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).

was still under contract, the Tribunal found that this letter arrived on July 11, 1904, three days after Dearly's new contract had been signed. Since proof of intentional fault on their part failed, there was no liability under Article 1382.

Both parties appealed this judgment to the *Cour d'Appel de Paris* which affirmed the decision below. As to the question of tort liability, the *Cour d'Appel* found that there was no certain proof that the Isola brothers *knew* when they contracted that Dearly's and Samuel's contract had not expired. It was not enough to show or argue what they might have suspected or what might have occurred to them in regard to Dearly's situation, or to point out that they made no effort to inform themselves on the point. Furthermore, Samuel's letter concerning Dearly's situation did not oblige them to break off the engagement and to return Dearly to the *Variétés*. "The behavior [of the Isola brothers]," said the *Cour d'Appel*, "may be subject to criticism from the point of view of good manners and maintenance of good relationships within the fraternity of theater directors; but the acts in question do not constitute a quasi-delict." It was not established that the defendants *knew* that Dearly was under contract, nor that their actions and contractual inducements provoked or incited its breach.[25] Defendants would not be liable for their negligence in failing to make enquiry or to discover the existence of a prior contract. A third person is under no such legal duty.[26] Liability arises solely for causing intentional harm to plaintiff's contract rights.[27]

Barachet v. Bigot[28]

The case of *Barachet v. Bigot* decided by the *Cour de Cassation* in 1904 was an important decision involving a third person's liability for employing someone previously bound by a covenant not to compete (*clause de non-concurrence*). It might be first noted that the great popularity of such covenants or contractual clauses in the nineteenth century, as contrasted with their virtual absence in previous times, certainly reflects the new capitalistic and competitive economy developing in France. By the turn of the twentieth century trade skills,

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25. René Demogue, Rev. Trim., 1906, p. 896.

26. The case bears out René Savatier's observation that the third person has only an obligation to abstain from intentional interference. He has no duty to do any research or make any enquiry to determine if a pre-existing obligation exists. I *Responsabilité Civile*, 189 (L.G.D.J. 1939).

27. After this lawsuit apparently Max Dearly and Samuel were reconciled, but in 1905 Dearly once again left *Les Variétés* to play *Les Arcadiens* at the Olympia. Nevertheless Dearly returned to play many roles at the *Variétés* until the outbreak of World War I. DICTIONNAIRE DE BIOGRAPHIE FRANÇAISE, *supra.*

28. Req., 8 Nov. 1904, D. 1906.I.489, note by Lacour.

trade secrets, clientele, and goodwill[29] had become important intangible forms of wealth requiring zealous protection wherever possible by private agreement. The *clause de non-concurrence* became a commonplace in employment contracts[30] in both England[31] and France where the jurisprudence was particularly abundant.[32]

The ruling by the *Cour de Cassation* in *Barachet v. Bigot* involved the second of two related lawsuits filed by the plaintiff against the defendant Bigot.

The plaintiff, Barachet, had employed Rouffet as a travelling salesman in a certain territory, apparently in the region around the city of Orléans, under an employment contract dated February 16, 1901, which *inter alia* provided that, after the termination of the agreement, Rouffet would not engage in the same business in the circumscribed territory.

After Rouffet ended his relationship with plaintiff, he became a salesman employed by the defendant Bigot, (plaintiff's competitor) and Rouffet carried on business for defendant's account within the interdicted territory in violation of his previous contract.

Plaintiff's first lawsuit alleged that defendant was tortiously liable for having employed Rouffet in that territory with knowledge that he was under an obligation not to compete. In the circumstances, however, the *Cour d'Orléans* absolved defendant of any knowledge or notice of Rouffet's obligation. The court's view was that defendant could have been misinformed by what Rouffet had related about the agreement and consequently defendant may not have been actually aware of the violation.

After this first ruling, however, Rouffet continued to work for defendant's account in the disputed territory. Plaintiff then brought a second suit alleging once again the same cause of action. On this

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29. Lists of client addresses, for example, were viewed as the property of the employer, not of the travelling employee, and thus restitution of such address books could be demanded in order to prevent the employee, after his severance from the concern, from using such lists on behalf of a competitor. *Cour de Paris*, 7 Aug. 1893, D.94.II.519.

30. Of course these clauses are not found exclusively in employment contracts but may be encountered in sales agreements, leases, partnership contracts, and other types of contracts.

31. *See* Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960) (Noting that as contractual provisions replaced customary norms of apprenticeship system, covenants not to compete became standard feature of employment contracts in nineteenth-century England.)

