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The Major Periods of Louisiana Legal History

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ARTICLES

THE MAJOR PERIODS OF LOUISIANA LEGAL HISTORY*

*Alain A. Levasseur***

PART I. THE FRENCH PERIOD

Although 1682 marked the year in which Robert Cavalier Sieur de La Salle claimed, officially in the name of King Louis XIV of France, the vast stretch of land extending from the Gulf of Mexico to the Great Lakes in the northern half of the United States, it was not actually until 1699, following the truce of Riswick, that this land truly underwent colonization and development.¹

* ©Copyright 1996 Alain A. Levasseur. This article is an excerpt from a forthcoming book on Louisiana Legal History by Professor Levasseur that will be serialized in future issues of the Loyola Law Review. A second installment will appear in Volume 42, No. 2.

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1. See generally 1 & 2 CHARLES GAYARRÉ, HISTOIRE DE LA LOUISIANE 1846-1847 [hereinafter GAYARRÉ HISTOIRE]; 1-4 CHARLES GAYARRÉ, HISTORY OF LOUISIANA (1879) [hereinafter

The first French settlement along the Gulf Coast was founded at this time by Pierre Le Moyne, Seigneur d'Iberville, and established in Biloxi, now in Mississippi. That settlement, which consisted of a military outpost, and other posts along the Mississippi River that were later added so as to establish a link with the northern part of the country were the symbols of France's control of this territory.² On September 14, 1712, a royal edict granted to Antoine Crozat, a wealthy French merchant, commercial and economic control over the colony and, at the same time, provided that the legal system of Louisiana would be the Custom of Paris.³ The Superior Council, whose structure and powers were defined in patent letters dated December 18, 1712, was entrusted with the administration of this Custom, which thus represented the first legal system to be enforced in the territory of Louisiana. A royal edict issued September 10, 1716 had declared the Superior Council to be a permanent body, after the model set up in the other French colonies.⁴ In August 1717, the colony was turned over to the Company of the Western Indies and the financier, John Law. Then, in August and September of 1719, a new royal edict and letters patent were issued,⁵ confirming the existence of the Superior Council, extending its powers, and raising it to the status of a legal institution. The Council was to remain in existence until 1763, a year that marked the end of the first period of the French presence in Louisiana.

The Superior Council, which functioned as the court of last resort, was composed primarily of nonlawyers who were representatives of the Company. The Council had jurisdiction over both civil and criminal cases, applying the royal civil ordinance and the royal criminal ordinance of 1670 and judging according to the rules of procedure in use at the Châtelet in Paris.⁶

Within the smaller districts of Louisiana, the military commanders acted as Justices of the Peace, referring the more important cases to the Superior Council. By virtue of a royal edict issued

GAYARRÉ HISTORY]; FRANÇOIS X. MARTIN, *THE HISTORY OF LOUISIANA* (1882); 1-4 MARCEL GIRAUD, *HISTOIRE DE LA LOUISIANE FRANÇAISE* 1953-1974; Henry Plauché Dart, *The Legal Institutions of Louisiana*, 2 *LA. HIST. Q.* 72 (1919).

2. Dart, *supra* note 1, at 72; 1 GIRAUD, *supra* note 1, at 31-38.

3. Dart, *supra* note 1, at 74; 2 GIRAUD, *supra* note 1, at 279.

4. 2 GIRAUD, *supra* note 1, at 87-88.

5. Dart, *supra* note 1, at 85-86.

6. *Id.* at 86-91.

in 1725, a special court was established in New Orleans. The function of this court was to relieve the Superior Council of some of its responsibilities and to expedite the administration of justice in certain matters.⁷

The Company of the Western Indies experienced economic and financial difficulties and, in 1731, surrendered the administration of the colony back to the French crown. For the next thirty years (from 1731 to 1762), few changes occurred within the government of Louisiana, aside from the fact that the officers of the French crown took over the former functions of the representatives of the Company of the Western Indies.

On November 3, 1762, by virtue of the Treaty of Fontainebleau, the King of France ceded to his cousin, the King of Spain, the Louisiana territory. This "gift" was to remain a secret between the two kings until the signing of the Treaty of Paris on February 10, 1763.⁸ On April 21, 1764, King Louis XV of France wrote a letter to the French military commander, D'Abbadie,⁹ instructing him to transfer his powers over the colony of Louisiana to the representatives of the Spanish monarch upon their arrival.¹⁰ When the news of the cession became known to the French inhabitants of the territory, they were stunned and deeply disturbed.¹¹ The feeling that they were being treated as mere objects of bargaining between France, England, and Spain made them wonder with anxiety what would become of their form of government, their laws, and their customs.¹² It was precisely at this time, moreover, that several hundred exiles from the Canadian province of Nova Scotia, or Acadia, fled to Louisiana after being driven out of their land by British troops.¹³ This influx of new French blood, together with the fact that the entire year of 1765 passed without a Spanish governor assuming control of the territory, gave the local French-speaking population hope that the treaty of cession to Spain would not be carried out.¹⁴

7. Dart, *supra* note 1, at 95-96.

8. 2 GAYARRÉ HISTOIRE, *supra* note 1, at 91-93.

9. *Id.* at 109; MARTIN, *supra* note 1, at 196-205.

10. 2 GAYARRÉ HISTOIRE, *supra* note 1, at 110.

11. *Id.* at 113.

12. *Id.* at 112-13.

13. *Id.* at 115.

14. *Id.* at 129-31.

On March 5, 1766, however, Don Antonio de Ulloa arrived in Louisiana to assume power in the name of the King of Spain. Although Ulloa was received with due respect, there was an undercurrent of disdain and hostility. Ulloa, realizing that he could not assume immediate and effective control of the reins of government, thought it wiser to leave intact, at least temporarily, the institutions in force and seek the good graces of the French commander Aubry, successor of D'Abbadie,¹⁵ who had died a few months earlier. Thus, Ulloa was the governor in title, but Aubry was the actual authority. Ulloa refused to recognize the Superior Council as a representative part of the former colonial government, except in its capacity as a court. Nevertheless, by its very rejection and the humiliation felt by its members,¹⁶ the Superior Council gained an important political power.¹⁷

Quite naturally, the local population, hostile to the new Spanish government, put its trust in the Superior Council rather than in Aubry, who was suspected of being an agent of the Spanish crown. These suspicions, which ultimately became justified by a series of events, were based upon Aubry's clear disregard for the instructions that the King of France had given to Aubry's predecessor, D'Abbadie, on April 21, 1764.¹⁸ This clear and open hostility expressed by most of the Creole population was deeply rooted in its fear of the Spanish system of administration of colonies, which many associated with a total denial of their rights as persons or as owners. The overt conflict between the two parties to this "forced coexistence" reached its peak in October of 1768 when the Superior Council decided to expel Ulloa from Louisiana.¹⁹ Some six hundred plantation owners and merchants had sent a petition to the Superior Council, asking that certain rights and liberties be restored to them and that Ulloa, along with the other Spanish officers, be expelled from Louisiana. Lafrénière, who was the assistant public prosecutor at the Superior Council, as well as a gifted speaker, charged the Spanish authorities, and Ulloa in particular, with having violated both the spirit and letter of the treaty of

15. *Id.* at 115.

