C.F.*, Maleville, *supra*, note 55 at 401 stated: "Et non pour toute sa vie, car alors on serait une espèce d'esclave. Mais on peut s'engager pour une entreprise, quoiqu'il soit impossible d'en fixer la durée, et cela fut observé ici." See also J.B. DeLaporte & P.N. Riffé-Caubray, *Les pandectes françaises, ou recueil complet de toutes les lois en vigueur*, vol. 13 (Paris: Riffé-Caubray, 1805) at 190-91: "Il est évident que l'engagement des services pour la vie serait une servitude."

¹⁴⁸Papiers Caron, *ibid.*, 786 verso at Aa-11. In Livre des Minutes, *supra*, note 20 at 261 (8 January 1863) it was merely noted that draft art. 62 had been "adopté".

¹⁴⁹*Supra*, note 62 at 30.

[The contract of lease or hire of personal service] is terminated by the death of the party hired or his becoming, without fault, unable to perform the services agreed upon.

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

In their discussion the commissioners noted that though there was no equivalent article in the French *Code*, it was as well to include it, since the rule was exceptional to the common rule on the extinction of contracts.¹⁵⁰ They seem to have had some difficulty, however, in providing from the *ancien droit* a "source" for the rule. In the drafts, they cited some passages from Pothier dealing with the effect of *force majeure* — such as a servant's illness or weather preventing the harvesting of crops — on the contract and the duties under it, and with the potential damages due should a servant leave his master's employment with or without justification.¹⁵¹ The drafts also cited two passages from Clamageran's treatise, of which the first discussed the means by which the contract of *louage d'industrie et de services* ended in Roman law, including the incapacity of the worker and death of the employee or contractor, and the second dealt with *force majeure* in the *ancien droit*.¹⁵² In one of the drafts, the reference to Clamageran was possibly added later in a different hand, which has also added three notes not found in the other draft, one on the second paragraph to article 1668 *C.C.L.C.* to the effect that "even according to Pothier the contract may be only suspended", another stating that the texts, cited from Pothier were contrary to two texts of the Digest "as to force majeure as interpreted by Clamageran no. 22", the third stating simply "V. Ortolan II.p.269".¹⁵³ In fact, the rule embodied in the first paragraph of article 1668 *C.C.L.C.* in part closely resembles the passage cited from Ortolan's textbook on Justinian's *Institutes*: "Pour le louage de services (*operarum*), le contrat finit par la mort de celui qui a loué son travail, car avec lui périt aussi la chose louée."¹⁵⁴ Perhaps Ortolan was ultimately given as an authority because no exact statement of this rule could be culled from a text of the *ancien droit*,¹⁵⁵ and McCord

¹⁵⁰Papiers Caron, *supra*, note 20, S. 786, verso at Aa-11; in Livre des Minutes, *supra*, note 20 at 261 (8 January 1863) it was noted that draft art. 63 was "discuté et adopté".

¹⁵¹Pothier, *Traité du contrat de louage*, *supra*, note 74, nos 165-66, 168, 171 and 174-75.

¹⁵²Clamageran, *supra*, note 131, nos 30 and 106.

¹⁵³Papiers Caron, *supra*, note 20, S. 790 at 71. The reference to Clamageran, *ibid.*, no. 22 is to his discussion of D.19.2.19.9 and h.t. 33.

¹⁵⁴Ortolan, *supra*, note 104 at 269. Clamageran, *ibid.*, no. 30 sets out the same rule for Roman law.

¹⁵⁵Gorrie, *supra*, note 105 at 31 dealt with the effect of death only in connection with the contract *operis faciendi*. See, *infra*, note 158.

gives as authorities for the article only Pothier and Ortolan.¹⁵⁶ McCord also cites article 1795 *C.C.F.*, though in the drafts, where usually there was a reference to the French *Code*, it merely was stated: "C.N. (Nil)".¹⁵⁷ This article dealt with the contract *operis faciendi*.¹⁵⁸ Though here uncited, it may be pointed out that the precise rule in article 1668 *C.C.L.C.* was set out by Marcadé:

Le louage des services finit toujours par la mort du domestique ou de l'ouvrier. Le maître ne saurait être contraint d'accepter leurs héritiers à leur place, et ceux-ci réciproquement ne pourraient pas être contraints par le maître à continuer le travail de leur auteur, le contrat n'ayant été formé de part et d'autre que pour la personne de cet ouvrier ou de ce domestique. Quant à la mort du maître, son effet ne saurait être indiqué en thèse et d'une manière absolue; car c'est par les circonstances de chaque espèce qu'on verra si le louage n'a été fait qu'en considération du maître, et si sa mort dès lors doit résoudre le contrat.¹⁵⁹

Any other provision would have been unacceptable, and in their report the redactors remarked that this was a matter which ought to be decided, there being no provision in the French *Code*.¹⁶⁰

¹⁵⁶He cited Pothier, *Traité du contrat de louage*, *supra*, note 74, nos 165-68 and 171-75; and Ortolan, *supra*, note 104 at 271 (this latter page may be an error or a reference to a different edition).