32. P. HUGUENEY, Thesis, Dijon 1910, DE LA RESPONSABILITÉ DU TIERS COMPLICE DE LA VIOLATION D'UNE OBLIGATION CONTRACTUELLE, p. 118.

occasion the *Cour d'Orléans* granted judgment in his favor. The court awarded 2500 francs in damages and issued an order directing defendant to cease employing Rouffet within 48 hours or else to pay a fine (*astreinte*) of 100 francs per infraction.[33] On appeal the *Cour de Cassation* upheld plaintiff's judgment. The French Supreme Court reasoned that the defendant Bigot was properly found liable in the second suit brought under C.C. art. 1382 because he could no longer plead ignorance of the violation of plaintiff's rights. He had learned of Rouffet's contractual obligation via the first lawsuit in which he was made a defendant and yet he persisted in employing Rouffet for his own account in the prohibited territory.[34] The court summarily rejected the argument that the *clause de non-concurrence* concerned only the contracting parties and could not be the basis of a third person's liability. The terse reply to this objection was that the defendant's fault was of a delictual nature, and in that case the privity argument had no relevance.[35] The principle of C.C. art. 1165 declares simply that no third party should be held liable in contract to plaintiff--and defendant was not held liable in contract.

Joost v. Syndicat de Jallieu[36]

This case illustrates the interesting role played by labor unions in the evolution of the action for wrongful interference with contract. The lawful status of unions and the legitimacy of using collective action were, in 1892, a relatively recent concession to the French laborer. Since the time of the Revolution and well into the nineteenth century, French law had declared illegal all combinations, whether of workers or proprietors. The Penal Code expressly punished the formation of labor unions or *syndicats*.[37] Then in 1864 new legislation[38] made a

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33. The court also ordered that its judgment be published in six newspapers in the Orléans region. This publication was apparently a means of warning away those in the described territory from having commercial dealings with Rouffet. We may note the fact that unlike a common-law court or a Louisiana court for that matter, the French tribunal has no power to issue an injunction over the person. Rather the court's grant of specific performance is enforced by use of monetary fines and publicity of its order.

34. The point remains *jurisprudence constante*, ignorance of the third party, is initially an excuse, but a second employer is culpable if he continues to employ a contract breaker after learning of the violation of his obligation. *Cour de Cass.* Ch. Sec. 10 May 1983, Bull. Civ., Arret No. 935. (LEXIS).

35. The court actually stated that defendant's fault constituted a "quasi-delict," and the terminology was properly criticized by the note author, Léon Lacour, as being inaccurate. The court should have used instead the term "delict" to describe an intentional offense under C.C. art. 1382.

36. Ch. Civ. 22 June 1892, S.1893.I.42, note by Raoul Jay.

37. The Law of 1803, 22 germinal, year 11 declared in art. 7 that "Every coalition of workers seeking to have work stop at the same time, to prohibit work at certain factories, to prevent entry to factories, to occupy factories before or after certain

distinction between violent and nonviolent union activity; the latter remaining punishable under the Penal Code, the former becoming recognized as licit. Finally, legislation in 1884 formally proclaimed the right of labor unions to exist--"Unions or professional associations . . . may establish themselves freely without authorization of government."[39]

Now that collective action was lawful in principle, was it lawful for a union to pressure an employer into dismissing a worker who was employed at will? This issue arose in *Joost v. Syndicat de Jallieu.*[40] Joost was employed in 1889 at the printing house of Mr. Brunet-Lecompte under an "at will" contract. He was at that time a member of the printer's union of Jallieu[41] but perhaps due to some internal dispute between Joost and his union, he had refused to pay his regular dues in 1889 and resigned his membership. At a special meeting called thereafter, the union voted to exclude him from membership and to call a strike against Joost's employer or any future employer, unless he was dismissed. Mr. Brunet-Lecompte bowed to this threat and ended Joost's employment. When Joost found that the union's influence also prevented other employers from hiring him, he brought suit seeking 10,000 francs in damages against the union. Both the court of first instance (*trib. civ. de Bourgoin*) and the Court of Appeal (Grenoble) dismissed his action. These courts reasoned that wrongful interference under C.C. art. 1382 presupposed the commission of an illegal or illicit act that violated the plaintiff's legal or contractual rights. The union's threat of a strike unaccompanied by violence or fraud was simply the exercise of a right granted by law. The threat exerted only a moral pressure and was taken in pursuit of professional interests, not personal hostility. Therefore it was not an unlawful act. Furthermore, Joost's dismissal was not a violation of his contractual rights, since his contract had no definite term.

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hours, and in general to suspend, prevent, or raise the cost of production will be punished by imprisonment of not more than three months."

38. 25 May 1864, SIREY, LOIS ANNOTÉES, p. 25.