16. *Id.* at 131-32.

17. *Id.* at 186-206.

18. *Id.*

19. MARTIN, *supra* note 1, at 201; 2 GAYARRÉ HISTOIRE, *supra* note 1, at 192-206.

transfer of Louisiana from France to Spain and with having encroached upon the rights, customs, and privileges of its inhabitants. In a word, Lafrénière accused Ulloa of having usurped his power and of having behaved like a despot. Despite the strong protests raised by Aubry, the Superior Council ordered the expulsion of Ulloa on October 29, 1768. Ulloa was to leave Louisiana shortly thereafter.²⁰

This revolution was actually no more than the rebellion of a few who would soon pay dearly—some with their lives—for their insubordination. Backed by the approval of France and the determination of the Duke of Choiseul (the French Minister in charge of the colonies) to abide by the provisions of the treaty of transfer, the Spanish government decided to resort to force and to subdue the colony. This mission was entrusted to General Alexander O'Reilly.²¹

On August 18, 1769, the new Spanish governor landed in New Orleans heading a cohort of officials and an impressive army. On August 21st, General O'Reilly had the leaders of the October 1768 rebellion arrested and brought before a court.²² Once order had been restored and his power secured, O'Reilly undertook a thorough reform of the military, administrative, financial, and judicial structures of the colony, in accordance with the instructions given to him and the powers vested in him.²³

This period in Louisiana political and legal history has been summarized in the following words by Baron Pierre de Coubertin:

Quoique, d'ailleurs, on affectât de nier à Madrid que l'attachement pour la nation française et pour le Souverain eut été la cause du crime et que même on y considérât comme pleinement prouvé que la patrie et le souverain étaient des objets très indifférents pour tous les chefs du soulèvement, le gouvernement espagnol n'essaya pas de s'en autoriser pour entreprendre l'hispanisation de la Louisiane. O'Reilly parait avoir mesuré d'un coup d'oeil l'impossibilité d'en venir à bout, car il posa les bases d'un régime

20. MARTIN, *supra* note 1, at 201-02.

21. *Id.* at 203-08.

22. *Id.* at 201-02; 1 LAS SIETE PARTIDAS at xix (L. Moreau Lislet & Henry Carleton trans., 1820).

23. The text of this commission, which is dated April 16, 1769, has been translated into English and appears in Rodolfo Batiza, *The Unity of Private Law in Louisiana Under the Spanish Rule*, 4 INTER-AM. L. REV. 139, 143-44 (1962).

*qui ne devait avoir d'espagnol que le titre et qui, pour le reste, demeurerait entièrement français . . .*²⁴

Those words express an opinion that is shared by some and criticized by others, with respect to the scope and depth of the reforms, especially legal, that were introduced by O'Reilly in the early part of the Spanish colonization of Louisiana.

PART II. THE SPANISH PERIOD

Opinions concerning the extent of the legal reforms introduced by O'Reilly, such as the replacement of the Custom of Paris with the law of "La Recopilacion de las Indias," are often one-sided.²⁵ Our purpose here is not to undertake an analysis of these opinions but rather to give as impartial an overview as possible of the essential aspects of the legal administration of the colony under Spanish rule.

One of the first reforms that O'Reilly implemented in order to better establish his authority was to abolish the Superior Council.²⁶ This institution had been the source of many difficulties for the former governor, Ulloa, and had been the instigator of the October 1768 uprising against the Spanish crown. It was no surprise, then, that on November 25, 1769, O'Reilly issued a proclamation defining the colony's new form of government:

[I]t is indispensable to abolish the said Council, and to establish in their stead that form of political Government and administration of justice prescribed by our wise laws . . . We establish . . . a city council or cabildo, for the administration of justice and preservation of order in this city. . . . And as the want of advocates in this country, and the little knowledge which his new subjects possess of the Spanish laws might render a strict observance of them difficult, and

24. Pierre de Coubertin, *L'Amérique Française et le Centenaire de la Louisiane*, 20 *REVUE DES DEUX MONDES* 805, 814 (1904). The following is the author's translation:

Although an attempt was made in Madrid to deny that the affection for the French nation and sovereign had been the cause of the criminal act and even though it was considered to be proven that the motherland and sovereign were unimportant to the leaders of the uprising, the Spanish government did not attempt to take advantage of it to undertake the hispanisation of Louisiana. O'Reilly seems to have immediately realized that it was impossible to do it, since he laid down the basis of a system which would be Spanish in title only, and which would otherwise remain entirely French

25. These opinions, of which there are essentially three, will be presented in my forthcoming book, *THE SOLVED MYSTERY OF LOUISIANA LAW*.

26. *Ancient Jurisprudence of Louisiana*, 1 *LA. L.J.* 1, 1 (1841).

as every abuse is contrary to the intentions of His Majesty, we have thought it useful, and even necessary[,] to form an abstract or regulation drawn from the said laws . . . until a more general knowledge of the Spanish language may enable every one, by the perusal of the aforesaid laws, to extend his information to every point thereof²⁷

On that same day, Don Alexander O'Reilly published a series of instructions bearing on the procedure to be followed in civil and criminal trials "in conformity with the laws of the Nueva Recopilacion de Castilla, and the Recopilacion de Las Indias" ²⁸ With respect to the law applicable to the merits of a case or the substantial issues raised, O'Reilly, who had been fully authorized to act according to the circumstances,²⁹ informed the Council of the Indies:

In all respects I deem it necessary that this Province be governed by the same laws as those in force in the other dominions of His Majesty in America, and that everything be written in the Spanish language; in this manner it will be easy to make appeals to the higher courts . . . , or else the king would have to establish a new court

27. *Id.* at 1-27.

28. *Id.* at 27-60. Aside from presenting the rules of procedure, these instructions included a sixth section on wills, which dealt not only with the form of wills but also with provisions of substance relating to the transmission of successions.

