

THE  
AMERICAN LAW REGISTER.

---

JANUARY, 1890.

---

THE LAWS OF LOUISIANA, AND THEIR SOURCES.

Read before the New Orleans Academy of Sciences in 1871, and revised for THE AMERICAN  
LAW REGISTER.

It is a maxim that all men are presumed to know the law, and that ignorance of the law excuseth no man. This maxim is well enough as it respects offenses *malum in se*, and such questions of right and wrong as one's conscience settles without any elaborate appeal to reason. But when we come to consider regulations which are made merely for convenience, or questions which require the cautious weighing of reasons by the cultivated mind to arrive at what is just, the propriety of the maxim is by no means so clear; yet it is essential to administration of justice.

It is well known that the laws of Spain were the laws of Louisiana at the cession of the territory to the United States in 1803, by the treaty of Paris.

It is true, the country had been settled by the French in 1699, and had continued in the possession of France for seventy years, when O'Reilly took possession of the same in 1769 for Spain, and that the larger part of the inhabitants were of French descent, and that the country had been retroceded to France by the treaty of Ildefonso in 1800, and by that power transferred to the United States, yet the brief possession *de facto* by France from the 30th day of November, A. D. 1803, to the 20th of December of the same year, did not permit the carrying into effect of any material changes in the laws. The only changes made by Lausat, acting for France, was to substitute

a Mayor and Council for the government of New Orleans, in the place of the Cabildo, and to re-establish the black code of Louis XV, prescribing the duties toward and the government of slaves. But as Spain and her Indies were governed by the civil law, which also prevailed in France and Louisiana, the change was not so marked, so far as private rights were concerned, as it was respecting the parceling out of the public domain, and laws affecting the public order and the substitution of the Spanish language for the French in legal proceedings. It is quite apparent that the Spanish laws were acceptable to the inhabitants, for no attempt was made to change them after the cession, further than was operated by subjecting the country to the authority and Constitution of the United States. So that at this time, Louisiana is the only State of the vast territories acquired from France, Spain and Mexico, in which the civil law has been retained, and forms a large portion of the jurisprudence of the State.

The Treaty of Paris guaranteed to all the inhabitants of Louisiana, then embracing the immense territory from the Gulf to the forty-ninth parallel of latitude, and from the Mississippi River to the Rocky Mountains, all the rights, advantages and immunities of citizens of the United States, and protected them in the enjoyment of their liberty, property and religion. As in matters of treaties, the President and Senate of the United States possess the supreme power, no steps were needed to naturalize the inhabitants of the territory, how short soever the residence in it had been at the time of the cession. They became at once citizens of the United States.

The first government provided for the ceded territory by our Government was exceedingly simple. Congress, in advance of the transfer on the 31st October, 1803, provided that until the expiration of that session of Congress (unless provision for the temporary government should be sooner made) all the *military, civil and judicial* powers exercised by the officers of the existing government of the same, should be vested in such person or persons, and should be exercised in such manner as the President of the United States should direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion.

It was not long, however, before the principal part of the present State of Louisiana was organized into a territorial government under the name of the Territory of Orleans. We say principal part, because although the terms of the law embraced within the territorial limits that part of the State between the Mississippi River and Pearl River, and between the Mississippi Territory and the Manchac or River Iberville, this part of the territory was at that time actually held by Spain, and continued to be so held until 1810. The legislative power of the territory of Orleans, by the Act of Congress of March 22, 1804, was vested in the Governor, appointed by the President, and in thirteen of the most fit and discreet persons of the territory, who were to be appointed annually by the President. The ancient laws were continued in force until repealed or modified by the Legislature. In March, 1805, Congress reorganized the territorial government by authorizing the President to establish a government similar to that exercised in Mississippi Territory, which had been created by adopting the same government as that organized under the celebrated ordinance of 1787, for the government of the territory of the United States, northwest of the river Ohio, excluding the last article of the ordinance which prohibited slavery. Therefore, to know what law governed the territory, recourse was had to the ordinance of 1787.

As was to be expected, the first changes made in the laws of Louisiana were in relation to crimes and offenses, which could, in a country having no immemorial usages, exist only by virtue of statute law, and which were introduced in language and terms known to the laws of England; and in the Act of the 4th of May, 1805, the following provision was adopted, viz: "All the crimes, offenses and misdemeanors hereinbefore named, shall be taken, intended and construed according to and in conformity with the common law of England, and the forms of indictment (divested, however, of unnecessary prolixity), the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of said crimes, offenses and misdemeanors, changing what ought to be changed, shall be (except by this Act otherwise provided for) according to said common law."

