HISTORICAL ORIGINS OF THE CIVILIAN ACTION AGAINST INTERFERENCE WITH CONTRACT RIGHTS IN FRANCE: LOUISIANA PERSPECTIVE ON A ROAD NOT TAKEN

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I. Introduction

This paper is an historical excursus that deals with a particular creative moment in French legal history, a moment when the judiciary of that country recognized a new form of delictual liability. The paper is an excerpt from a broader study that I have made of the action for wrongful interference with contractual relations in France.[1] In the broader study I have traced the evolution and extension of this action in modern-day French law, and I have made certain comparisons to the common law of tort. In this short paper, however--which I happily dedicate to the memory of my great teacher and beloved friend, Ferdinand Stone--I will deal only with the birth or first recognition of this action, which occurred around 1900, and the revealing relationship between that first recognition and the action's long prenatal development. The itinerary for this excursion thus begins with samples of the French jurisprudence at the turn of the century and then leads back to the historic antecedents of this liability in order to understand its sources and causes.

Judging by Ferdinand Stone's long-standing criticism of the law on this subject in Louisiana,[2] I believe that this story not only would have interested him, but it would have confirmed and exemplified the practical virtues of comparative law to which he was so profoundly attached. He was strongly critical of the 1902 case of *Kline v. Eubanks*[3] in which the Louisiana Supreme Court declared that there was no cause of action nor any wrong committed under Louisiana Civil Code article 2315 by a defendant who deliberately enticed away a laborer from plaintiff's plantation and employed him. He would have found it obvious, indeed ironic, that if the Louisiana Supreme Court in 1902 had looked abroad to the French experience (or to that of other

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1. *See* Palmer, *A Comparative Study (From a Common Law Perspective) of the French Action for Wrongful Interference with Contract*, 40 AMER. JOURN. OF COMP. LAW, Issue No. 2 (1992).

2. Stone, *Tort Doctrine in Louisiana: From What Sources Does it Derive?*, 16 TUL. L. REV. 489, 512 (1942); Stone, *Tort Doctrine in Louisiana: The Materials for the Decision of a Case*, 17 TUL. L. REV. 159, 168 (1942); Stone, *Tort Doctrine* § 263, p. 365, Vol. 12 LA. CIVIL LAW TREATISE (1977).

3. 109 La. 241 33 So. 211 (1902).

civil law countries) instead of maintaining an exclusive focus upon common law authorities from the United States, it would have encountered a stream of persuasive authority recognizing this liability under general civil code provisions like our own Article 2315. If the comparison had been made, the Supreme Court would not have advanced with conviction and assurance the strange argument that the action for procurement of breach of contract could not be recognized under Article 2315 because that article's scope must be confined to the problems known to its drafters.

In the light of comparative law and historical study, the Court's argument for the *status quo* seems as historically inaccurate as it is methodologically debatable. For as this paper will attempt to show, the "problem" of wrongful interference with contract was centuries old and even in a feudal pre-capitalistic era, French legislation had regulated it long before the Code Napoléon and the Louisiana Civil Code were enacted. Furthermore, French courts circa 1900 were recognizing delictual liability under the Code Napoléon's general tort provision in the very period that the Louisiana court adopted a static view of Article 2315.

My purpose in recalling this past, however, goes beyond an excursion in history for history's sake. Historical roads, even those roads not taken, can lead to the present and point to the future. This past has a particular claim upon the future, as recent events have shown. In 1989 the Louisiana Supreme Court, overruling the old case of *Kline v. Eubanks* and nearly a century-long list of precedents relying upon it, finally recognized the existence of this tort,[4] though the recognition came about largely "in principle" without any specific commitment by the Supreme Court to particular rules and definitions. The Supreme Court made heavy use of common law citations and, in fact, referred exclusively to these authorities when it developed the tort "precepts" to be derived and applied in Louisiana. The Court only alluded to the existence of a comparable action in civil law jurisdictions without giving any indication of the basic elements of this civilian action, its inner congruence with our law of obligations, nor any description of the special differences of scale and scope between the civil law action and its Anglo-American counterpart.