29. Royal patent issued at Aranjuez on April 16, 1769. *BATIZA*, *supra* note 23, at 145.

The powers vested in O'Reilly by Charles III were neither specific nor restricted. On the contrary, O'Reilly received "full powers" in all areas, especially legal. The extent of these powers contrasts with the more restrictive nature of the powers vested in Ulloa on March 22, 1767. With respect to the introduction of Spanish law in Louisiana, Ulloa was entrusted with ensuring

{t}hat civil and criminal lawsuits and proceedings instituted between natives of the country, or when a Spaniard or foreigner is involved, be commenced, continued, and decided according to the laws and customs having a constant and uninterrupted force in the colony, and in situations which are either doubtful or have not been specifically contemplated, according to the Laws of the New Compilation of the Indies; but when the lawsuit be instituted between Spaniards, it shall be decided according to the said Laws of the Indies

Id. at 146. Therefore, the powers which were vested in O'Reilly included and exceeded those which had been vested in Ulloa. It is not surprising, then, that although no official document has yet been discovered to confirm this allegation, O'Reilly introduced the Spanish law into Louisiana, as he had the general power to do and as it was later confirmed by Louis Moreau Lislet that he had done:

From the time of its promulgation [O'Reilly's proclamation of November 25, 1769] until now, the French laws ceased to have any authority in this country, and all controversies were tried and decided conformably to the Spanish laws, by a tribunal, of which the governor was the only judge, though he was bound to take the advice of a lawyer appointed and commissioned to that effect, by the King of Spain

1 *LAS SIETE PARTIDAS*, *supra* note 22, at xx-xxi.

with judges familiar with different laws and foreign languages
...³⁰

O'Reilly's suggestions received the formal approval of the King of Spain on January 27, 1770.³¹

The documents summarized above, whose authenticity is beyond doubt, prove in a clear and definite manner that O'Reilly received the authority to initiate any reform which he deemed necessary to ensure the proper administration of Louisiana. Of course, the fact that O'Reilly had been given the power to replace the Custom of Paris with "la Recopilacion de las Indias" and other sources of Spanish law does not necessarily mean that he actually made use of this power. But, then, why would a "general" ask to be granted certain powers from his superiors if he did not intend to use them in order to serve the best interests of a cause which he, himself, was defending? Why would O'Reilly have gone to such length to explain the reasons for his petition to the King of Spain if he had not considered all the advantages that his administration would gain by the change that he contemplated?

The wording of the last few sentences of the preamble of the Proclamation of November 25, 1769, quoted above, is very instructive: On the one hand, it illustrates the skill with which O'Reilly introduced a change into Louisiana's legal system, taking his time and beginning with an "abstract" of the Spanish laws that everyone could understand;³² on the other hand, it reflects the determination with which he began this reform, addressing the settlers in French, thereby preventing them from claiming ignorance of the Spanish language as an excuse for disregarding the new law.³³ In the end,

time brought familiarity [with the Spanish law], and before the close of the first decade the French inhabitants and the Spanish system made friends, the people began to understand and to take advantage of the laws of the Indies and the laws of Spain, finding after all that there was no fundamental difference, or at least no such difference

30. Batiza, *supra* note 23, at 146.

31. *Id.* at 147.

32. This "abstract" is accompanied by numerous references to the various Spanish laws.

33. The Proclamation of November 25, 1769 was published in both French and Spanish. Henry P. Dart, *Courts and Law in Colonial Louisiana*, 1921 *REF. LA. B. ASS'N* 17, 54.

as justified their original disgust at the change of rulers and systems.³⁴

It appears that the various governors who succeeded O'Reilly after 1772³⁵ did not bring about any major reform to the legal system introduced by O'Reilly in 1769. This suggests that the local population had finally accepted the Spanish laws. However, the history of Louisiana law was not to end there. During the last few months that marked the turn of the century, the settlers had reason to believe that their hopes, which had for so long been disappointed, their wishes so long disregarded, were about to be fulfilled: Napoléon Bonaparte apparently wished to integrate Louisiana into the Empire that he was beginning to build.

PART III. THE TRANSITIONAL PERIOD: THE FATE OF LOUISIANA

Based on all of the information he had received, particularly that contained in a thorough and convincing report drawn up by De Pontalba, a resident of Louisiana for quite some time,³⁶ Bonaparte concluded that France's repossession of this territory, which held a strategic position on the vast American continent, could greatly contribute to the expansion of French industry and trade.³⁷ Therefore, by virtue of a treaty concluded on October 1, 1800 at San Ildefonso, Spain agreed to return Louisiana to France on the basis of the territorial boundaries set by the Treaty of Fontainebleau of November 3, 1762.³⁸ In return, Bonaparte granted the duchy of Tuscany to the Duke of Parma, the son-in-law of the King of Spain.³⁹ France and Spain agreed, however, that the Treaty of San Ildefonso would remain a secret as long as England and France were at war for fear that England, mistress of the seas, would seize control of Louisiana. As a result, the Spanish government sent a new governor, Don Juan Manuel de Salcedo, to Louisiana in June of 1801.⁴⁰

34. Henry P. Dart, *Colonial Legal System of Arkansas, Louisiana and Texas*, 1926 REP. LA. B. ASS'N 43, 56.

35. The governors were Unzaga 1772-1776, Galvez 1777-1783, Miro 1784-1791, Carondelet 1792-1797, Gayoso 1797-1799, Casa Calvo 1799-1801, and Salcedo 1801-1803.

36. 3 GAYARRÉ HISTORY, *supra* note 1, at 410.

37. *Id.* at 443-46.

38. *Id.* at 445.

39. *Id.* at 446.

40. *Id.* at 447.

The Treaty of San Ildefonso, which was important from both a political and strategic point of view, would not remain a secret for long.⁴¹ The American ambassador to England⁴² was quickly apprised of this news and informed his government of it in March of 1801. The American government, fully conscious of the unique position that the port of New Orleans held with respect to the great waterway, the Mississippi River, was somewhat alarmed by the news.⁴³ It immediately dispatched Robert Livingston as its emissary to the French authorities to dissuade France and Spain from carrying out their plan and to make a bid towards a purchase of the territory on behalf of the United States.

The negotiations between France and the United States were to last over two years. In the meantime, to fill the vacuum, Louisiana was returned by Spain to France.

One of the many concerns of the French *préfet*, Clément Laussat, was the nature of the powers that he and the Commissioner of Justice, Aymé, had received to carry out possible reforms of the Louisiana legal system. The importance of this issue cannot be underestimated because it is at the very heart of the controversy that has divided Louisiana's scholars over the importance and the extent of Laussat's powers to modify the legal system introduced by O'Reilly as well as the extent of Laussat's use of those powers. Some official documents that were drawn up prior to Laussat's departure for Louisiana help to illustrate the problems with which the new French administrators were confronted.

In a report dated August of 1802, while still in France, Laussat wrote the following to the French Minister of the Navy, Decrès:

Avant d'établir l'organisation judiciaire qui convient à la Louisiane je pense qu'il faut avoir été sur les lieux.

Néanmoins, on voit aisément d'ici qu'il y a peu de procès dans un pays où les habitants vivent à de grandes distances les uns des autres et dont les propriétés n'ont pas pour ainsi dire de voisins.

La Nouvelle Orléans presque seule est dans une position différente; mais c'est surtout par son commerce qu'elle a de la population, et qu'elle est le théâtre de beaucoup de transactions; aussi sera-ce un bienfait très salutaire que d'y établir très promptement

41. *Id.* at 448.

42. The ambassador was Rufus King.

43. 3 GAYARRÉ HISTORY, *supra* note 1, at 448-51.

un tribunal de commerce, sur le pied de ceux qui existent dans nos places de commerce.

Sous le gouvernement Espagnol, la partie civile et criminelle est exercée à la Nouvelle Orléans par le gouverneur assisté de deux assesseurs. Il y a appel de ses jugemens d'abord au Conseil Supérieur de la Havanne, et enfin au Conseil de Madrid.