¹⁵⁷See Papiers Caron, *supra*, note 20, S. 789 at 47; S. 790 at 71.

¹⁵⁸Art. 1795 *C.C.F.* states:

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

Compare art. 2737 *C.C.La*:

Le contrat de louage d'ouvrage est dissous par la mort de l'ouvrier, architecte ou entrepreneur, à moins que le propriétaire ne consente d'accepter, pour la continuation de l'ouvrage, l'héritier de l'entrepreneur, ou l'ouvrier que cet héritier lui présente.

The variation from art. 1795 *C.C.F.* is drawn from its project of 1800. The equivalent article in the Quebec *Code*, art. 1692 *C.C.L.C.*, reads thus:

The contract of lease or hire of work by estimate and contract is not terminated by the death of the workman; his legal representatives are bound to perform it. But in cases wherein the skill and ability of the workman were an inducement for making the contract, it may be cancelled at his death by the party hiring him.

This compares with Gorrie, *supra*, note 105 at 31:

Contracts for hiring out work are cancelled by the death of the workman, architect, or undertaker, whenever the work is of such a nature that the personal talents of the undertaker have been taken into account, unless the owner should consent to the continuance of the work by the representatives or heirs of the deceased person.

¹⁵⁹Marcadé, *supra*, note 114 at 527-28.

¹⁶⁰See Fourth Report, *supra*, note 62 at 30.

D. *The Decisory Oath*

Draft article 64 provided:

The oath of the master is received to establish the rate of wages and the payment of them.¹⁶¹

When it was discussed on 8 January 1863, commissioner Morin suggested that the point was already covered by an article in the title on prescription,¹⁶² and indeed the last three paragraphs of draft article 104 in that title dealt with the decisory oaths of masters.¹⁶³ The draft article was reserved for further consideration.¹⁶⁴ On 14 January 1863 draft article 64 was reconsidered, and the following adopted in its place:

In any action for wages by domestics or farm servants, the master may, in the absence of written proof, offer his oath as to the fact of the payment accompanied by a detailed statement, and as to the conditions of the engagement; if the oath be not offered by the master, it may be deferred to him and is of a decisory nature as regards the subjects to which it is limited.¹⁶⁵

This was enacted as article 1669 *C.C.L.C.* with minor rearrangement.¹⁶⁶ Though the draft minutes of the discussion of this article do not survive, we may note that in the printed report the commission described this article as having been taken from the title on prescription and transferred here as its proper place, as following the old law, and as coincident with article 1781 *C.C.F.*¹⁶⁷

The decisory oath of the master was a well-established institution of the *ancien droit*, as the citations of sources in the draft and in McCord's

¹⁶¹Papiers Caron, *supra*, note 20, S. 789 at 48; S. 790 at 72.

¹⁶²Papiers Caron, *ibid.*, S. 786 verso at Aa-11.

¹⁶³Papiers Caron, *ibid.*, S. 785 at 208-211.

¹⁶⁴While on Papiers Caron, *ibid.*, S. 786 verso at Aa-11 was merely noted "reserved", on S. 790 at 72 someone has written: "reserved for comparison of this with 104 Prescn."

¹⁶⁵Livre des Minutes, *supra*, note 20 at 263.