39. Law of 21 March 1884, SIREY, LOIS ANNOTÉES, p. 644.

40. An employment contract of indefinite term is terminable by either side at will. "Nevertheless," declares C.C. art. 1780, "the cancellation [*résiliation*] of the contract by the will of a single party may give rise to damages." Article 1780 clearly controls the liability *ex contractu* of a party who abruptly or unreasonably breaks off the employment relationship. Would a parallel remedy for abrupt termination exist against a third party? The case of *Joost v. Syndicat de Jallieu* dealt with this issue. It asked the question whether a union's pressures causing an employer to dismiss a nonunion employee constituted fault under art. 1382 and gave rise to a cause of action against the union.

41. Jallieu, or Bourgoin-Jallieu as it is known today, is a small town in southeastern France which lies approximately midway between the cities of Lyon and Grenoble.

The *Cour de Cassation*, however, quashed the judgment below finding that the defendant union was liable in damages to plaintiff. The court determined that the defendant, by using its collective power to force Joost's dismissal, had violated the terms of the 1884 legislation (Art. 7) which the court interpreted as meaning that every member of a union had the "absolute right" to resign from the organization.[42] Although a threat of a strike is licit when its object is to advance or to defend the professional interests of the workers and the union, it is an illicit act when its aim is to force the dismissal of an employee who exercises his right to retire and refuses to rejoin the union. The court apparently saw the union's threat as licit means directed toward an illicit end.[43]

Interestingly the *Cour de Cassation* gave relief because it found the defendant's act was illicit in its aim of depriving plaintiff of his right to resign from the union. This liability involved a statutory violation and thus might have constituted an independent tort. Considering the date of the case, perhaps the action in delict had not yet been generally recognized to cover interferences by nontortious means.

III. Historical Antecedents and Sources of the Modern Action

The emergence of this delictual action circa 1900 raises a number of questions about its historical antecedents, sources and causes. Having explored in the preceding section the circumstances of its birth, we may now consider the questions surrounding its inspiration and procreation.

Why did the French courts wait until the turn of the twentieth century to recognize this action?

Given the convenient breadth of the general tort article, C.C. 1382, why was there no earlier recognition?

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42. Article 7 declares, "Every member of a professional union may resign at any time from the association, notwithstanding any contrary agreement, but the union may seek without prejudice the current annual dues." SIREY, LOIS ANNOTÉES, p. 644.

43. The case was returned to the Court of Appeal at Chambéry, 14 May 1893, S.93.II.139, D.93.II.191, which followed the terms of decision set forth by the *Cour de Cassation*. *See also* the decision of the *Cour de Cassation* of 9 June 1896, Ch. Civ., D.96.I.582 (defendants liable for employing threats of strike against employer to obtain dismissal of plaintiff foreman, if inspired by "*un pur esprit de malveillance*"). *Accord*, decision of the *Cour de Nimes* of 2 Feb. 1898, D.98.II.104.

Considering that liability might have arisen upon virtually any kind of contract, why were the employment contract cases the leading edge of the jurisprudential development?

Why did the seminal cases so often involve the contracts of highly skilled and/or artistic employees rather than those of ordinary laborers?

In considering these questions one must be clear that the control of *débauchage* was not new to France in the years circa 1900. It had been dealt with for centuries by a variety of statutes, ordinances, and policies of French government. The problem itself was very old, and judges did not write on *tabula rasa*. The private law remedy they invented was a continuation by other means of public law remedies that had existed for two centuries before. The control of economic competition and *débauchage* had its origins more in status reinforced by legislative and administrative sanctions than in private contracts supported by tort sanctions. The public-law controls appeared in three distinct forms:

1. Special statutory liabilities imposed on employers who hired away another's employee;

2. The closely-regulated guild system which gave to masters full control over apprentices and other workers;

3. Public documentation and registration of worker obligations through use of the *livret*.

These laws and institutions were designed to tie the labor force to the shop, the employer, and the locality. After the economic freedoms decreed by the great revolution in 1789, such regulations appeared to be anomalous, and certain ones were directly abolished. But others would survive, and even those abolished by the Revolution were sometimes reintroduced, as in the case of the worker's *livret*. Yet as the new economy and the fruits of *laissez faire* capitalism developed in France, these surviving fetters could not last, for they no longer reached the emerging classes of employees thrown up by the industrial economy and they were at war with the prevailing philosophy of individualism and *laissez faire*. Labor became increasingly specialized, free and mobile--more contractually than legally regulated.[44] The case