The crimes and offenses referred to in the section comprised

the principal offenses known to our law, so that at the present time the section of the statute of 1805 is deemed to be applicable to all crimes and offenses. Standing as it has done on the statute book from 1805 to the present time, without modification or change, in the midst of the various schemes for the revision of our statute laws, it has had a marked influence upon the criminal jurisprudence of Louisiana. It has given stability to that jurisprudence, since the inquiry of our judges was limited to the common law as it stood at the time of the passage of the Act. They were not bound to follow the common law of England, as it became modified by adapting itself to the changes introduced by statutory law of England, but they were to look to a single standard, viz., the common law of 1805. This venerable provision was re-enacted for the first time in 1870, but, at the same time, in the last section of the revised statute it is excepted from repeal. The common law of England, ever pliant, and bending itself to the gradual changes wrought by the improvements in science, the arts, manufactures and commerce, and by the modified habits of the people, has never been precisely the same from age to age. Hence the modern English authorities, whenever overruling the standard works on the criminal law of the period of 1805, have not been regarded as of binding authority.

The next important measure affecting the civil laws was the codification of the civil laws of the territory. A great misapprehension exists in the minds of many in regard to the Civil Code of Louisiana. It is supposed to be but a re-enactment of the Napoleon code. It is true the French code preceded our code of 1808 by five years, and a *projet* of it (for the Napoleon code, as adopted, had not reached the territory), may have suggested to our legislators the necessity of reducing the laws, which were in the Spanish language, a tongue foreign to the largest portion of the citizens of Louisiana—Americans, or those who were of French descent—into a single code, which should be published in French and English.

In June, 1806, the Legislature, by a resolution, appointed two prominent lawyers, James Brown and Moreau Lislet, to compile and prepare a civil code, and they were expressly instructed by the Legislature "to make the civil law by which

this territory" was then "governed the groundwork of said code;" in other words, to make the Spanish law the groundwork of the code. On the 31st of March, 1808, the old code was adopted, declaring merely an abrogation of the ancient laws wherever the same were contrary to that code, or irreconcilable with it. The effect of this provision was to leave all the Spanish laws not irreconcilable with the code in force, and they continued to be quoted and acted on in the courts until 1828, when by one sweeping clause in the statute of 25th of March, known to lawyers as the great repealing act, all the civil laws which were in force before the promulgation of the civil code then lately promulgated were repealed.

If it was the intention of the Legislature to prevent reference to foreign systems of law, principles, maxims, and for rules for the exposition and interpretation of our own, and to confine our courts to the meagre provisions of the civil code and of statutory law for all rules for right and justice, it was a mistaken labor. The Legislature might as well attempt to repeal and abrogate the language of its people and the rules of logic, as to prevent the lawyer from recurring to the ancient principles and maxims of the law as well as its history, in order to ascertain its meaning. The enactment of a law, whether organic, as in the case of constitutions, or legislative, presupposes the existence of rules of interpretation. And so it has happened that the ancient laws are still examined, not as only reflecting light upon those remaining, but as also furnishing the great storehouse of equitable maxims for the decision of cases not foreseen by the law-givers. The ancient laws and maxims teach us what is equitable and just.

By resolution of the Legislature, passed the 14th of March, 1822, Messrs. Livingston, Derbigny, and Moreau Lislet were appointed, on joint ballot, to revise the civil code of 1808, by amending it in such a manner as they should deem advisable, and by adding thereto such laws as were still in force and not included therein. These jurists, among whom the last named was not the least, reported their proposed amendments of the code to the Legislature, and the articles of the old code and the amendments were numbered continuously, and on the 12th of April, 1824, they were approved by the Legislature, and

went into operation in 1825—in the city of New Orleans, the 20th day of May, 1825, the day of its promulgation.

There are very many articles in the civil code of 1808, and as amended in 1825 and continued by the recent revision of 1870, which are identical with articles in the Napoleon code, and lead to the supposition that whenever the compilers of the code of 1808 found an article in the *projet* of the French code, which they had, which fully expressed the sense and meaning of a provision of the law of Louisiana, it was appropriated. In other instances, the French text was amended to conform to our law, and so adopted. In others, the Spanish law was first written in French and translated into English. Nevertheless, the laws of Louisiana, where differing from the Napoleon code, have been preserved, and thus the civil code contains some provisions in sharp contrast with the Napoleon code.