Over the past century, meanwhile, French jurisprudence and doctrine have successfully incorporated the tort action for wrongful interference into the framework of the Code Napoléon. Basic obligations concepts such as fault, causation, contractual relativity (privity) and solidary liability have been applied to the action in a systematic way. Since Louisiana's civil law framework rests upon a

4. *See* 9 to 5 Fashions, Inc. v. Spurney, 538 So.2d 228 (La. 1989).

similar conceptual foundation, the French experience may be a valuable guide to civil-law solutions that will enable us properly to integrate it within the Louisiana Civil Code. A more detailed civil law comparison may be especially fruitful in view of the Supreme Court's own warning that it might be undesirable to adopt "whole and undigested" the fully expanded common law doctrine. As the Court noted, "Some aspects of this tort have been subjected to serious criticism, leaving open a good many questions about the basis of liability and defense, the types of contract or relationship to be protected, and the kinds of interference that will be actionable."[5] The warning is well taken against an action burdened by blunt concepts, broad scope and amorphous rules that has grown into a model of complexity and indeterminacy as compared to its French counterpart.[6] A comparison to French law will reveal a far simpler and more predictable action that has not attracted the serious

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5. *Ibid.* p. 234.

6. The RESTATEMENT OF TORTS 2ND requires thirteen rather lengthy articles to set forth the rules of liability. Under the general rule of § 766 ("one who intentionally and improperly interferes with the performance of a contract (except a contract to marry) . . . is subject to liability to the other . . . ."), the plaintiff must prove defendant's intention to interfere, but there are a number of established privileges which may justify defendant's conduct and thus the further necessity of proving that the interference was "improper." *See* RESTATEMENT TORTS 2ND, Introductory Note to Chap. 37, p. 4. There is no clear cut distinction between the requirements of a *prima facie* case and the requirements for a recognized privilege and hence no clear division of the burden of proof as to the impropriety of the conduct. The more traditional rule had been that plaintiff's proof of an intentional act of interference constitutes a *prima facie* case, casting the burden on the defendant to show the interference was justified. Alyeska Pipeline Service Co. v. Aurora Air Service Inc., 604 P.2d 1090 (Alaska 1979). Departing from this position some cases now state that plaintiff must demonstrate some wrong beyond the mere fact of interference. Top Serv. Body Shop Inc. v. Allstate Ins., 582 P.2d 1365 (Oreg. 1978). The determination that an interference is improper involves judicial balancing of interests, motives and relationships that have been reduced to no less than seven factors. Section 767 of the RESTATEMENT TORTS 2ND lists these propriety factors as follows:

(a) the nature of the actor's conduct
(b) the actor's motive
(c) the interests of the other person
(d) the interests sought to be advanced by the action
(e) the social interests in freedom of action and the contractual interests of the other person
(f) the proximity or remoteness of the conduct to the interference
(g) the relationship between the parties.

The spongy nature of the notion has forced the Reporter's admission "This tort has not developed a crystallized set of definite rules as to the existence or nonexistence of a privilege to act." *Ibid.* § 767, note b. This imprecision is likewise characteristic of the counterpart notion of "justification" in English law which Winfield and Jolowicz say "has no exact definition" but must be gleaned from considering many factors. WINFIELD & JOLOWICZ ON TORT, 507 (13th ed. 1989). Furthermore the scope of the action reaches beyond interference with an enforceable contract. Liability extends also to interference with expectancies and prospective relationships, that is, for inducing someone not to enter into or continue a prospective relation, such as an opportunity to be employed or to continue business with a regular clientele. *Ibid.* § 766 B.

criticisms directed at the common law action. As both guide and comparison, the French treatment is surely worthy of study and consideration.

When an historic choice appears on the legal scene, such as the one now facing the Louisiana Supreme Court, one always wonders if history will repeat itself or will something new emerge. There was an earlier choice in 1902 when, to paraphrase Robert Frost, two roads diverged, one civil and the other common, and our court took the one more travelled by. Today we are again at the crossroads, but there is no necessity for history to repeat itself. Here, I would urge, is an opportunity to reconsider the road not taken.