44. An extreme division of labor (*le travail en miettes*) became a dominant feature of industrialized European countries by the end of the 19th century. The 1886 census of industry and trades in Belgium showed that this proliferation then totalled 858 different professions. BRAUDEL *ET* LABROUSSE, IV HISTOIRE ECONOMIQUE ET SOCIALE DE LA FRANCE, p. 474 (1979). Economic restructuring gave birth to a new category of

of the travelling salesman (*Barachet*) is perhaps symbolic of a new kind of free employee who was in a position to take away the employer's clientele and who had to be contractually bound not to compete in his assigned territory. He was far less likely to have occupied that position prior to 1789. The statutes or policies of the *ancien régime* established to confine apprentices, journeymen, and vineyard laborers to their shops or estates were not applicable to dress designers, theater performers and travelling salesmen. In 1900 the judiciary was being asked to impose a private law solution in circumstances where public law solutions had become anachronistic, or had fallen into disuse in the face of modern economic conditions. The terms upon which they recognized the tort action, however, correspond almost entirely to these public-law antecedents. These antecedents, to which we now turn, were sources and models of the modern tort.

1. Special Statutory Liabilities

As far back as the year 1350 one can find French legislation which directly prohibited and attached criminal sanctions to the hiring away of another's employee. In the famous *Ordonnance* of 1350,[45] Jean "Le Bon" enjoined that no master of a trade, by offering higher wages to workers (*valets*),[46] could take them away from another master, under penalty of an arbitrary fine. A Paris police regulation of 1720 prohibited anyone, of whatever station in society, from enticing away or receiving laborers or vineyard workers of another employer, under penalty of being held solidarily liable (along with the laborer) for

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"specialized worker" (*ouvrier spécialisé*) falling between the professional and the unskilled laborer. Braudel and Labrousse describe this burgeoning category as one "without qualification and employed at fractional tasks that are quickly learned." *Ibid.* By the end of the 19th century this worker represented already one-third of the labor force in the large French industries. *Ibid.* p. 475. Much of this tendency toward worker specialization and task compartmentalization was caused by the introduction of machines in the workplace which supplanted many human functions and among other things, made the old system of master and apprentice quite obsolete. JULIEN FOUQUÉ, LA CRISE DE L'APPRENTISSAGE, 9-12, Thèse, Paris (1900).

45. Dated 30 January 1350, this measure is entitled Ordonnance concernant la police du royaume, and will be found in the Recueil Général des Anciennes Lois Françaises (Isambert, ed. 1822) Vols. I-VIII [hereinafter referred to as Recueil Générale]. This was a detailed measure (252 articles, 62 sections) passed in response to the serious inflation and labor shortage caused by the Black Plague, which the Ordonnance refers to both as "la mortalité" and "l'épidémie." In motivation, aims and provisions, the Ordonnance is the counterpart of the English Statute of Labourers (1349) which likewise attempted to control the labor shortage caused by the plague. For a comparison of the two statutes, see J.W. THOMPSON, ECONOMIC AND SOCIAL HISTORY OF EUROPE IN THE LATER MIDDLE AGES (1300-1530), pp. 378-395, Chap. XVI (1931).

46. The *ordonnance* employs the expression "*valet du mestier,*" and clearly the word "*valet*" is used in an original sense with a wider meaning than in modern usage. A "valet" in the trade would refer to all types of salaried workers, including servants and domestics. *See* the word "*valet*" in LE ROBERT METHODIQUE (1982).

damages sustained by the employer.[47] Another illuminating prohibition of this kind appeared in an 1851 statute entitled *Law Relative to Contracts of Apprenticeship*.[48] The statute as a whole is a detailed set of regulations governing the nature and form of the apprentice contract (authentic act or private writing required), the incapacities affecting certain parties, the duties of the master toward the apprentice and *vice versa*, certain protections against excessive labor, reasons justifying resolution or termination of the contract, and the vesting of exclusive jurisdiction in the labor tribunals (*conseil des prud'hommes*).[49] The most interesting feature is art. 13 which made a third party liable for luring away an apprentice from his master. The provision reads: "Every manufacturer, factory director or worker, who caused an apprentice to leave ("*detourné un apprenti*") his master, in order to employ him or her as an apprentice or worker, may be liable for all or a part of the indemnity awarded to the original employer." M. Callet, the Rapporteur of a commission studying this law, justified the provision in the following terms:

> A frequent abuse, particularly in large cities, is to take from a competitor, by means of an immediate salary increase, an intelligent apprentice who is already trained and in a position to be of use to his master. The labor courts have not been able to reach the parties originating these frauds, the apprentice escapes because of his insolvency; the master who is an accomplice declines the court's jurisdiction. Art. 13 declares that those who mislead the apprentice away from his master before the expiration of the contract are solidarily liable for the damages owed by the apprentice.[50]

The fate of this law may be seen as a sign of the swiftly changing socio-economic picture in nineteenth century France. Pierre Hugueney noted that by the time he wrote his dissertation (1910) the apprenticeship law of 1851 was in disuse and no longer enforced.[51] The law's brief lifespan, coupled with the Rapporteur's justification for

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47. This ordinance, dated 16 October 1720, is referred to by HUGUENEY *supra* note 31, at p. 90 who cites Guyot, Rep. 1784, t. VI., V. Domestiques, p. 101, note. Hugueney states that a like prohibition extended outside Paris to those who attempted to lure away domestics and servants working in the countryside.