Le Conseil Municipal (Cabildo) juge les causes sommaires, et au civil jusqu' au dessous de 1650 francs; il est, dans ces sortes de jugemens, présidé par le gouverneur, et assisté par un gradué, qui a titre d'auditeur.

On voit que, tel étant l'état des choses, ce qu'on peut faire de mieux est de suspendre tout plan d'ordre judiciaire pour ce pais là, et de se contenter d'y envoyer le Commissaire de Justice avec des instructions adaptées à ces notions locales.

Laussat⁴⁴

The Commissioner of Justice submitted suggestions of instructions to the Minister of the Navy in a report of November 1802, excerpts of which are given here:

RAPPORT

Le Commissaire de Justice Aymé, par sa lettre du 17 Brumaire, demande au Ministre des Instructions sur l'organisation judiciaire et sur la législation de la Louisiane.

44. ARCHIVES NATIONALES COLONIES, C 13, A 51. The following is the author's translation of the report:

In order to determine the judicial structure which is best suited to Louisiana, one must have lived or have spent some time there.

Nevertheless, it is clear that there are few judicial proceedings within a country in which the inhabitants live far from one another and in which the owners have no neighbors so to speak.

New Orleans represents one of the few exceptions, although it is mainly because it is a center of trade that it is densely populated and that so many transactions are carried out there; therefore, it would be most beneficial to establish in New Orleans, as soon as possible, a commercial court on the same scale as those which exist in our market-places.

Under the Spanish government, civil and criminal actions are heard in New Orleans by the governor and two assistants. Appeals from these decisions may be taken, first, to the Superior Council of Havana and, second, to the Council of Madrid.

The Municipal Council (Cabildo) judges in summary proceedings and cases which amount to less than 1,650 francs; in these decisions, the municipal council is presided over by the governor and assisted by a graduate who acts as an auditor.

It would appear, then, that the best thing to do would be to postpone any plan of judicial reorganization in this territory and to send the Commissioner of Justice to Louisiana with instructions adapted to the local way of thinking.

Laussat

Il observe, au sujet de l'organisation actuelle et pour en montrer l'incompatibilité avec nos lois, "que c'est tantôt le gouverneur général officier essentiellement militaire qui juge soit au civil soit au criminel et tantôt un Alcalde; que la décision n'émane presque jamais que d'un seul juge; qu'enfin les jugements sont portés par appel à la Havane et que ceux rendus par ce second tribunal vont en dernier ressort au Conseil de Castille."

Dans l'intention de présenter aux justiciables plus de motifs de confiance sans les exposer aux mêmes lenteurs, il propose, comme meilleur mode d'organisation judiciaire pour la Louisiane:

1. Un Tribunal d'Appel séant à la Nouvelle-Orléans qui jugeat en dernier ressort tant au civil qu'au criminel et ne put juger qu'au nombre de Sept juges. Ce Tribunal serait composé d'un Président, de six juges, d'un commissaire du gouvernement, d'un greffier et de deux suppléants.

2. Deux Tribunaux de première instance, l'un à la Nouvelle-Orléans, l'autre au siège de la Sous-Préfecture, lesquels seront en même temps Tribunaux Civils, de Commerce et de l'Amirauté. Ils jugeraient en dernier ressort jusqu'à concurrence de 2000. Ils seraient composés chacun d'un Président, de deux juges, d'un commissaire du gouvernement, d'un greffier et de deux suppléants. Ils ne pourraient juger qu'au nombre de trois juges.

Le Commissaire de Justice s'abstient de prononcer sur ces deux questions, savoir:

1) Si le recours sera admis au Criminel

2) S'il convient de renvoyer pour le recours en cassation, en matière civile, devant le Tribunal de Cassation, ou devant le Tribunal d'Appel de la Colonie française la plus voisine qui en ferait fonction.

En considérant que la population de la Louisiane est d'origine française, qu'on y parle notre langue et que son régime a été longtemps le même que celui de nos colonies, il pense que le gouvernement trouvera convenable d'ordonner que la justice y soit rendue tant au civil qu'au criminel, suivant les formes de procéder, les Loix, Règlements et Tarifs qui étaient observés en 1789 dans les possessions rendues à la France par le traité d'Amiens⁴⁵

45. *Id.* The following is the author's translation of the report:

The Commissioner of Justice Aymé requests, in his letter of 17 Brumaire, that the Minister of the Navy issue some instructions on the judicial structure and legislation of Louisiana.

He observes that the present structure is incompatible with our laws and that civil and criminal cases are decided, sometimes, by the governor-general and, sometimes, by an alcalde; that the decision is almost never rendered except by only one

On Brumaire 29, year 11, (November 2, 1802) the Minister of the Navy, Decrès, sent the following instructions to the commissioner of justice in Louisiana:

Je réponds, citoyen, à vos deux lettres des 16 Vre et 17 de ce mois, par lesquelles vous demandez des instructions sur l'organisation judiciaire, sur la législation de la Louisiane et présentez des bases relatives à l'administration de la justice, dans cette colonie.

L'intention du gouvernement n'est point de régler, en ce moment, ce qui concerne les tribunaux et les formes de procéder à la Louisiane. Il attendra, pour s'en occuper, les propositions que vous lui soumettrez, à cet égard, sous les rapports combinés du plus grand intérêt des justiciables, des localités, de la législation de la métropole et de celle de ses colonies: après en avoir mûrement conféré avec le capitaine général et le préfet colonial, dans des assemblées communes à la forme prescrite par le règlement de l'organisation des pouvoirs respectifs. Vous devrez même, auparavant, vous entourer consultativement de toutes les lumières que vous pourrez recueillir des principaux habitants et officiers publics du pays.

judge; and, finally, that the judgments are appealable to Havana and may be subsequently taken in last resort to the Council of Castille.

In order to instill more confidence in the ordinary man without subjecting him to the usual delays, he proposes that the new legal structure in Louisiana consist of:

1. A court of appeal, established in New Orleans, which would judge in last resort in both civil and criminal cases and which would require seven judges for any ruling. This court would be composed of a President, six judges, a commissioner for the government, a clerk of court, and two deputies.
2. Two district courts—one in New Orleans, and one at the seat of the sub-prefecture—both of which would also serve as civil courts, commercial courts and courts of admiralty. They would judge in last resort up to 2000. Each court would be composed of a President, two judges, a commissioner for the government, a clerk of court and two deputies. The court would require three judges for any ruling.

The Commissioner of Justice will refrain from taking any position on two questions:

1. Whether a recourse will be granted in criminal cases;
2. Whether appeals from judgments in civil cases should be taken to the Tribunal of Cassation or to the Court of Appeal of the nearest French colony which would act in this capacity.