II. Historical Development in France

A Parallel Story Across the Channel

The second half of the nineteenth century saw unfold, on one side of the English Channel, a story that is quite familiar to the common lawyers. When Johanna Wagner, operatic soprano and cantatrice to the Prussian court, breached her exclusive engagement to sing in Mr. Lumley's theater in London, he sued Mr. Gye, the rival impresario who had intentionally induced her to break her agreement and to perform instead at his theater. In the famous decision which ensued in *Lumley v. Gye*,[7] the English court recognized for the first time, in a case not involving the breach of an ordinary master-servant relationship, that a third person could be liable in tort for intentionally causing another to break his contract. The court also recognized, in effect, that the means of interference might be nontortious in themselves. The defendant had not resorted to force, fraud, or intimidation; he had offered better terms.[8] The precedent was reaffirmed in 1881[9] and by the turn of the century it was extended to cover both existing and prospective contracts and contracts other than those for personal services.[10]

Meanwhile, on the other side of the Channel, an equally interesting legal development in the field of tort was taking place.

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7. (1853) 2 El. & Bl. 216.

8. *See also* the companion case of Lumley v. Wagner, (1852) 1 De G.M. & G. in which the same plaintiff obtained an injunction against Miss Wagner.

9. Bowen v. Hall, [1881] 6 Q.B. 333.

10. Temperton v. Russell, [1893] 1 Q.B. 715. In the United States also the evolution of the tort was at first confined to contracts of personal service before being extended to all kinds of contracts. PROSSER AND KEETON, THE LAW OF TORTS § 129, p. 981 (5th ed. 1984).

Approximately at the turn of the century, the French judiciary tilled the same terrain in tort that its English counterpart had worked only a few years earlier. The close timing of these two events, however, is not the only, nor even the principal, similarity involved. The French courts recognized the delictual action for wrongful interference in much the same terms used by the English courts, for example in ruling that the interference must be intentional, not merely negligent. In France as in England, the litigational stimulus came initially from the breach of personal service contracts in which the class of employee enticed away was not the kind of worker covered under ancient laws like England's Statute of Labourers or France's *Ordonnance* of 1350.[11] Some French cases in the vanguard of this development, like the seminal English decisions, also center upon fashionable personages and impresarios, rather than employees from the trades, manufactures or household. What was new to the docket in both systems was not *débauchage*, as the French call the hiring away of another's employee, but a new class or type of *débauchage*.

These parallels follow each other so closely that, at first sight, one is tempted to say that there must have been some cross-fertilization of legal ideas across the channel. Yet on closer inspection this seems highly unlikely, for all of the internal evidence--the opinions themselves, the authorities cited, the commentary and doctrine surrounding them--is devoid of any reference or allusion to a foreign law. Based on direct evidence it is difficult to conceive that any conscious emulation, reception or transplant took place. Perhaps a rather strong case can be made for the possibility that this was a remarkable instance of spontaneous convergence not limited to France and Britain, but rather a general phenomenon arising nearly at once in other civil law countries of Western Europe.[12] Later in this paper, I

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11. *See infra* note 44.

12. In the civil law world generally there are two major approaches to liability for unfair competition. The first relies upon recourse to general tort law, and the chief exponent of this approach is France, which has based actions for unfair competition on C.C. arts. 1382 and 1383, the general provisions dealing with civil liability. For a long time European countries such as Belgium, Luxembourg and Italy followed the French approach, some perhaps more consciously than others. For example, in Spain this liability was recognized as "*culpa extracontractual*" in the case of T.M. versus R.M. & S.E. & G., 23 March 1921, where the artist R.M. entered into a 5-year contract of exclusive dealings with the T.M. record company which she breached by recording songs for the rival S.E. & G. company in circumstances where the latter company was formally notified by notarized instrument of her prior obligation to sing exclusively for the plaintiff T.M. The Spanish court held the artist liable for her contractual fault and also held the defendant S.E. & G. liable for its extracontractual fault. *See* ANTONIO BORRELL MACIA, RESPONSABILIDADES DERIVADAS DE CULPA EXTRACONTRACTUAL CIVIL, 81 (2nd ed. 1958).