When the code of 1808 was enacted, laws were passed in French and English. The government being territorial, there was no constitutional provision requiring the laws to be passed in the English language. Hence the French text of the articles found in the code of 1808, and still retained, have been held to be of equal force with the English articles, and have been resorted to by the courts to prevent the evils which might flow from a bad translation.

Although Spanish law has been the law of the land, and our courts take judicial knowledge of the same without proof, and although the French laws are esteemed foreign laws which require to be proven when brought in controversy in our courts, yet the similarity of the French text of our late codes to the Napoleon code has been so great that commentators on the French code, as well as the decisions of the court of cassation, have exercised great influence on controversies arising under our own code. Perhaps one reason has been that we have no commentaries of our own further than some annotated codes, and a work on criminal law and digests of the decisions of the courts, owing to the limited sale which has followed all similar publications. Hence French authors are an essential part of a lawyer's library.

The practice of the State Courts of Louisiana up to September, 1825, when the code of practice prepared under the reso-

lution of 1822, approved April, 1824, went into effect, was regulated by the Act of 1805 (which was based on the Spanish laws) and amendments thereto. The Code of Practice itself was written by its compilers in the French language, and many of its articles are badly translated. It was (1870) revised by incorporating some amendments (which have, from time to time, been enacted) into the body of the work. It has not been materially changed in other respects, and the numbers of the articles remain the same.

We notice some efforts now being made to introduce further amendments in order to lessen the present heavy costs of litigation which drive suitors from the courts of justice. Some change is certainly very desirable, not so much to amend as enforce the law respecting costs. When we consider how extensive the litigation is which arises from the adoption by the Legislature of a new system of practice, it should admonish us to modify with some caution. It took twenty years to settle the practice act of 1805, and since 1825 our courts have had much of their time occupied in ascertaining the meaning of the Code of Practice. The experiments in our sister States in adopting codes of procedure have also given rise to a great deal of litigation. Hence it would seem that if any change was to be introduced, it could best be done by way of amendments to the present system. It may also be observed that the new codes of procedure are rather imitations of our Code of Practice than otherwise. The preparation of the pleadings by the attorneys in New York is, we think, but a continuation of the ancient practice in that State of making up the rolls by the attorneys. The attempts of the Legislature of Louisiana to codify the other branches of the law failed.

A *projet* of a commercial code was prepared under the resolution of 1822, but fortunately never was adopted. It would be extremely unsatisfactory for a single State of the Union to adopt a system of commercial law which should sometimes come in conflict with the commercial law of the neighboring States as settled by their courts, and in conflict with the laws as settled by the courts of the Nation. As it is, the courts being free to act, have gracefully yielded on questions of commercial law to the customs of merchants and the rules settled

under the common law and in our sister States, so that the whole body of the commercial law governing this Union is, in the main, moulded into a harmonious whole. As it had been formed upon the custom of merchants, engrafted upon the common law, the decisions in England were generally looked to with great respect, and what is commercial law in London is commercial law in Washington, as well as among most commercial nations.

A like attempt was made to reduce the criminal law and criminal proceedings to a simple code in 1820. In 1821 Edward Livingston was elected by ballot of the General Assembly to draft a criminal code. Livingston prepared and presented to the Legislature a system comprising "a code of crimes and punishments." "A code of procedure, a code of evidence, a code of reform and prison discipline, and a book of definitions." This constituted the celebrated Livingston code, a work more famed abroad than at home—a work noted for its scientific description of crimes and offenses, and of the proceedings devised for the trial, prison discipline and punishment of offenders and their reformation. The *projet* never having become a law, has left the world unenlightened as to what would have been its practical operation. Being based upon the common law, which Livingston sought to simplify, much of it would doubtless have worked well, but, like all unbending legislative provisions regulating the details of practice, it would have taken years of discussion before the courts to settle its meaning. As it was, scarcely a question could be raised under the criminal law which had not been previously decided by some binding decision.

The Legislature of 1855 attempted to revise the statutes of the State, and adopted the hazardous experiment of annexing to each statute a clause not only repealing all laws contrary to the provisions of each act revised, but all laws on the same subject-matter, except what was contained in the civil code and code of practice. There being no saving clause except as to the act relating to crimes and offenses, an adherence to the language of the statutes would have occasioned the overthrow of offices and the loss of rights. It forced the courts to depart from the letter of the law in order to ascertain its meaning



and prevent an evil which the law-givers had not foreseen.

In the recent revised statutes the Legislature has repeated the same experiment without even a saving clause as to the crimes and offenses, and again forced the courts to interpret so as to prevent great evils. The revised statutes of 1870 are comprised in 3990 sections, and contain the matters of the revised statutes of 1856, and the recent amendments.