48. 22 Feb. - 4 March 1851, Bull. no. 2765, D.1851.IV.43.

49. The critical remarks of members of an advisory commission, together with the report of the Rapporteur of the commission, M. Auguste Callet, are appended in the notes. The whole debate is a fascinating dialectic between those favoring a highly paternalistic law with many legal protections for apprentices versus those commissioners calling for greater liberty of contract and less state regulation of the master-apprentice relationship.

50. *Ibid.*, no. 17, p. 48.

51. HUGUENEY, *supra* note 31, at pp. 91-96.

its passage, are suggestive evidence about the pressures upon the judiciary to take its pioneering step around 1900. The apprentice agreement was emerging as a contract with negotiable terms, and not, as in the former days of the guilds, a status that one could elect but not modify.[52] The abuse of raiding apprentices suggested to *Parlement* the need for a statutorily authorized remedy against the culpable employer. A contract remedy was available, but it was insufficient because it could not reach beyond the apprentice who was frequently insolvent or judgment proof. Yet as the twentieth century approached, this careful reform legislation fell into desuetude and a remedial gap appeared. The demise of the apprenticeship law also reflects that the second type of public control--the guild system--had collapsed.

2. The Gild System

In pre-revolutionary France guilds were known as *corporations*, meaning an association of artisans of the same trade (*métier*) living in the same city or town and enjoying a monopoly over manufacture and sale of their goods.[53] Already in thirteenth century Paris we have in Prévot Boileau's BOOK OF TRADES (*Livre des Mêtiers*) a glimpse of the guilds and the way in which medieval

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52. Some commission members, led by M. Benoit, desired to amend the *projet* so that all terms of the apprenticeship contract would be left subject to the rule-making power of the *conseil des prud'hommes* in the interest of protecting the weaker party to the contract against abuses. This was necessary, M. Benoit argued, because this contract is not free in reality. The party in interest, the apprentice, cannot contract for himself. Many apprentices, he continued, are exploited as "beasts of burden" for whom the slightest rest is considered a theft of the master's investment. The proposed amendment, however, was rejected by the Rapporteur whose reply is testimony to the gathering strength of the "liberty of contract" argument:

> M. Callet, reporter, responds that the amendment . . . has the effect of taking away from the parties the liberty that the law wishes to leave to them; that he [M. Benoit] calls for a system of regulations analogous to that power held by the ancient *jurandes*, and then France would have as many regulations as *conseils des prud'hommes*; that the industrial legislation would then vary from city to city as in the Middle Ages, and there would no longer be any liberty except in the places where there existed no *conseil des prud'hommes* . . . But what will these regulations deal with? Will they cover the price, the lodging conditions, the food? . . . If they rule on these points and conditions, what becomes of the contract? What good is it to talk about a contract? Don't say that you are making a law concerning apprenticeship contracts for that would be a lie, because where there is no liberty there is no longer a contract . . . . It's slavery that you are asking for.

See supra note 47, at p. 43 n. 3.

53. PAUL PIC, TRAITÉ ÉLÉMENTAIRE DE LÉGISLATION INDUSTRIELLE, 59, No. 102 (1922).

commerce was structured.[54] At the end of the seventeenth century a royal edict (1673)[55] extended the guilds into every city and village in France and to all branches of commerce, thus dramatically increasing both their number and economic significance.[56]

The guilds were founded on the twin principles of exclusivism and protectionism.[57] There must have been little need to curb competition by private means. Competition was strictly controlled by internal regulations. Laborers were divided into three classes--masters, journeymen, and apprentices--the latter classes being subordinate to the first. The number of masters was fixed and qualifications severely restricted. Regulations set the hours of work, forbade advertising, called for inspectors with inquisitorial powers and fixed the number of workers and tools employed in a workshop.[58] The essential aim, said Henri Pirenne, was to protect the artisan not merely from external competition but also from the competition of his fellow-members: "The result was to safeguard the independence of each by the vigorous subordination of all."[59]

Under the corporate system one's right to practice a trade was a purely local right and the mobility of laborers was accordingly restricted. Each community had its proper set of regulations. There was no uniformity to these regulations in the various cities and towns, nor did provisions permit workers to pass from one trade or corporation to another. A master who acquired his *maîtrise* in making silk at Tours could not leave Tours and establish himself at Lyon without exceptional difficulty and certainly not without undergoing further training in Lyon. Similarly a journeyman who had completed his apprenticeship at Tours could not hope to leave and become employed at Lyon, since he would be required to start his apprenticeship all over again under the statutes of Lyon.[60]

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54. This book was written around 1260 and listed 101 separate trades found in Paris. *Recueil Général*, Vols. I-VIII. *See also* the legislation of Louis XI in 1467 organizing the *mêtiers* of Paris under 61 separate banners.