Later in the twentieth century many European countries found it expedient to enact statutes on unfair competition which sought to detail precisely the kinds of acts constituting unfair competition. Apparently this second approach was stimulated

will speculate on the social and economic conditions that might explain this parallel trend. For the moment, however, I should like to set forth a few of the early French cases in order to demonstrate the tenor of the French jurisprudence and the various similarities that have been referred to. In the section immediately below I have set forth five representative French cases that were instrumental in the recognition of this action in the years circa 1900. Because the French style of reporting is uncommonly terse and elliptical, I have, wherever possible, fleshed out the facts of the cases from the reports and other sources, and I have freely translated from the French.[13]

First Recognition

We may begin by noting that before the turn of the century the action for contractual interference was apparently not recognized. The *Bourdais* case,[14] decided first by the *Tribunal de Commerce de la Seine* (16 July 1891) and confirmed by the *Cour de Paris* (28 May 1892) may be cited as an indication that French courts were not yet prepared to entertain an action based in delict.

In that decision Barranger sold his commercial agency in Paris to Bourdais subject to a covenant not to compete. It was stipulated that Barranger, the vendor, would not operate or be employed by any establishment of the same kind in Paris. Nevertheless a third person named Condray--who operated a rival establishment in Paris--hired Barranger as his employee and Bourdais brought suit against both of them. There was recovery against Barranger for breach of his agreement not to compete, but the action against Condray was rejected. The Tribunal de Commerce de la Seine stated:

> "As to Condray: -- Whereas Condray never undertook any contractual engagement with Bourdais;--that it is well established that in taking Barranger into his service, Condray only exercised his right to search for an employee who could be of use to him in his enterprise; -- that as a complete stranger he cannot be held responsible for Barranger's obligations which he

historically by Germany's Law of 1909, the first and most influential statute on unfair competition. Greece (1914), Austria (1923), Switzerland (1943), and Turkey (1958) adopted statutes that were considerably indebted to the seminal German law. Ollier and Le Gall, *Various Damages: Injury to Business Interests*, INT. ENC. COMP. L., XI Torts (1983) Ch. 10, § 120.

13. In developing the cases in this fashion, I have had in mind the needs of the American reader. I am conscious of the fact that it will undoubtedly appear unconventional to a French jurist to see the jurisprudence presented by using the names of the parties and in this amplified form.

14. Baranger v. Bourdais et Condray, Paris, 28 May 1892, D.93.II.399.

> might disregard;--that in these circumstances Condray did not commit any act of unfair competition (*acte de concurrence déloyale*)."

This rejection of the claim against Condray rested upon the privity or relativity of contract principle of Civil Code art. 1165. The reasoning was that the defendant had made no contract with plaintiff by which he promised not to hire Barranger, and therefore the hiring was nothing more than an exercise of his lawful right. However, soon after the turn of the century, privity was reconsidered and then discontinued as a defense to this liability, and the decisions turned in favor of the injured plaintiffs. The lower courts invoked a new rationale: the competitor's behavior is culpable behavior.[15] The stage was now set for recognition of the new action in tort under Article 1382.

Doeuillet v. Raudnitz[16]

Madame Richard, a fashion decorator, worked for the *Maison Raudnitz* under a contract paying 11,000 francs per year that was to expire December 31, 1901. In June, 1901, she abruptly left *Maison Raudnitz* and signed a contract with the Paris designer Doeuillet to commence on July 1, 1901 on terms of 12,000 francs salary for the first year, 14,000 francs the second year, and a penalty of 10,000 francs for withdrawal. Doeuillet well knew of her subsisting contract with Raudnitz and had even agreed to a special clause to indemnify her for any liability that she might incur in breaking her earlier agreement. Yet before she began to perform on this second contract, *Maison Raudnitz* and Madame Richard renegotiated their original contract. To retain Madame Richard, *Maison Raudnitz* was forced to increase her salary and to pay a 10,000 franc penalty that she incurred for withdrawing from her engagement to Doeuillet. This added salary and penalty formed the damages sought in the litigation against *Doeuillet et Cie*.[17]

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15. The employer who steals away the employee of another employer exceeds the limits of the competition permitted between merchants. *Trib. de la Seine, Gaz. Pal.* 12 March 1909.