Having thus hastily glanced at some of the prominent points in our legislation, we will look for a moment into the courts in session in our midst, and take a practical view of the laws enforced in them. We shall find that, among others, the courts of the United States have jurisdiction of cases—

1st. In admiralty.

2d. In bankruptcy, patents and copyrights.

3d. In revenue and prize cases, offenses against the United States and other causes in which the Government of the United States is interested as plaintiff.

4th. Of causes affecting ambassadors and other public ministers and consuls, and controversies between two or more States.

5th. Concurrent jurisdiction with the State courts of all cases, where the matter in dispute exceeds \$2000, in which a citizen of another State is plaintiff or defendant and the other party is a citizen of the State, or in which an alien is a party.

6th. Concurrent jurisdiction with the State courts, where the matter in dispute exceeds \$2000, and arises under the laws and Constitution of the United States or treaties made under their authority.

We shall find that the State courts have exclusive jurisdiction of crimes and offenses against the State, of probate matters, of all controversies between citizens of the State, whether it respects their property or *status*, or obligations arising from wrongs done to them by others. And they have concurrent jurisdiction with the courts of the United States on all these questions when an alien or citizen of another State submits himself to the jurisdiction of the State courts, or when sued does not avail himself of his right which he has to remove his cause to the courts of the United States.

If we now regard the mode of proceeding in the different

courts we shall find it very dissimilar, and, in a few particulars, resting upon principles directly the opposite of each other; for example: if your ship has been damaged by collision on navigable waters, and the party who was instrumental in occasioning the damage, is within the reach of process of the court, you have your choice, to proceed against such party on the law side of the State or Federal courts, according to the citizenship of the party, or to bring your action in admiralty, *in rem* or against the person. If you sue on the law side of the courts, you must take care that neither you nor your agents controlling the ship have been in fault. For the courts of law, deriving their rules from a rigid morality, inform you that they do not sit to balance negligences, faults and wrongs; that whoever comes before them must come with pure hands. Their maxim is, *procul, O procul este profani*, and the suitor who has been partly in the wrong, is sent away without redress, however much he may have been damaged, and how much greater soever may be the fault of the other party.

The courts of admiralty, looking at human actions in a more benevolent light and with a juster appreciation of the conduct of men in times of danger and excitement, consider the faults and negligence of both parties, and where both are in fault, estimate the loss of both vessels and divide the loss between the parties, and grant relief where, in a court of law, it would be refused.

The proceedings in admiralty are of civil law origin, and many of the principles governing the court are of very great antiquity. They can be traced back to the Greeks before the Christian era, whence they were received into the Roman jurisprudence.

The jurisdiction of the courts of admiralty is exclusive, whenever the proceeding is *in rem*; that is, against the vessel or other thing not the subject of maritime jurisdiction. If, however, at the same time persons can be found and service made upon them by arrest, which is still allowed as citation, and the matter to be brought to the consideration of the court is one for which the common law gave a remedy, the courts of ordinary jurisdiction have concurrent jurisdiction *in personam*, and may decree compensation and damages as in other cases. But if the

ship or vessel is the object of pursuit, and the same is to be taken into the custody of the law and made responsible for liens and privileges in ordinary cases, civil and maritime, including spoliation, civil and maritime, or prize cases, the District Courts of the United States alone have jurisdiction, and any judgment pronounced in a proceeding *in rem* in the highest court in the State where the same can be rendered, if that court be but a justice of the peace, in an unappealable case, can be carried before the Supreme Court at Washington, where it is sure to be reversed—that Court zealously protecting the jurisdiction of the Federal courts over such cases.

In admiralty, personal qualities are in effect attributed to matter, so that it is the ship, vessel, or other thing which is supposed to have offended in prize cases, and in ordinary civil cases it is the ship or vessel which owes the duty or lien, as well as the captain and owners, and all persons interested are admitted in the process *in rem* as claimants, and the thing is treated as a real defendant. Revenue cases are in some respects assimilated to the above, although not belonging to the admiralty jurisdiction.

The proceedings are commenced by a libel (*libellus*, a little book), in which the plaintiff, through his lawyer, called a *proctor*, alleges, and articulately *propounds*, in a series of numbered propositions, the grounds of his complaint, to be specifically answered by the defendant, or by whoever comes into the case as claimant, if the proceedings be *in rem*. If either party give a bond for property, etc., he borrows a term from this, a solemn form of the civil law, and calls it a stipulation.