¹⁶⁶Art. 1669 *C.C.L.C.* reads as follows:

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

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

¹⁶⁷Fourth Report, *supra*, note 62 at 30, and compare *Report of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters* (Third Report), vol. 1 (Quebec: Desbarats, 1865) at 435 [hereinafter Third Report].

edition amply testify,¹⁶⁸ and article 1781 *C.C.F.* expresses it in clear, general terms.¹⁶⁹ Where article 1669 *C.C.L.C.* seems to differ from the *ancien droit*, the French *Code* and most notably its own original draft, is in its restriction of the possibility of such an oath to the masters of domestics and farm servants. It also seems to do so to a lesser extent in contrast with draft article 104 of the title on prescription, which had talked of "serviteurs de maison ou de ferme et autres employés domestiques à gages".¹⁷⁰ This was perhaps alluded to when on one draft was written: "Note the difference between this new art: & 104 Presc. in the report the art: 104. must be remodelled."¹⁷¹ While the sources in the *ancien droit* did tend to use the terms *domestiques* and *serviteurs*,¹⁷² we have seen that the Quebec redactors deliberately broadened the scope of lease of service beyond menial occupations. The *Pandectes françaises* explained thus the general rule of the French *Code*:

En effet, on n'est guère dans l'usage de prendre des quittances des gages que l'on paye à un domestique, et des salaires que l'on donne à un ouvrier. Il est juste, dans ce cas, d'accorder la créance au maître. La règle contraire, ou celle qui exigerait une preuve écrite serait très-embarrassante.¹⁷³

¹⁶⁸Papiers Caron, *supra*, note 20, S. 789 at 48; S. 790 at 72 cite: Pothier, *Traité du contrat de louage*, *supra*, note 74, no. 175 (the first in fact gives no. 174, obviously an error); Merlin, *Répertoire universel et raisonné de jurisprudence*, vol. 4, *supra*, note 84 at 4-5 (*domestique*, nos 2-4) (note that the redactors are citing a different edition); J.B. Denisart, *Collection de décisions nouvelles et de notions relatives à la jurisprudence*, vol. 6, rev. ed. (Paris: Desaint, 1787) at 636-51 (*domestique*); and, in the same collection, vol. 9, rev. ed. (Paris: Desaint, 1790) at 139-45 (*gages*). The redactors of the *Code* of 1866 always referred to this edition as the *Nouveau Denisart* in contrast to the earlier editions, such as J.B. Denisart, *Collection de décisions nouvelles et de notions relatives à la jurisprudence actuelle*, vols 1-3 (Paris: Savoye, 1763-1764), which they called the *Ancien Denisart*. McCord gives as sources: *Coutume de Paris*, art. 127 (a provision on prescription), Pothier, *supra*, no. 175; Denisart, vol. 9, *supra* at 140 (*gages*, no. 3); P.J.J.G. Guyot, *Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale*, vol. 6, rev. ed. (Paris: Visse, 1784) at 102 (*domestique*). Both S. 789 at 48 and McCord cite art. 1781 *C.C.F.* as the equivalent article. The differences between the two lists are readily explained. Art. 127 *C.P.* was added in respect of the alteration of the article on prescription (compare S. 785 at 210). In S. 790 at 72, a later hand has added this article to the list of sources. Merlin's *Répertoire* was based on that of Guyot, and in both S. 789 at 48 and S. 790 at 72 it is said of the citation to Merlin "he cites the arrêts". The passage cited from Guyot is the same one. A subsequent hand has also added on S. 790 at 72 a reference seemingly to Troplong, which seems to have little relevance, and is probably mistaken.

¹⁶⁹*Supra*, note 97. See A. Castaldo, "L'histoire juridique de l'article 1781 du Code Civil: Le maître est cru sur son affirmation" (1977) 55 *Rev. hist. dr. fran. étr.* 211.

¹⁷⁰Papiers Caron, *supra*, note 20, S. 785 at 208.

¹⁷¹Papiers Caron, *ibid.*, S. 790 at 72.

¹⁷²See e.g., Guyot, *supra*, note 168.

¹⁷³DeLaporte & Riffé-Caubray, *supra*, note 147 at 191. Maleville, *supra*, note 55 at 402 wrote:

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

On répondit que l'offre de preuve ne devait pas être reçue, parce que les ouvriers et domestiques se serviraient de témoins entre eux.

These arguments could not be used in the broader scheme set out by article 1666 *C.C.L.C.*, so one may conjecture that the redactors accordingly restricted the applicability of article 1669 *C.C.L.C.* to those two groups of servants who not only were low in status but also worked in close contact with their masters. The rule would not have been appropriate in the case of, say, clerks or factory hands.

E. Contract and Special Legislation

Articles 1670 and 1671 *C.C.L.C.* have no equivalents in the French *Code*. The former states:

The rights and obligations arising from the lease or hire of personal service are subject to the rules common to contracts. They are also regulated in certain respects in the country parts by a special law, and in the towns and villages by by-laws of the respective municipal councils.