16. Cass. Civ., 27 May 1908, D.1908.I.459, S. 1910.I.118.

17. There are many signs of an intense competition between these rival *couturiers*. Raudnitz's original petition discloses that Doeuillet had been regularly hiring away Raudnitz's top employees, having already purloined its designer in chief, bodice designer, a fitter and top salesperson. There are charges of "disloyal competition" in these pleadings against Doeuillet, but the Court of Appeal found that these allegations were unfounded due to the absence of proof of "bad faith."

Unfair competition in the fashion industry was the occasion to break new legal ground in more than one important jurisdiction. The first case recognizing inducer liability in the state of New York happened to involve a fashion designer who defected to a rival *maison*. *See* S.C. Posner v. Jackson, 119 N.E. 593 (1918).

In a decision rendered in 1908 the *Cour de Cassation* declared that the defendant Doeuillet, in "facilitating"[18] Madame Richard's breach of contract through its promise to indemnify her for any losses that she might sustain *vis à vis* her employer, had committed a tortious act for which the plaintiff was entitled to reparation. In refusing to quash the judgment rendered in plaintiff's favor by the Court of Appeal (Paris), the *Cour de Cassation* frankly rejected the argument that the privity (or relativity) of contract between plaintiff and Madame Richard provided a shield against liability in delict. The court reasoned that the "judgment [of the Court of Appeal] had not made *Doeuillet et Cie* liable for failing to perform a contract to which it was a stranger, but liable instead for quasi-delictual acts; committed intentionally and for their own interest, which led to or facilitated a breach of contract." The foundation of the liability clearly rested upon C.C. art. 1382. The principle that private contracts produce effects confined to the parties alone would not be taken to shield third parties from delictual liability. The liability of Doeuillet was not deemed to be contractual.[19]

Now we pass on to two cases which cast the new action in a dramatic role in the theater world of Paris. In these cases the Isola brothers, impresarios and directors of the Olympia theater in Paris, were sued on different occasions by rival theaters (the Paris Casino and the *Variétés*) for wrongfully inducing performers already under contract to defect to the Olympia. The defectors in question were the racing champion Hélène Dutrieu and the celebrated actor Max Dearly.

Borney & Desprez v. Dutrieu & Isola freres[20]

At the time of the litigation in 1903, Hélène Dutrieu was a world famous Belgian cyclist who had won the women's world championships in 1898. Although she would later become far more renowned for her remarkable exploits as an aviatrix,[21] she performed

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18. By saying defendant "facilitated" her breach of contract the French courts seem to be alluding to the same causal notion that English courts had applied in actions of this kind under the Statute of Labourers--". . . the very act of giving him employment is affording him the means of keeping him out of his former service." Blake v. Lanyon, (1795), 6 Term Rep. 221, 222. French courts also use the expression that in providing employment the defendant is helping or "aiding" the contract breaker (*"aidant . . . a violer son engagement. . . ."*) Ch. Com. 5 Feb. 1991, *pourvoi* No. 88-18.-748 (LEXIS).

19. HENRI LALOU, RESPONSABILITÉ CIVILE 449, No. 716 (6th ed. 1962).

20. S.1905.II.284.

21. As an aviatrix Hélène Dutrieu (1877-1961) would win international competitions at Etampes in 1910, Florence in 1911, and set various speed records. She received the French Legion d'honneur in 1957. DICTIONNAIRE DE BIOGRAPHIE FRANÇAISE, Vol. XII, p. 939 (1970).

in 1903, together with her brother Eugène, an exotic cycling act called "The Human Arrow" ("*La Flèche Humaine*") which apparently featured dangerous aerial leaps and other feats by the bounding bicyclists.

Starting in early September, the plaintiff directors launched a large scale publicity campaign which announced the reopening of the *Casino de Paris* on September 16. They signed Miss Dutrieu to perform her act on opening night and thereafter to perform for two months for a global sum of 47,500 francs (paid in advance), with a cancellation clause of 18,000 francs as penalty. Two days before her scheduled debut, however, she was offered "more advantageous terms" (as the report puts it) by the Isola brothers who directed the Olympia theater, and she agreed to perform her act on their stage instead during the same period. Cancellation on such short notice forced the plaintiffs to delay the opening of the Casino for three days and to change the program. According to their petition, the reopening finally took place, but with diminished success. Accordingly plaintiffs alleged damages of more than 100,000 francs, in addition to the 18,000 franc forfeiture under the penalty clause of Miss Dutrieu's contract.