55. Versailles, 20 March 1673, Louis XIV.

56. In 1672 there were only 60 corporations in France, but by the end of the *ancien régime*, it is estimated that 521 French cities and villages had been brought within the guild system. *Ibid.* 65, No. 119. Gilds spread over Europe in all places where commerce and industry were found. Frankfurt in the fifthteenth century had 137 guilds, Hamburg 114, Lubeck 129. Figures for the number of guilds in the great cities of Europe are given in J.W. THOMPSON, ECONOMIC AND SOCIAL HISTORY OF EUROPE IN THE LATER MIDDLE AGES (1300-1530) 396-414 (1931).

57. HENRI PIRENNE, ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE, 183 (Clegg transl. 1937).

58. *Ibid.* p. 186.

59. *Ibid.* p. 186.

60. P. PIC, *supra* note 52, pp. 60-61, nos. 103-105.

In such a setting there was no danger of an apprentice or journeyman leaving a master artisan to work for another master or to set up a rival trade for himself. The problem of *débauchage* would have been dealt with by the severest penalties under the association's laws. A prohibition of this kind may be found in the byelaws of the Clothmakers of Lyon of 1554:

> That a master of this trade can neither take away nor receive ("*ne pourra retirer n'accueillir*") a journeyman working in the city and faubourg (of Lyon) for another master, nor give him work without having first enquired and received assurance from the master for whom the journeyman worked before that he is satisfied with him.[61]

The essential point of such a provision was that the regulatory and economic system itself, rather than private agreements or tort sanctions sustaining private agreements, guaranteed freedom from competition for labor already within the guild system.[62] In the time of the guild, the modern noncompetition clause which became so prevalent in contracts and controversies in the nineteenth century would not have developed from the needs of the artisanal classes. And without such contracts as a predicate, there was still no need for a tort action to prevent wrongful interference.

The Demise of the Gilds

The abolition of the guilds soon after the French Revolution of 1789 was an indispensable step toward a system of free exchange and modern capitalism.[63] It was the *Loi d'Allarde* of 2nd March 1791 which definitively suppressed the monopoly of corporations, guilds,

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61. These byelaws received a royal *imprimatur* of Henry II in the form of confirmatory letters and were registered with *Parlement*. Vide, *Recueil Général*, Vols. IX-XV, *Lettres qui confirment les statuts des ouvriers de draps d'or et d'argent de la ville de Lyon*, Paris, April 1554, registered 4 December 1554.

62. This is supported by the appearance of the first law prohibiting the *débauchage* of apprentices in 1851. It appears that prior to 1851, i.e. until the time when apprenticeship emerged from status to contract, *débauchage* was not publicly regulated because there was little risk that it might occur under the guild system.

63. The edict of Turgot in 1776 abolishing the guilds was a precursor of this era, but the edict was overturned several months later. P. PIC, *supra* note 52, p. 67, No. 127. A later attempt to abolish all corporate privileges was decreed on August 4th, 1789, but this decree was soon modified to permit the guilds to renew their existence.

Capitalistic theory was sketched in France in the mid-eighteenth century, but the system did not in reality flourish until the years 1820-1840. *See* BRAUDEL ET LABROUSSE, HISTOIRE ECONOMIQUE ET SOCIALE DE LA FRANCE, Vol. 2, Tome III, p. 241 (1976).

and privileged manufacturers.[64] Article 7 of the *Loi d'Allarde* declared that "From the 1st April of next year it will be open to every citizen to practice whatever profession, art or trade which he pleases, after obtaining his license. . . ." Theoretically this law emancipated the spirit of free enterprise and free competition.[65] Allarde proclaimed that "The soul of commerce is industry, the soul of industry is liberty," and the era of modern capitalism and economic liberalism was about to begin.[66]

One might have thought that labor's release from the iron grip of the guild would have led sooner or later to new pressures for a remedy against *débauchage* to replace those that were abolished. Such pressures undoubtedly developed, but the particular remedy to which French law now turned in the early nineteenth century was not to be the private tort action to which this paper is devoted. Instead it now made use of an interesting mechanism known as the worker's *livret*, to which our attention now turns.