The latter states:

The hiring of seamen is subject to certain special rules provided in the act of the imperial parliament, intituled: *The Merchant Shipping Act, 1854*, and by an act of the parliament of Canada, intituled: *An Act respecting the Shipping of Seamen*, and the hiring of boat-men, commonly called *voyageurs*, by certain rules provided in an act intituled: *An act respecting Voyageurs*.

When the first of these was adopted by the commission, it was explained in the draft minutes that “the rules of the Statute are not set forth because they are more matters of police than of principle and in many instances in fact are departures from formal principles.”¹⁷⁴ The first sentence of article 1670 *C.C.L.C.* states clearly the redactors’ general approach to the relationship between employer and employee, and helps explain why they provided so few rules on the nature of the contract. The comment in the minutes is intriguing, and shows the commission to have considered that only broad statements of principle ought to be found in the *Code*.¹⁷⁵ This suggests — as article 1671 *C.C.L.C.* tends to confirm — that the commissioners were unwilling to let the actual detail of important areas of law and practice undermine broad statements of general contractual principle.

Conclusion

The first sentence of article 1670 *C.C.L.C.* is in many ways the legislative counterpart to the business community’s declaration in 1867 of its belief in contractual freedom in employment,¹⁷⁶ and is reminiscent of Gor-

¹⁷⁴Papiers Caron, *supra*, note 20, S. 786 verso at Aa-11.

¹⁷⁵Compare Fourth Report, *supra*, note 62 at 30.

¹⁷⁶See above, text accompanying note 45.

rie's statement that "[t]he contract[s] between those persons and their employers are regulated in the absence of particular law or express stipulation, by the rules governing Conventional Obligations generally."¹⁷⁷ Even more than the redactors of the French *Code*, the codification commissioners believed in freedom of contract, which explains not only the paucity of special provisions on employment, but also their rejection of the alternative institutional treatment — exemplified by Blackstone's *Commentaries* and the Louisiana *Code* — of a servant as having a particular status. Though the commissioners did not claim to be innovating over the *ancien droit* in any of the articles on lease or hire of service here examined,¹⁷⁸ they consistently exercised their discretion to expand its scope, while providing only a minimum of regulation — presumably because they thought that the specifics of any individual contract would best be left to negotiation between the parties, and because of the existing detailed statutory provisions.¹⁷⁹

Both the *ancien droit* and the French *Code* restricted lease and hire of service to fairly menial occupations. While the Quebec redactors, under the influence of tradition, decided not to amalgamate mandate with lease and hire of work (which generally would have affected *locatio operis* rather than *locatio operarum*), as well as having broadened the scope of lease and hire of work,¹⁸⁰ they seem to have grouped together all types of lessees in this contract. Guyot and Pothier, for example, distinguished the terms of service of farm servants and labourers in town, from those of personal servants who could be dismissed at the will of their masters, no matter the period for which they had been employed.¹⁸¹ Blackstone and the Louisiana *Code* also differentiated among different types of servants.¹⁸² The Quebec *Code*, on the other hand, distinguished between different classes of servants only by following article 109 *C.C.F.*¹⁸³ to give domestic servants who stayed with their master his domicile¹⁸⁴ (thus settling a controversial point in the *ancien*

¹⁷⁷Gorrie, *supra*, note 105 at 20.

¹⁷⁸Except in some of those on prescriptive periods mentioned *supra*, note 139.

¹⁷⁹See Gorrie, *supra*, note 105 at 20-25.

¹⁸⁰Consider that art. 2262(3) *C.C.L.C.* classes "merchants' clerks and other employees" with "domestic or farm servants". Contrast arts 3172 and 3181 *C.C.La* which distinguish between "domestiques ou gens de service" and "commis, secrétaires et autres employés de ce genre".

¹⁸¹Pothier, *Traité du contrat de louage*, *supra*, note 74, nos 168-75; Guyot, *supra*, note 168 at 102.

¹⁸²Blackstone, *supra*, note 11 at 411-15; art. 157 *C.C.La* On the complications of the Louisiana position, see Cairns, *supra*, note 7 at 561-67.

¹⁸³See *supra*, note 96.