The Constitution of the United States conferred upon the courts of the Union exclusive jurisdiction in admiralty. In England this jurisdiction extended to tide waters only. At the commencement of the Government, giving the language the signification it then bore, it was supposed the power conferred only extended to tide waters, and so it was decided by the Supreme Court of the United States. The jurisdiction in the case of *Warring et al. v. Clarke*, 5 How. (46 U. S.) 44, decided in 1847, for a collision between the steamboats Luda and De Soto, was maintained by proving that there was a per-

ceptible tide extending up the Mississippi River as high as Bayou Sara.

Since that period the Supreme Court of the United States, notwithstanding the earnest dissent of some of its members, has, as it always happens when convenience and expediency demand a change, extended the admiralty jurisdiction over the lakes and all rivers navigable by vessels of ten tons burthen and upwards. [*The Genessee Chief v. Fitzhugh* (1851), 12 How. (53 U. S.) 443; *The Ad. Hine v. Trevor* (1866), 4 Wall. (71 U. S.) 555; *Ex parte Boyer* (1883), 109 U. S. 629; *Butler v. Boston & S. Steamship Co.* (1888), 130 Id. 527.] The simple and speedy proceedings in the courts of admiralty make that court a great favorite with many, while others think they see the tendency in the national courts to engross jurisdiction, which may lead to greater evils in the end than the present good attained by decisions, which they think overstep the limits of the Constitution as understood by those who framed it.

The Constitution of the United States also confers upon Congress power to pass uniform rules of bankruptcy. It is a principle governing many of the provisions of the Constitution of the United States, that they are inoperative until Congress has passed some law to carry the provisions of the Constitution into effect. Thus the Constitution gives the courts of the United States the right to take jurisdiction of controversies between citizens of different States, between aliens and citizens, and as it respects the grants of lands made by different States, etc. But the courts of the United States hold that they cannot take cognizance of such controversies without an act of Congress to carry the provisions of the Constitution into effect. Hence the individual States have power to pass and enforce insolvent and bankrupt laws when no act of Congress is in force on the subject. Since the formation of the Federal Government, bankrupt laws have been passed between long intervals and following commercial disasters, on three occasions, viz., April 4, 1800, repealed in 1803; and 19th of August, 1841, repealed 3d of March, 1843, and that of 1867, which expired on the 1st of September, 1878.

The insolvent laws of Louisiana, thus dormant by reason of the act of Congress, are of Roman origin. Under the law in

the period of the twelve tables, the borrower of money or debtor could deliver himself, his family and effects into the hands of his creditor, and became bound to him *nexu vinctus*. He was only released on payment of the debt by himself or by another for him. If he failed to pay, he was adjudged to the creditor with all his property. In other cases, after certain publications and delays, the debtor was adjudged (*addictus*) to the creditors, who could slay him, or sell him as a slave beyond the Tiber. If there were several creditors, the twelve tables ordained that he should be cut in pieces *and fairly divided* among the creditors—which probably meant a division of the price of the debtor, after he and his goods were sold. As the *pater familias* had the power of life and death over his children and grandchildren, of whatever age they might be, as well as over his slaves, this provision of the twelve tables does not seem so extraordinary.

After the preceding provision was abolished, there was a period of the Roman law, in which the debtor's goods were sold in mass (*per universitatem*), and the vendee succeeded *actively* and *passively* to the effects and debts of the insolvent, and was bound to pay the price to the creditors *pro rata*. Hence, as the debtor had an universal successor, he was discharged from the debt. The benefit of the cession of goods (the insolvent law), as it now exists in our law, had its origin in the time of Julius or Augustus Cæsar. Where the cession was made under the law Julia (*ex lege Julia*), the debtor enjoyed the right to the *beneficium competentiæ*, which is a point of difference between the bankrupt laws and our own, the *cessio bonorum*.

A man may commit an act of bankruptcy and be forced into court without being insolvent. Under the State law, he cannot be forced into insolvency so long as he has effects to meet executions. The bankrupt laws discharge the debtor absolutely from the debt. The *cessio bonorum* does not relieve the debtor absolutely from his obligations, but if he comes to a fortune subsequently to his surrender, he can be compelled to make a second surrender, but he is entitled to retain for his own use a competency—that is, the *beneficium competentiæ* just mentioned. The insolvent laws of Louisiana, in common with the bankrupt laws of the individual States, do not discharge the debtor from his obligation due the citizens of the other States, and

only barred the obligation due citizens of the same State.