3. The Worker's Livret

The origins of the *livret* can be found in legislation as early as 1565 wherein Charles IX decreed that no head of a family or household could employ domestic servants unless the servant presented an authentic act certifying his last place of employment and the reasons for leaving that employment.[67] The preamble to the measure disclosed the evil to be suppressed. It stated that servants of loose morals frequently abandoned their masters' employ, and the master not only lost their

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64. The masters and *jurandes* were indemnified by the state. Arts. 3-4.

65. BRAUDEL ET LABROUSSE, HISTOIRE ECONOMIQUE ET SOCIALE DE LA FRANCE Vol. 1,, Tome III, p. 11 (1976).

66. At the same time that the old monopolies and privileges were abolished, worker unions and strikes were likewise suppressed as a matter of principle. The municipal authorities of Paris declared 26 April 1791 that coalitions of masters and journeymen were illicit. That same year the *Loi Le Chapelier* of 14 June struck further blows against the corporations, by stating in the strongest terms, "The abolition of all forms of corporations being one of the fundamental bases of the French Constitution, it is illegal to reestablish them in fact, under whatever pretext or form." (art. 1.) The next provision interdicted those belonging to the same estate or profession to nominate presidents, secretaries or syndics or "to formulate regulations concerning their pretended common interests." (art. 2.) All agreements between members of the same profession tending to fix prices was deemed unconstitutional, null and contrary to the rights of man (*droit de l'homme*). (art. 4). Finally art. 8 stated that "Every assembly composed of artisans, workers, journeymen, . . . or excited by them against the free exercise of industry and labor . . . shall be deemed to be seditious assemblies . . . ." BRAUDEL ET LABROUSSE, *supra* note 64, p. 12. The French Penal Code of 1811 confirmed the illegality of worker strikes in arts. 414-416 and imposed a term of imprisonment of 1-3 months for violation.

67. *Déclaration*, Toulouse, 21 February 1565 of Charles IX registered in Paris 8 March 1565, *Recueil Général*, Vols. IX-XV.

services[68] but the master's home was frequently robbed and pillaged as well. Hence the purpose of requiring the certificate, so that "the fidelity and loyalty of the servant may be better known to everyone." By 1733 these certificates were officially termed "certificates of fidelity" in an ordinance squarely aimed at the arrest of beggars, vagabonds and others who lacked proof of employment.[69] In the late eighteenth century, however, it was apparently realized that the time and expense of obtaining a new certificate upon every change of employment were inefficient and besides, loose certificates did not make good identity cards. This realization led to the use of a more permanent record of each worker's activities.

In 1777 each worker was required to carry an identity card ("*un cartouche*") which carried inscriptions showing every change of employer. In 1781 this card was replaced by a permanent booklet (le *livret*) which showed what obligations or debts a worker owed to his current or previous employer. The purpose of these regulations was to bind the worker to his shop.[70] At the time of the Revolution, these regulations were temporarily abolished, but the *livret* was reestablished in 1803 (law of 22 germ. year II) and thereafter maintained until 1890.[71] The strict controls of the law were revamped and enlarged in 1831 and 1834.[72]

The *livret* functioned as a veritable passport to employment within France. The document carried the worker's name, date of birth, description, profession and the name of his employer when he first acquired the *livret*. Every worker, on first entering a departmental district, had to obtain a *livret* or to have his existing *livret* signed by the police. The document could not be signed unless it disclosed the previous employer's discharge (*congé d'acquit*). In presenting himself for employment, every worker had to furnish his prospective employer with a *livret* showing a certificate of discharge by his previous employer. The worker was obliged to have a local official verify his last discharge and to indicate the place where he next proposed to present himself for employment. The new employer was obliged to inspect the *livret* and to inscribe his own name. Any employer hiring a worker without a certificate of discharge would be liable in damages if

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68. "*le desbauchans de leur services.*"

69. *Ordonnance*, Versailles, 23 August 1733, *Recueil Général*, Vols. XVI-XXII. *See also Ordonnance*, Paris, 6 November 1778, *ibid.* requiring expanded information to be contained in the certificate.

70. J. BLAISE, TRAITÉ DE DROIT DE TRAVAIL, 308 (Dalloz 1966).

71. *Ibid.* 309. The reintroduction of the *livret* in 1803 serves as a good example how freedoms grandiloquently granted in the revolutionary statutes could be tempered or retracted in the aftermath.

72. These successor police ordinances are set forth in DALLOZ, REPERTOIRE DE LEGISLATION, Vol. 27, p. 397, note 1 (1852).

the worker were still bound to the previous employer. Yet an employer's liability did not depend solely upon what he could glean from the booklet. If he was informed by other means that the worker was not discharged, and that the worker's *livret* was incorrect or incomplete, then he could be liable for receiving or engaging him.[73] Workers who travelled without this document were deemed vagabonds and were subject to arrest.