¹⁸⁴Art. 84 *C.C.L.C.* states:

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

droit — though this is not mentioned¹⁸⁵) and by allowing masters of domestic servants and farm labourers in certain circumstances to give decisory oaths. Following the French *Code*, the Quebec *Code* eschewed the elaborate regulation, found in the *ancien droit* and the Louisiana *Code*, of the ending of a contract of hire of services. In all this the codification commission's choice of provisions can be seen to be determined by its members' beliefs in freedom of contract. It is perhaps in this respect significant that though under article 1054 *C.C.L.C.*¹⁸⁶ masters and employers continued, as in the *ancien droit*,¹⁸⁷ to be liable for damage caused by their servants and workmen in the performance of their work, whereas in the *ancien droit* this had tended to be explained on the grounds of a master's failure to choose good servants,¹⁸⁸ the master's liability now tended to be explained as follows:

¹⁸⁵They cited Merlin, *Répertoire universel et raisonné de jurisprudence*, vol. 4, *supra*, note 84, at 10-12 (*domicile*, no. 4); and J.B. DeLaporte & P.N. Riffé-Caubray, *Les pandectes françaises, ou recueil complet de toutes les lois en vigueur*, vol. 2 (Paris: Riffé-Caubray, 1803) at 427, both of which works mention the two main contrasting pre-codification cases on the domicile of servants, the latter stating — if the McCord reference to p. 227 is, as it must be, a mistake for 427 — that: "Cet article décide une question autrefois fort controversée. On doutait si la commoration, pour un service, ou un travail habituel, attribuait le domicile." The redactors also cited F. Bourjon, *Le droit commun de la France et la coutume de Paris réduites en principes tirés des ordonnances, des arrêts, des lois civiles et des auteurs; et mises dans l'ordre d'un commentaire complet et méthodique sur cette coutume*, vol. 1 (Paris: chez Grange, 1747) at 90. Certainly in the edition I consulted, this has nothing germane. They also cited art. 109 *C.C.F.*, *supra*, note 96 and D.50.1.6.3. and 50.1.22 which are relevant if one equates *libertini* with servants. It may be noted that J. de Maleville, *Analyse raisonnée de la discussion du Code civil au Conseil d'État*, vol. 1, 2d ed. (Paris: Garnery, 1807) at 109, who is not cited, remarked that art. 109 *C.C.F.* was "Conforme aux lois 8 et 22, ff. *ad municip*", i.e. D.50.1.8 and 50.1.22. See also Second Report, *supra*, note 25 at 165. There is nothing of interest on this in the manuscript working papers.

¹⁸⁶Art. 1054 *C.C.L.C.* states:

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

....

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

The differences from art. 1384 *C.C.F.* apparently arise from the commission's study of various works critical of that article: K.-S. Zachariae, *Le droit civil français*, vol. 4, trans. by G. Massé & C. Vergé (Paris: Auguste Durand, 1858) at 24 n. 8 (on those who have minors under their care); C.-B.-M. Toullier, *Le droit civil français, suivant l'ordre du code*, vol. 11, 5th ed. (Paris: J. Renouard, 1830) nos 260-78 and 282-89 (no. 283 on whether the last paragraph of art. 1384 *C.C.F.* referred to "maîtres" and "commetants"). Also cited were: D.47.6.1.1 and 47.6.5 and 6; art. 1384 *C.C.F.*; Denisart, *Collection de décisions nouvelles et de notions relatives à la jurisprudence*, vol. 6, *supra*, note 168 at 151 (*délit*, no. 3); Pothier, *Traité des obligations*, *supra*, note 53, nos 121-22.

¹⁸⁷See Pothier and Denisart, *ibid.*

¹⁸⁸Denisart, *ibid.* An ordinance of François I of December 1540 had in fact forbidden the taking into service of persons of bad character, under sanction of civil liability for any damage caused by them in the course of their duties: see Guyot, *supra*, note 168 at 99.

[I]l est considéré comme l'ayant fait lui-même par le ministère de son domestique ou de son préposé, contre lesquels il ne peut, par conséquent, avoir de recours ...¹⁸⁹

In retrospect the adoption in 1866 of a contractual approach to employment may seem to have been foreordained — a perfect example of the operation of Maine's over-quoted principle.¹⁹⁰ It is important, however, to appreciate that the redactors cannot have viewed their decision as inevitable. Only the commissioners' intuitive understanding of what seemed appropriate for Quebec society brought about these specific rules. In Louisiana, the *Code* of 1870 still included a title on master and servant in its book on persons.¹⁹¹ As Kahn-Freund has shown, Blackstone's approach influenced English law well into the twentieth century.¹⁹² Furthermore, while the provisions in the *Code* usefully espoused a popular ideology, Quebec's labour law was not long to remain the few simple statements made by the codification commission.¹⁹³ Indeed, given that articles 1670 and 1671 *C.C.L.C.* already referred to special legislation and provisions outwith the *Code*, one may wonder whether the redactors' approach was not obsolete from the beginning, other than as an expression of desired principle. In this, Gorrie's otherwise rather slight and uninteresting *Synopsis* is instructive. He devoted very little attention to the matters dealt with in the *Code* but set out many of the statutory provisions and alluded to many more. The picture painted by his pamphlet is of detailed legislative regulation.