Where contracts are entered into during the existence of a bankrupt law, there can be no question of the right of the courts (considered as a question of morals), to discharge the debtor. The right is a condition making a part of the contract. The debtor could say to his creditor: "When I bound myself to pay you a sum of money, it was with the understanding that if, by misfortune, I should become embarrassed, that I should be discharged from the debt by surrendering to you and my other creditors all of my effects. You took my obligations, knowing that the law, which was a part of the contract, gave me this right, and you are bound by the contract." But where the bankrupt law is passed after the debt was contracted, the right to discharge the debtor is not quite so apparent, since it is a fundamental principle of our law that the States cannot impair the obligation of contracts.

The propriety of enacting bankrupt laws by the sovereign power, depends upon the weighing of the propositions whether it is better that some persons should suffer inconvenience on account of the incautious use of credit, as an example to deter others and prevent the like occurrences, and the advantage which the State will derive from the free and untrammelled industry of all its citizens, particularly where many are embarrassed, coupled with the drawback that the bankrupt laws are frequently made the means of screening the money and effects of a fraudulent debtor from the pursuit of his creditors.

The insolvent, oppressed with debt, is incapable of engaging in new business and occupation. Freed from the overwhelming burden, he engages again in useful employments with spirit and zeal, and becomes a wealth producer and a valuable citizen to the State.

In 1824 Congress passed a law adopting for the practice of the Federal courts in this State, the rules of proceeding of the State courts. At this time, as already shown, the *code of practice* was not adopted. But the rules of proceeding under the practice acts were very similar to those prescribed by the Code of Practice. A large number of the bar were of the opinion that the broad terms of the Act of Congress of 1824 introduced into the Federal courts the State practice in all cases, and to the

exclusion of proceedings on the equity side of the court, according to the forms common in the other States. After a strenuous contest it was finally settled that the courts of the United States had equity jurisdiction according to the ancient forms, and all causes proper for the consideration of the chancellor are required to be brought on the equity side of the court—that is, they must be brought according to the rules of the practice in chancery—and these rules are uniform throughout the United States, while the law side of the Federal courts is governed by the laws of the individual States to the same extent as the State courts in ordinary affairs.

There are great misapprehensions as to the meaning of the term equity, or chancery. It will surprise some to be told that proceedings in equity are governed by laws as well known and as faithfully carried out as those upon the statute book, and after all, that is nothing more than a mode of rendering justice and granting relief in a different manner, concurrently with, or in a different class of, cases from those relievable at law.

In every system of laws there must arise a state of facts with which courts of justice are required to deal, not contemplated by the law-giver, nor provided for by him, or if within the express letter of some broad provision which he has laid down, yet of such a character that, to carry the provision into effect, would shock that innate sense of justice implanted in the bosom of everyone, and such considerations would leave no doubt that the law-giver never intended the provision in question to govern the particular case. In the first example, the courts find rules of decisions from the equitable maxims which are supposed to be the foundation of all laws; in the other, the courts interpret according to the rules of equity and the general intent or scope of other laws on like subjects, and endeavor to arrive at the true spirit and meaning of the law, and exclude from the broad words of the law what was not the intention of the law-giver to embrace in them. For, as St. Paul has it—

“The letter killeth, but the spirit giveth life.”

If, from some forgotten statute, or from time immemorial, the practice of the courts of law has been confined to a set of *formulas*, there will arise a condition of things not contem-

plated in former ages, and a class of wrongs which these formulas are insufficient to redress. Precisely this condition of affairs did arise under the *jure civile* in the Roman law, which was remedied by the jurisdiction which the praetor assumed or amplified when he established the *jus honorarium*, and allowed petitions to be addressed directly to him in extraordinary cases, and in England, where the chancellor assumed jurisdiction of those cases in which there was no adequate redress at law. In the latter country (as in the former, in ancient time), proceedings on the law side of the courts were regulated according to certain strict forms, and relief could not be afforded in any other manner. In the action of assumpsit, for example, a judgment could only be rendered for damages; in debt, that the defendant recover his debt and damages; in covenant, even to convey land, the judgment is that plaintiff recover his damages, and so of the other actions. It was found in very many cases that the relief granted by the courts at law was wholly inadequate to the injury. The Chancellor of England gradually assumed jurisdiction over this class of cases, and, uncontrolled by formulas, rendered his decree according to the right of the case. If the defendant had contracted to sell to the plaintiff a tract of land, while a court of law could only in the action of assumpsit or covenant give judgment for damages, the Chancellor, meeting the very equity of the case, ordered the defendant to make title and to account for the revenues, and compelled obedience to his decrees by proceedings known to his court.