Since the inhabitants of Louisiana are of French extraction and speak French, and since the system of law in this province had long been the same as that of our colonies, he believes that the government should order that justice be dispensed, in both civil and criminal cases, in accordance with the forms of action, the regulations and the tariffs observed in 1789 in those colonies handed over to France by virtue of the treaty of Amiens

Le recours, par voie d'appel, ne pouvant plus avoir lieu à la Havane, ni au Conseil de Castille, vous attribuerez ces recours, de concert avec les deux autres premières autorités, à celui ou à ceux des Tribunaux existans, que vous jugerez devoir déterminer, en évitant néanmoins une composition trop nombreuse, et par conséquent trop onéreuse aux finances de l'état.

Quant au pourvoi en cassation, il aura lieu, comme dans toutes nos autres colonies, au Tribunal créé à cet effet en France, dans les délais que la distance des lieux vous paraîtra devoir comporter. J'ignore si le gouvernement ne changera pas cet ordre de choses par la suite, en attribuant compétence de Cassation ou de révision, soit d'Isle à Isle, soit de continent à l'Isle la plus voisine; mais quant à présent, son intention est de ne rien ôter à l'universalité des pouvoirs du Tribunal de Paris.

Ainsi, jusqu'à ce que les Consuls de la République ayant fixé l'organisation judiciaire de la Louisiane, celle qui subsiste aujourd'hui sera maintenue, sauf les modifications provisoires que l'administration locale aurait jugées être indispensables et ne pouvoir souffrir de retard. Néanmoins, en votre qualité personnelle et en vertu de vos attributions, vous jugerez seul, ou en concurrence avec d'autres juges, et comme leur Président, dans tous les cas où le Gouverneur Général jugeait seul ou en concurrence.

Ces explications me paraissent résoudre vos objections contre la conservation temporaire du régime espagnol, sur le fait de la justice.

Decrès⁴⁶

46. *Id.* The following is the author's translation:

I reply, citizen, to your two letters of 16 Vre and 17 of this month in which you request instructions on the judicial structure and legislation of Louisiana and present some bases relating to the administering of justice in this colony.

The intention of the government is not to decide, at this time, what concerns the courts and the forms of action in Louisiana. Rather, the government before acting will wait to have those proposals submitted by you in this regard which will serve the best interests of the ordinary man, the localities, and the legislation of both the mother country and its colonies; after having discussed this at great length with the Captain-General and Colonial Prefect in meetings which observe the form prescribed by the rules governing the organization of the respective powers. You should first seek all available information from the leading citizens and public officials of this territory.

Since appeals from judgments can no longer be taken to Havana or the Council of Castille, they shall henceforth be taken to the court or courts which you in conjunction with the other two superior authorities will consider necessary and financially feasible to establish.

Appeals to the highest instance shall be taken, as in all of our colonies, to a special court in France and scheduled in accordance with the distance and estimated travel time. I do not know whether the government will eventually change this state

Decrès' letter is important for two reasons: First, it emphasizes the fact that the French government had no intention of introducing any hasty and ill-conceived reforms. Quite to the contrary, if there were to be reforms, they would not be introduced until after the Commissioner of Justice had completed an in-depth study and had compiled a report for the benefit of the consuls of the Republic on the alterations which ought to be made in the administration of justice in Louisiana. Second, the letter clearly states that Louisiana would, for the time being, remain under the Spanish legal system. It follows from this letter that O'Reilly and his successors had indeed implemented a Spanish legal system of law in Louisiana. This is confirmed by a document that was written by Decrès in November of 1802, which contains the following:

INSTRUCTION pour le Capitaine Général de la Louisiane.

La Louisiane qui est rétrocédée à la France par l'article 3 du Traité conclu à St. Ildelphonse entre la Cour de Madrid et la République française

La Louisiane doit être ici considérée surtout sous le rapport de la Justice, des finances

JUSTICE

L'ordre judiciaire parait avoir été réglé jusqu'à ce jour fort simplement, mais arbitrairement, sous le gouvernement espagnol.

Cet ordre de choses va prendre un caractère respectable par les travaux et la surveillance du Commissaire de Justice nommé par le Premier Consul.

Son premier soin devra être de considérer ce qui doit être maintenu dans l'organisation actuelle des Tribunaux de la Louisiane, dans la forme des procédures et la composition des juges.

of things and grant the power of review or cassation from Island to Island, or from the continent to the nearest Island; at this time, however, it intends to leave fully intact the universality of powers vested in the Tribunal of Paris.

Therefore, until the Consuls of the Republic have determined the judicial structure of Louisiana, the existing structure shall be preserved and subject only to temporary modifications of an indispensable and urgent nature. Nonetheless, in your personal capacity and by virtue of your powers, you shall judge alone or together with other judges, and as their President, in all cases in which the governor-general would have judged alone or with other judges.

Those explanations should dispel any objection which you may have to the temporary preservation of the Spanish system of law.

Decrès

Nul doute que l'ordre judiciaire de cette colonie ne doive être rapproché de ce qui a lieu dans tous les pays soumis aux loix de la République, mais tout mouvement subit a ses inconvénients. On ne peut d'ailleurs se dissimuler que des habitans épars sur une grande étendue de territoire, séparés les uns des autres par de grandes distances, n'ayant que de faibles complications d'intérêts, n'ont pas besoin de la multiplicité des Tribunaux et des formes judiciaires qu'exige une population nombreuse et réunie dans un petit espace.

Les Fonctions du Commissaire de Justice, se borneront donc, à son arrivée, à remplir les fonctions de la première autorité judiciaire dans la colonie par quelques personnes qu'elles aient été exercées précédemment, et il entrera dans la plénitude des attributions du Titre Trois de l'arrêté du 24 fructidor.

Il rédigera un plan d'ordre judiciaire adapté à la colonie et il le fera parvenir sans délai, au Ministre, pour être soumis aux Consuls.

Il enverra en même temps ses propositions pour la nomination des juges et jusqu'à ce qu'il ait reçu la décision du gouvernement, les tribunaux actuels de la Louisiane continueront à avoir leur cours

Le Ministre de la Marine et des Colonies

Decrès⁴⁷

47. *Id.* The following is the author's translation:

INSTRUCTION for the Captain-General of Louisiana:

Louisiana, which is retroceded to France by virtue of article 3 of the treaty concluded at San Ildefonso between the Court of Madrid and the French Republic Louisiana must be considered mainly in the light of Justice, finances

JUSTICE.

Until now, justice has been dispensed very simply, although arbitrarily, under the Spanish government.

The Commissioner of Justice, appointed by the First Consul, is entrusted with establishing a more reputable system of justice as a result of his own involvement and supervision.

His first order of business shall be to consider what must be maintained in the present organization of Louisiana's tribunals, with respect to their procedure and composition.

There is no doubt that the administration of justice in this colony should be brought closer to that of those countries subjected to the laws of the Republic, although any precipitant change has its disadvantages. However, one cannot claim that inhabitants who are scattered over a vast stretch of land, separated from one another by great distances, and suffering only minor complications of interests, should need the multiplicity of courts and legal procedures required by a large population massed together in a small and confined space.