This paper started with the suggestion that the conservatism of the *Civil Code of Lower Canada* has traditionally been exaggerated: I hope this has been demonstrated, at least for lease and hire of service. I would not want, however, to be understood as arguing that the *Code* operated as some type of total revolution in the law. Even though in contract in general, and employment in particular, reforms, even important reforms, were introduced, the *Code* is still deeply rooted in a specific legal culture, and only to be fully

¹⁸⁹Toullier, *supra*, note 186, no. 282.

¹⁹⁰H. Maine, *Ancient Law*, 8th ed. (London: John Murray, 1880) at 170:

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to be sufficiently ascertained. All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of progressive societies has hitherto been a movement from Status to Contract.

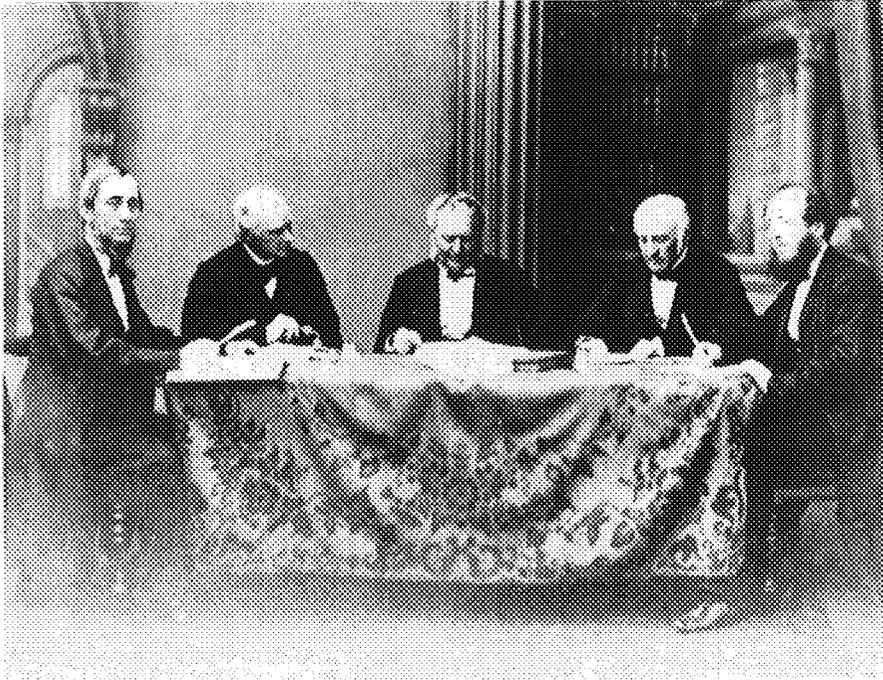
¹⁹¹Arts 162-177 *C.C.La.*

¹⁹²Kahn-Freund, *supra*, note 12 at 508-09.

¹⁹³See G. Charlap, "The Contract of Employment" in *Le droit civil français: Livre souvenir des journées du droit civil français* (Montréal and Paris: Sirey, 1936) 417.

understood within that culture. The codification commissioners in Lower Canada acted not on the basis of a scientific¹⁹⁴ investigation of the state of Lower Canadian society to identify the reforms needed in the law, but on that of a critical examination of the existing law in the light of the provisions made by other systems, and in the context of tradition and current jurisprudential theory, while taking into account their own intuitive understandings of what would be best in present circumstances. Though the conservatism of the *Code* may have been exaggerated, the reforms carried out arose from within the tradition which gave birth to the *Code* itself.

¹⁹⁴PS. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 92-93, has pointed out that a "scientific" approach to legislation for the U.K. was only possible when government had become a large bureaucracy capable of collecting and examining a large volume of data.



Commission chargée de la codification des lois du Bas-Canada. La photographie, prise entre 1863 et 1865, montre, de gauche à droite, Joseph-Ubalde Beaudry (secrétaire), l'honorable Charles Dewey Day (commissaire), l'honorable René-Édouard Caron (président), l'honorable Augustin-Norbert Morin (commissaire) et Thomas McCord (secrétaire). Cette photographie se trouve à la bibliothèque de droit de l'Université McGill.