The kind of jurisdiction assumed by courts of equity may be illustrated by an example from the statute of frauds and perjuries passed in England in 1677, and adopted, in some form or other, in most of our sister States. By this act, among other things, it was provided that no action should be brought upon any contract for the sale of lands, unless the agreement, or some memorandum or note thereof, should be in writing and signed by the party to be charged therewith.

Now it sometimes happens that verbal contracts are made and partly performed, as for example, the intended purchaser, who paid part of the price and has been put in possession. By the strict letter of the statute, the vendee would be defeated in



his action upon the verbal contract. But a court of equity, viewing the statute as made for the purpose of preventing fraud, comes to the relief of the purchaser, on the ground that, to allow the vendor to avail himself of his advantage, would be to encourage one of the mischiefs which the Legislature intended to prevent. It compels him to answer plaintiff's complaint under oath, and decrees a specific performance. Under our State law, where equity and law are administered together, the like relief is only granted where the defendant admits the contract under oath, and possession has been delivered the vendee.

Equity, among other things, grants relief in the following cases, viz: Suits for the specific performance of contracts for the sale of real estate; to foreclose or redeem mortgages; to stay waste of lands; to enforce trusts; to relieve against fraud, and enjoin parties against enforcing judgments of courts at law where obtained by fraud; to compel a party to answer under oath, in order that the replies of the defendant, or the documents, where any are disclosed as existing, may be used as evidence in suits at law; to settle long and intricate accounts; to marshal securities; to settle boundaries; to correct mistakes in contracts to relieve, in some cases, against penalties and forfeitures, and to protect the rights of married women, minors, etc. It is thus seen, from the examples given, that equity embraces a very considerable portion of jurisprudence, and as it is governed by principles of its own, it is easy to see that in many instances it may come in conflict with the State laws. For if citizenship gives the United States courts jurisdiction, and the case be one of exclusive equity jurisdiction, and should be brought in the United States courts, it will not be heard, except on the equity side and according to the rules in equity, no matter what is the State practice in the same case.

The practice on the law side of the courts of the United States, sitting in Louisiana in civil cases, is governed by the practice of the State, which practice was adopted in 1824 by the act of Congress for the Federal courts, as stated above [and now by sec. 914, of the Revised Statutes of the United States, the practice of the law courts of the several States is

adopted for the United States courts sitting in such States].

Criminal proceedings, both in the courts of the United States and the State courts, are conducted as already shown, according to the forms of the common law.

The courts of Louisiana also take judicial cognizance of the common law as it exists in the other States of the United States, but statutes of the other States are to be proved. Published statutes and digests are received in evidence, as well as exemplifications under the great seal: La. Rev. Stat. 1869, sec. 2171; *Copley v. Sanford, Exr.* (1847), 2 La. Ann. 336.

Without adverting to their more remote origin, the following branches of law come to us with the forms with which they have been clothed, and the principles with which they are allied from English sources, viz :

1st. Admiralty and matters of maritime jurisdiction ; the law and practice of courts of admiralty ; equity and the rules and practice of courts of chancery.

2d. Bankruptcy.

3d. Criminal law and criminal proceedings, including warrants for arrest, indictments, informations, etc., although unlike the original States of this Union, we have no common law offenses, and all crimes and misdemeanors are created by statutes.

4th. Evidence, criminal and civil.

5th. Commercial law, which in addition to maritime contracts just mentioned, among others, embraces promissory notes, bills of exchange, bank paper, checks, etc.

6th. The great writ of habeas corpus ; and,

7th. Martial law, of which this city, since O'Reilly's entry in 1769, has had large experience, both Spanish and American.

The law relative to the *status* of persons, domicil, minority, emancipation including the *venia aetatis*, corporations (*universitates*), donations, testaments, dotal rights and property, the contract of sale, exchange, letting and hiring including leases, loan to use, loan for consumption, partnership, mandate, suretyship, annuities and rents, the aleatory contracts, pawns and pledges, antichresis, privileges, mortgages, usucaption, prescription, the discharge of debts by novation, compensation, payment

with subrogation, release, or acceptance, and the effect of notarial acts, are from the civil law.

The *venia etatis*, in its origin, was granted by the prince, and gave the minor the rights of an adult. By the Louisiana law, it is granted to a minor having capacity, and over eighteen years of age, by the courts, and enables him to exercise full control over his estate.