The duties of the Commissioner of Justice, therefore, shall be limited, upon his arrival, to fulfilling those of the leading legal authority in the colony whoever were

These instructions from Decrès define very narrowly the extent of the powers of reform vested in the future French administrators of the colony. They were instructed to proceed only with limited reforms with respect to the organization of the courts and the rules of procedure. They were not given any power to implement any change in the substance of the law; moreover, even with respect to the rules of procedure, the Captain-General was warned to proceed with moderation because "any precipitate change has its disadvantages."

On March 26, 1803, Laussat arrived in New Orleans to assume his duties. On May 24th of that same year, Laussat addressed the following letter to "Citizen Decrès, Minister of the Navy and the Colonies":

Par vos instructions, vous avez voulu qu'en ce qui est de l'ordre Judiciaire, les choses restassent provisoirement ici dans l'état où elles sont, en un mot, selon vos propres expressions, que les Tribunaux actuels de la Louisiane continuassent à avoir leur cours.

Je suis ici depuis deux mois: j'ai écouté et observé; il est de mon devoir d'avertir Votre Excellence que, plutôt au contraire ce cours cessera, plutôt nous opérerons un grand bien, un bien essentiel après lequel toute la colonie soupire; car, vous le dirai-je Citoyen Ministre? il n'y a pas de Tribunaux à la Louisiane, il n'y en a même pas l'ombre.

Voici comment l'ordre judiciaire s'y exerce; c'est pis qu'en Turquie.

Les jugemens de toute espèce, dans le sein de la Colonie, se rendent au nom du Gouverneur, excepté en matière fiscale où l'intendant est arbitre souverain.

Le Gouverneur ne donne son nom que pour la forme; sa signature est un act passif, auquel est attaché un salaire qui forme l'une des branches du revenu de sa place.

the persons who previously fulfilled these legal duties. The Commissioner of Justice shall exercise all of the powers of Title Three of the Decree of 24 fructidor.

He shall prepare a plan for the administration of justice adapted to the colony and shall promptly send it to the Minister, who shall, in turn, submit it to the Consuls.

He shall also send his proposals on the appointment of the judges; and until he has received the government's decision, those courts which are in existence in Louisiana shall remain in existence.

The Minister of the Navy and the Colonies
Decrès

Mais à côté du Gouverneur est ce qu'ils appellent un auditeur de Guerre, un Lieutenant du Gouverneur; il est gradué; rien de ce qui est de la compétence du gouverneur, hors du militaire, ne peut recevoir de décision qu'après qu'il a donné son avis.

Il est d'ailleurs seul juge en fait de justice tant au civil qu'au criminel.

Des assesseurs ne lui sont même pas adjoints; ce qu'un juge de paix en France ne peut se permettre pour une valeur de 100 est permis à l'auditeur de la Nouvelle Orléans pour quelle valeur que ce soit.

Aussi ses sentences n'inspirent-elles ni respect ni confiance; fondés ou non, les soupçons les plus honteux manquent rarement de les accueillir

La voie d'appel à Cuba et successivement à Madrid est un remède tardif et ruineux

On envisage un changement en cette partie comme un des premiers bienfaits du changement de domination

Il se passera peut-être deux mois avant que le Commissaire de Justice soit ici; ensuite un mois ou deux avant même qu'il puisse se reconnaître et proposer aucun plan; enfin au moins six ou huit mois avant que nous recevions votre réponse de France sur ses propositions.

Je vous conjure, au nom de la colonie entière, Citoyen Ministre, de ne pas laisser subsister si longtemps l'état dans lequel, à cet égard, elle gémit; l'honneur du gouvernement Français exige qu'elle en sorte sans délai

Maintenant que vous savez authentiquement ce qui existe ici, quel inconvénient trouveriez-vous, Citoyen Ministre, à ordonner aussitôt après la réception de cette dépêche, par une instruction commune au Capitaine Général, au Commissaire de Justice et à moi, qu'il fut établi immédiatement ici:

- 1. un Tribunal Civil ordinaire composé de cinq juges.*
- 2. un Tribunal de Commerce également composé de cinq juges indiqués par les Négociants.*
- 3. un juge de paix par arrondissement.*

Cette proposition est si simple, qu'elle n'est même susceptible d'autres objections que de celles qui seraient puisées dans les circonstances, les habitudes, les oppositions locales.

Or je garantis à votre Excellence que loin qu'elle ait à redouter des obstacles de ce genre, elle fera au contraire une chose utile, urgente, extrêmement désirée et fort agréable à la colonie.

Salut et Respect,

*Laussat*⁴⁸

48. ARCHIVES NATIONALES COLONIES, C 13, A 52. The following is the author's translation:

To Citizen Decrès, Minister of the Navy and the Colonies:

Citizen Minister

According to your instructions, you wish that the system of justice in effect at this time remain temporarily the same or, to use your own words, that "those tribunals which are in existence in Louisiana shall remain in existence." I have been here for two months—I have listened and observed. It is my duty to inform your Excellency that, contrary to your instructions, the sooner the present course of things is changed, the sooner we shall bring an improvement, an improvement highly desired by the whole colony. Shall I tell you Citizen Minister? There are no tribunals in Louisiana; there is not even a shade of one.

Let me tell you how justice is administered here: it is worse than in Turkey. All judgments within the colony are rendered in the name of the governor, except in matters relating to taxes, in which case the Intendent acts as the supreme arbitrator. The governor signs his name as a mere formality; his signature is a matter of course, for which he is paid a fee, which constitutes one of the sources of income of his office.

Beside the governor stands the auditor of war (or lieutenant-governor); he is a ranking officer; the governor cannot decide on any matter except military without first consulting with the auditor.

Moreover, the auditor is the sole judge both in civil and criminal cases. Assessors do not even act as assistants to him. What is not allowed to a justice of the peace in France for the amount of 100 is allowed to the auditor in New Orleans for any amount.

Therefore, his judgments inspire neither respect nor confidence and, whether sound or not, they are almost always regarded with the most shameful suspicions

The right of appeal to Cuba and Madrid is a slow and most expensive remedy

A change in this area is considered to be one of the first benefits of a change of sovereignty.

It may be another two months before the Commissioner of Justice arrives, and then another month or two before he is able to propose another plan; and, finally, at least six or eight months before one can expect to receive your reply from France regarding these proposals.

I beg of you in the name of the entire colony, Citizen Minister, not to allow this state of things to persist—a state in which, in this regard, the colony wails. The honor of the French government requires that the colony immediately free itself from this situation.

Now that you actually know our situation here, would you be assuming any risk, Citizen Minister, if you were to order, as soon as you receive this dispatch, by an instruction issued to the Captain-General, the Commissioner of Justice, and myself, that there be immediately established here:

1. a civil tribunal composed of five judges.
2. a commercial tribunal composed of five judges selected by the merchants.
3. a justice of the peace for each district.

This proposal is so simple that it could only raise objections on account of local circumstances, practices, or oppositions.

What Laussat obviously did not know, however, was that four days before he wrote this letter, Napoleon Bonaparte had ceded Louisiana to the United States by virtue of the Treaty of Paris. This cession might explain why Laussat was not to receive a reply to his letter of May 24th and why, moreover, he had not been empowered to take extreme measures, at any time, to reinstate French law in Louisiana.