The Tribunal of Paris found the Isola brothers liable for intentional wrongful interference with plaintiffs' contract. An important finding was that defendants well knew that she had a conflicting engagement with the Casino of Paris. It is worth noting how the court arrived at that conclusion. It inferred the existence of defendants' knowledge from the general publicity campaign about her engagement found in press reports, reviews, theater magazines, and street posters. The conclusion was also buttressed by a concession made in defendants' testimony to the effect that competing impresarios, even before there is general publicity, are aware of the signing and future engagements of performers in other theaters. Consequently by offering Miss Dutrieu certain advantages and inducements to perform at the Olympia, well knowing of her prior commitment, "the Isola brothers facilitated her breach of contract with the management of the Casino of Paris: and thus they cooperated with and participated in the fault committed by Miss Dutrieu." The court awarded plaintiffs 35,000 francs and made Miss Dutrieu and the Isola brothers solidarily liable.[22]

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22. Although the court imposed solidary liability, it took care to break down the sum into two components--18,000 francs upon the penalty owed by Miss Dutrieu and 17,000 francs for the part played by the Isola brothers. Dividing the damages in this fashion was probably for purposes of indicating what contribution would be owed by a co-defendant to the defendant who paid the entirety to plaintiff.

Samuel & Cie. v. Dearly & Isola Frères[23]

The *Tribunal de Commerce de la Seine* came to a different result in a colorful case involving the celebrated actor Max Dearly.[24] Dearly played comedic roles at the *Variétés* theater for a thirteen year period dating from 1901, but from time to time he had difficult relations and quarrels with the impresario Samuel. Dearly's contract with Samuel was not to expire until 1908. It stipulated a salary of 1500 francs per month, a certain bonus for each stage appearance, and a penalty of 60,000 francs should either party breach the agreement. During the 1904-1905 season Dearly and Samuel had a serious disagreement. Samuel had decided to change *Les Variétés* into a repertory theater which played French operettas exclusively and sold tickets to the public by subscription. Dearly viewed this programming change as a radical change as well as a breach of their agreement, for the new format required him to master a number of unfamiliar roles and to play them on alternating nights. His workload increased while the number of his performances and his bonuses decreased. Dearly broke away completely from the *Variétés* and on July 8, 1904 he signed a contract with the Isola brothers to play *Country Girl* at the Olympia.

Dearly did not consider himself to be a defector without cause. It was he who instituted suit before the *Tribunal de Commerce de la Seine* demanding judgment for 60,000 francs against Samuel and a judicial dissolution of his contract. The Tribunal rejected this demand and granted instead Samuel's reconventional demand (counterclaim) for 60,000 francs against him. In the court's opinion, Dearly rather than Samuel had breached the agreement by engaging his services to a different house. His original contract with Samuel contained "no limiting conditions, either as to the type of performances to be staged, the roles that Dearly ought to play, or the number of performances that he would appear in, ..." The court found that "Max Dearly was engaged to play, sing, dance, in a word, to fulfill all roles confided to him without exceptions; . . . ." Consequently Dearly's departure was unjustified and made him liable for the penalty stipulated in his agreement. The Tribunal, however, refused Samuel's demand to hold the Isola brothers liable *in solido*. Although Samuel contended that the Isola brothers had been warned by a registered letter stating that Dearly

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23. *Le Droit*, 25 August 1906, no. 192. *Le Droit* is a *Journal des Tribunaux* containing a complete report of the decision rendered in this case by the *Tribunal de Commerce de la Seine* of 22 Feb. 1905, and the *Cour d'Appel*, 4th Chamber of 28 Dec. 1905.

24. Dearly's given name was Lucien-Paul-Marie-Joseph Rolland. He was born in Paris in 1874 and died at Neuilly in 1943. In his youth, while travelling with an English circus as a pantomime, he adopted the name of a deceased Scottish player named Mac Deely (who committed suicide during a performance). He modified the spelling somewhat and with the approval of the *Conseil d'Etat*, Dearly became his official name. DICTIONNAIRE DE BIOGRAPHIE FRANÇAISE, Vol. X, p. 408 (1965).