The law respecting the community of acquets and gains is no doubt of German origin. It prevailed in certain provinces of Spain, as for example in Grenada and Salamanca, while other provinces, like the South of France, were governed by the dotal regime, called written law. The community of acquets and gains prevailed in the colony under the custom of Paris, from its first settlement, and it is stated by our excellent historian, Mr. Gayarré, that it was a subject of complaint to the colonist at one time, that it was extended to the cases where colonists had married, with the forms of the Catholic church, Indian wives who, having less stable habits than the whites, frequently absconded after the death of their husbands, with the personal effects, without paying the debts of the estate or settling up the same in due form. (The evil was corrected.)

One of the most marked peculiarities of the laws of Louisiana, as compared with the laws of the other States, is this institution of the community of acquets and gains. It is more favorable to married women than any other system with which we are acquainted, except the Spanish laws of the *Indeas*, from which it was, we think, immediately taken. By the custom of Paris, and the Napoleon code, the personal effects of the wife, in the absence of a marriage contract, fall into the community. Under our law, in the same case, the personal effects remain the property of the wife, that is, they remain paraphernal.

The advantages of the institution are decidedly in favor of the wife. The husband can not withdraw from the partnership, and he, the community, and his separate estates, are alike bound for the debts of the community as it respects third persons. The wife, on the other hand, can at its dissolution by death or divorce, withdraw from it without detriment to her separate estate, and where the affairs of the husband are embarrassed, she can be declared separate in property from her husband by

the courts, and take into her own hands the administration of her affairs, and sell under execution, the community, or his estates, to reimburse herself for any property or money used by him in his business; and as the law gives her a mortgage for her security, she is always a formidable adversary to a creditor seeking to recover a debt, even of the community. The income of the husband (married without a marriage contract) from his own labor, and from his separate property, falls into the community, without any ability on his part to prevent it. On the other hand, the wife has, at all times, the absolute right to withdraw from her husband (by contributing one-half of the matrimonial expenses) her separate or paraphernal property, and to manage it herself, and reinvest the income thereof in her own name, and for her own use, and we know no law to prevent her also from sharing in the community at its dissolution.

The husband, it is true, is the head and master of the community during the existence of the marriage, and can dispose of the effects of the same at his pleasure and without his wife's sanction by onerous title, that is, for an equivalent; but if he conveys the same by gratuitous title, that is, by gift or donation, his estate becomes responsible to the wife for the loss.

If prior to, or at the marriage, the parties choose, they can settle property in what we call dower—the *dos* of the civil law. Property so settled cannot be sold by either husband or wife, or both (except in one or two cases), during the marriage and thus the wife is assured of her estate at the termination of the marriage.

The provision prohibiting married women from binding themselves with or for their husbands is Spanish, and from the 61st law of Toro. The *senatus consultum Velleianum* had previously prohibited women from going surety for anyone—*ne pro ullo fœminæ intercederent*.

The marital fourth (that is, the one-fourth of the estate of the predeceased husband or wife who had died rich, the survivor being in necessitous circumstances) was given by the fifty-third and one hundred and seventeenth novels of Justinian, *in honorem præteriti matrimonii et conseruenter conjuges in Solito statu*.

The action of redhibition (on account of secret defects in things sold) was given by the edict of the *ædiles*. The order of seizure and sale, to coin a word, that Rhadamanthine provision of our law where execution comes first and judgment afterward, is from the Spanish law.

The various pacts which supplied the defects of the strict *leges civiles* are of pretorian origin.

We have thus briefly, and therefore imperfectly, glanced at some of the most striking features of our laws.

These laws, such as they are, and with their slight imperfections, are justly dear to the people of Louisiana. They have protected and shielded the home and the fireside, the labors, the bargains, and the acquisitions, the estates, and the persons of this people during all the growth of the State of Louisiana. The immigrant who has come here from the sterile hills of New England, from the more genial climes of the South, from the fertile fields of the West, as well as our ancient French, Spanish and German populations, has approved and blessed these laws. To those who would like to see the body of the common law introduced among us we say, what have you of value in the common law? The trial by jury, the *habeas corpus*, known and defined crimes and offenses, and enlightened rules of evidence? We have it all here, and more. Your criminal law is ours; your commercial law also is ours. But we have also the most admirable provisions of the civil law filled with benevolence, equity and justice, to regulate our dealings and define our rights in our every-day life. That our laws, like all others, may require amendments to make them more perfect, none will deny. Let us amend, but never change them for others, of which our people have no experience, and the adoption of which promises us no advantages in the future.

HON. E. T. MERRICK.

New Orleans, La.