Article 4 of the Treaty of Paris stipulated that the government of France was to send a commissioner to Louisiana in order to receive possession of the province from Spain and to deliver it to the commissioners appointed on behalf of the United States. On June 6, 1803, the First Consul appointed Laussat commissioner on the part of France. Laussat was instructed by article 4 of the Treaty to take only those measures that would ensure the successful cession of Louisiana to the United States. As commissioner, therefore, Laussat could not undertake any large-scale reform in a province that was soon to belong to the United States. Moreover, it was not until November 30, 1803 that Laussat officially received possession of Louisiana in the name of the French government and, therefore, only after that date that he was able to introduce some changes, the merits of which he praised in his letters to Decrès. Laussat was a loyal and faithful subject, however, and on November 30, 1803, he issued a proclamation announcing to the inhabitants of Louisiana that he was on the eve of delivering possession of the colony to the commissioners of the United States:

Louisianais

La mission qui m'avait transporté à travers 2500 lieues de mer, au milieu de vous, cette mission dans laquelle j'ai long temps placé tant d'honorables espérances et tant de vœux pour votre bonheur, elle est aujourd'hui changée. Celle dont je suis maintenant le ministre et l'exécuteur, moins douce quoiqu'également flatteuse pour moi, m'offre une consolation: c'est qu'en général elle vous est encore plus avantageuse

L'époque arrivera promptement où vous vous donnerez une forme de gouvernement particulier qui, en même temps qu'elle respectera les maximes sacrées consignées dans le pacte social de

I assure your Excellency that far from having to fear these kinds of obstacles, you would be doing a useful and urgent thing, highly desired by and most pleasant to the colony.

Greetings,
Laussat

l'union fédérale, sera adaptée à vos moeurs, à vos usages, à votre climat, à votre sol, à vos localités.

Mais vous ne tarderez pas surtout à ressentir les avantages d'une justice intègre, impartiale, incorruptible, où les formes invariables de la procédure et sa publicité, où les bornes soigneusement posées à l'arbitraire de l'application des lois, concourront avec le caractère moral et national des juges et des jurés, à répondre efficacement aux citoyens de leur sûreté et de leurs propriétés. Car c'est ici un des attributs singulièrement propres à la domination sous laquelle vous passez⁴⁹

Despite the temporary nature of his office, Laussat took his role seriously. As there was no way of knowing exactly when the United States Congress would ratify the Treaty, Laussat reorganized the administrative structure of New Orleans, replacing the Spanish Cabildo with a mayor, two deputy mayors, and a municipal council composed of ten members.⁵⁰ He also issued an important decree whose essential provisions are reproduced below:

Considérant que par la remise de possession de la Louisiane à la République Française, les Officiers de justice qui tenaient leur caractère de la Couronne Royale d'Espagne, ont dû cesser leurs fonctions, que le pays se trouve en ce moment sans Tribunaux; que cependant le traité de cession aux Etats-Unis touchant à son exécution, il ne peut manquer d'en résulter bientôt des changements très considérables dans l'organisation judiciaire; qu'il y aurait les plus graves inconvénients à y multiplier coup sur coup, sans une

49. 1 & 2 CHARLES GAYARRÉ, *ESSAI HISTORIQUE SUR LA LOUISIANE 1830-1831*, at 62-66 (1830). The following is the author's translation of the proclamation:

Louisianians:

The mission which has brought me to you across 2500 leagues of water, this mission upon which I have based so many high hopes and ardent wishes for your happiness, has now completely changed. The mission with which I am now charged, as minister and executor, is less gratifying but equally flattering to me, and offers me one source of consolation: It will be more advantageous to you

The time will come when you will establish for yourselves a form of government which, while respecting the sacred maxims of the social pact of the Federal Union, will be adapted to your mores, customs, climate, soil and particular localities.

But you shall soon feel the advantages of an upright, impartial, and incorruptible administration of justice, in which the strict and invariable forms of procedure and their publicity, and in which the carefully set limits to the arbitrary application of the laws, shall concur with the moral and national character of the judges and juries, to effectively meet the citizens' needs for security and safeguard of their property. For this is one of the inherent characteristics of the rule under which you are falling

50. Decree of November 30, 1803 for the Establishment of the Municipal Authority in New Orleans, 20 LA. HIST. Q. 170 (1937).

extrême nécessité, les innovations et les changements; qu'au contraire les délais sont en général dans la nature et la sagesse de sa marche, et que par conséquent on peut se permettre de lui en imposer un de quelques jours dans cette circonstance forcée et extraordinaire;

Considérant néanmoins qu'il se présente journellement quelques cas pressans auxquels il importe de pourvoir d'avance;
ARRETE:

Le Corps Municipal prononcera, en matière judiciaire, jusqu'après l'installation des Tribunaux ou jusqu'à ce qu'il en soit autrement ordonné, par un ou plusieurs commissaires choisis dans son sein, sur les causes sommaires, urgentes, et pour lesquelles il y aura péril en la demeure, et procédera à tous les actes de droit, sans préjudice de la juridiction qui lui appartient en fait de police. Quant au surplus des affaires pendantes et en instruction, elles demeureront en suspens, jusqu'à qu'il ait été incessamment établi des Tribunaux ou des juges pour en connaître.⁵¹

This decree does not state that Laussat repealed the Spanish laws in force at that time in Louisiana and that he established the laws of France in their stead.⁵² The proclamation issued by Laussat on November 30, 1803, along with the above decree issued on the same date, in fact, attest to Laussat's deep understanding of

51. New Orleans Public Library, R.V. A511, 1803-04 EARLY PRINTINGS IN NEW ORLEANS 114 (McMurtrie, ed.). The following is the author's translation:

Whereas by the retrocession of Louisiana to the French Republic, the judges who served the Spanish crown have been divested of their powers and whereas this province is presently without any tribunals; whereas, nonetheless, the treaty of cession to the United States shall soon be carried into effect, certain significant changes in the judicial structure of this territory are bound to occur and serious problems could arise if innovations and changes were made at the same rate as those made in the past and without dire need; on the contrary, time is generally of the nature and wisdom of the course of the territory and, consequently, one may venture to impose one more delay of several days under these strained and extraordinary circumstances;

Whereas, nonetheless, emergencies occur every day and must be provided for in advance;

IT IS DECREED:

The Municipal body shall adjudicate, in legal matters, until the Tribunals have been established or until it has been decided otherwise, by one or several commissioners selected from amongst its members, on summary and urgent proceedings for which there is danger in delaying, and shall undertake all legal acts without prejudice to the jurisdictional powers which belong to it in police matters.

All cases that are pending or under investigation shall remain undecided until the establishment of tribunals or judges capable of deciding them.