Historically speaking, one purpose of the *livret* was to facilitate official surveillance or detention of a social class which might be thought dangerous or simply idle. It was also designed, however, as French historian Albert Soboul rightly maintains, to prevent rival employers from luring away workers.[74] It was obviously unconvincing for a rival employer to claim ignorance of a worker's prior obligations if he hired him without examining his *livret*. Equally, from the worker's perspective, the *livret* was a deterrent against abandoning work, since a worker in default could not present a properly annotated and officially verified *livret* to the next employer. The *livret* thus became a registration system for personal contracts: an efficient means of enforcing worker obligations and of ensuring employer domination.[75] The *livret* endured as an institution almost throughout the nineteenth century.[76] During this period some judicial decisions held that to engage a worker without a *livret* could subject an employer to liability.[77] The present-day French Labor Code, Art. L 122-16, still requires an employer, at the expiration of a labor contract, to deliver a certificate to the worker, stating the date the contract began and ended and the nature of the work rendered. This certificate, though perhaps now intended to facilitate employment instead of controlling the mobility of laborers, still indicates to a new employer whether or not the worker is free from his last engagement. A new employer is required to verify this fact before engaging his or her services. A previous employer may also note on the certificate that the worker remains bound by a noncompetition clause.[78]

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73. Faleur et Lachapelle c. Lequeste, 3 May 1837, Douai, DALLOZ, 27 REPERTOIRE DE LEGISLATION 397-398, n. 2 (1852).

74. BRAUDEL ET LABROUSSE, *supra* note 64, p. 121.

75. The Minister of the Interior, in explaining the reasons for reintroducing the *livret* in 1803, stated: "In making the *livret* obligatory, one not only furnishes the worker with a means of justifying his behavior and his honesty; one also proposes *to give to employers a kind of guarantee of his fidelity*." *Ibid.*, p. 121.

76. It was abolished July 2, 1890. J. BLAISE, TRAITÉ DE DROIT DE TRAVAIL, 309 (Dalloz 1966).

77. Douai, S.1874.2.184; D.1874.2.114; Demogue, No. 1180, p. 603.

78. D.1964.215, J.C.P. 1964.II.13551, note R. Lindon; CAMERLYNCK & LYON-CAEN, DROIT DU TRAVAIL, 168, No. 180 (4th ed. 1970).

IV. Excursion's End

This excursion has journeyed from the birth back to the procreation of the modern French action for wrongful interference with contract. I have suggested that both the timing and the terms under which the action was judicially baptized cannot be understood in isolation from its public-law antecedents. The former is a continuation of the latter by different means in a new socio-economic environment.

On the basis of this account it seems accurate to say that the French civil-law mind knew the concept of inducer liability both before and after the Code Napoléon was drafted.[79] This antecedent variety was embodied in a series of statutes dealing with the employment of domestic servants, *valets du mêtier*, apprentices, journeymen workers and farm laborers. Such laws took the form of guild regulations, police ordinances, royal edicts, and documentation requirements imposed on employers and employees alike. Often these laws expressly authorized actions for civil damages sustained by the employer whose employee was hired or harbored.

Pierre Hugueney must have noted this historical continuum, for he said in 1910 *a propos* of the Apprenticeship Statute of 1851 that the action for *débauchage* pre-existed the statute as part of France's "*droit commun*." To Hugueney the statute was an application of, not a derogation from, the *droit commun*. Viewed from this perspective, it was not difficult to accept it into the Civil Code's most capacious provision.

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79. There is an interesting parallel here, of course, to the English development starting with the Statute of Labourers (1349). The common-law judges took charge of this primitive statutory action and filled in its gaps by actions on the case. Extending its ambit in this fashion they were able by 1530 to apply the statute to cases of interference with the contracts of apprentices and independent contractors who were outside the statutory terms. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, 517 (3rd ed. 1990). Legal historian John Baker believes that by 1529 the idea of an action for inducing a breach of contract, independently of the relationship of master and servant, had already occurred to the common-law mind. *Ibid.*, p. 520. An action was brought against a third-party purchaser of land which the plaintiff had previously contracted to buy from the same vendor. (The vendor had given plaintiff a right of first refusal if ever he should sell his copyhold lands.) The plaintiff alleged that the defendant had maliciously procured the vendor to break his contract with him and had promised to indemnify the vendor as against the plaintiff. Palmer v. Wryght (1529), KB 27/1067, 94 S.S. 254. *See also*, Southworth v. Blake (1529) KB 27/1072, 94 S.S. 254-255 (procurement of an apprentice fishmonger to leave his master.) Dr. Baker states that contractual interference by independently unlawful means (*e.g.*, to drive off tenants by threats and intimidation) was already actionable at an earlier date. *Ibid.*, p. 523.