52. This is the opinion given in John H. Tucker, Jr., *Effect on the Civil Law of Louisiana Brought About by the Changes in its Sovereignty*, SOC'Y OF BARTOLUS JURIDICAL STUD. 48, although he could not support it with any other official document.

the problems to which a radical and abrupt change in the existing legal instructions would give rise and his firm belief that it was necessary to avoid chaos at all costs.⁵³

It appears, then, that more credibility can be given to the statements made in the private and official documents written at the time of the cession than to the biased, and often unfounded, opinions expressed today. It appears certain, moreover, that O'Reilly had in fact abrogated all French law in Louisiana in 1769.⁵⁴ The following document, which is taken from the memoirs and correspondence of Laussat, leaves very little doubt on this point:

Inventaire, Registres, documents . . . émanant des archives du gouvernement de la Louisiane que le citoyen, Pierre Clément Laussat, Préfet Colonial, Commissaire du gouvernement français reçus des mains de MM De Salcedo et le Marquis de Casa Calvo . . . ainsi qu'il suit:

. . . .

. . . [u]n décret abolissant le conseil français et proclamant la mise en vigueur du droit espagnol et d'un nouveau conseil à la Nouvelle Orléans en date du 21 décembre 1769.⁵⁵

53. George Dargo brings an accusation against Laussat which is unwarranted and which Dargo would certainly have expressed in more reserved terms if he had been familiar with the above decree and had weighed its provisions as well as those of the Proclamation of November 30, 1803. "Pierre Clement de Laussat, had abolished all of the existing Spanish courts and had deliberately neglected to put French substitutes in their place . . ." GEORGE DARGO, *JEFFERSON'S LOUISIANA* 105 (1975). This accusation reflects one raised by Governor Claiborne. 9 *THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS* 338-40 (Clarence E. Carter ed., 1940). *Contra* Elizabeth G. Brown, *Law and Government in the Louisiana Purchase, 1803-1804*, at 2 *WAYNE L. REV.* 169-89 (1956).

54. This is not the opinion of Barbé Marbois, the French Minister of Finance in 1803 and one of the original signatories of the treaty of cession of Louisiana to the United States. BARBÉ MARBOIS, *HISTOIRE DE LA LOUISIANE* 350 (1829): "*Les Lois et les ordonances royales furent provisoirement maintenues à la Louisiane, mais pour un temps fort court. Le président et les deux chambres du Congrès ordonnèrent que les lois de l'Union américaine y seraient proclamées et exécutées.*" See also John T. Hood Jr., *The History and Development of the Louisiana Civil Code*, 33 *TUL. L. REV.* 7 (1959); THOMAS M'CALEB, *THE LOUISIANA BOOK, SELECTIONS FROM THE LITERATURE OF THE STATE* (1894); HENRY J. LOEVY, *LOUISIANA AND HER LAWS* (1851).

55. PIERRE CLÉMENT DE LAUSSAT, *MÉMOIRES SUR MA VIE. A MON FILS, PENDANT LES ANNÉES 1803 ET SUIVANTES QUE J'AI REMPLI DES FONCTIONS PUBLIQUES: À SAVOIR A LA LOUISIANE, A LA MARTINIQUE, A LA GUYANE FRANÇAISE* (1851) [hereinafter LAUSSAT] (regarding correspondence to Spanish officials relative to the cession of Louisiana); *PAPELES DE CUBA: DESPATCHES FROM THE GOVERNORS OF LOUISIANA TO THE CAPTAINS—GENERAL AT HAVANA,*

It follows that, despite Laussat's admonishments, the French government, not wishing to hurry things, adopted a wait-and-see policy at the time prior to the cession, as dictated by the political bargaining engaged in at that time for the control of Louisiana.⁵⁶ Moreover, there is not the slightest reference in Laussat's memoirs to a decision of any kind to revive the influence of French law in Louisiana.⁵⁷ Such a decision would have been clearly inconsistent with the instructions given to Laussat by his government and at odds with the wisdom and moderation which he displayed in his actions. An example is the Decree of December 17, 1803, which relates to the application of the Black Code in Louisiana and which Laussat issued after being pressured by the municipal council of New Orleans. It demonstrates the degree to which Laussat was aware of the nature of his mission, of the limitation of his powers, and of the minimal role that he was expected to play until Louisiana was to be officially ceded to the United States.⁵⁸

1766-1791, LEGAJO 220(5) (photographed in the Archives of the Indies, Seville, for the Carnegie Institution of Washington, D.C.) (retaking of possession by France from the hands of Spain). The following is the author's translation:

Inventory, registers, documents . . . emanating from the archives of the government of Louisiana which the Citizen, Pierre Clément Laussat, Colonial Prefect, emanating Commissioner of the French government, received from the hands of Messieurs De Salcedo and the Marquis de Casa Calvo as follows, to-wit:

. . . .
 Decree doing away with the French Council and proclaiming the placing in force of the Spanish law and of a new council at New Orleans, dated December 21, 1769

. . . .
 56. The records of the *Archives Nationales*, Série Colonies, C 13 do not appear to contain any official documents attesting to the reintroduction of the French law in Louisiana.

57. LAUSSAT, *supra* note 55.

58. This decree reads as follows:

*Au Nom
 de la*

République Française

Le Préfet Colonial, Commissaire du Gouvernement français,

Vu l'arrêté du Corps Municipal de cette ville, en date d'hier, 23 Frimaire, relatif à la Police des Esclaves.

Considérant que le Projet de Règlement, extrait de l'Edit de 1724 dont le corps municipal nous demande d'ordonner provisoirement l'exécution, contient des modifications et des additions à plusieurs Articles de cet Edit; Que, bien qu'en général elles tendent à son amélioration, le moindre changement serait un acte de Législation Suprême, qui d'un côté l'étendue d'autorité dont nous croyons pouvoir user dans les circonstances actuelles, ou supposerait de la part de la France, une sanction supérieure qu'elles ne comportent plus, et d'un autre côté réclamerait de nous une maturité d'examen à laquelle il nous est impossible maintenant de nous livrer; que, cependant . . . que les instructions du gouvernement français, d'accords avec une loi de la République, du 30 floréal an X, nous prescrivaient de le (Code Noir)

In conclusion, it appears that Laussat did, indeed, abolish the Spanish courts which had been established by O'Reilly and that he replaced them with a form of French court: "*Le Corps Municipal prononcera, en matière judiciaire, jusqu'après l'installation des Tribunaux ou jusqu'à ce qu'il en soit autrement ordonné, par un ou plusieurs commissaires choisis, dans son sein, sur les causes sommaires et urgentes, et pour lesquelles il y aura péril en la demeure . . .*"⁵⁹ However, Laussat did not restore the preeminence of French substantive law in Louisiana; it had been repealed by O'Reilly in 1769 and was never formally reinstated.

The twenty days during which France temporarily held official control of Louisiana would prove more significant in the history of the law of the State than the hundred or so years of prior French and Spanish government. When Governor William C.C. Claiborne took possession of Louisiana in the name of the United States on December 20, 1803, he certainly had no idea that his government would be the source and the cause of serious political turmoil, as well as the instrument by which a Civil Code and the civil law system would be introduced into Louisiana, adding further to the elements of originality and singularity which characterize this North American state.

remettre en vigueur; que le faire, en ce moment, autant qu'il est en nous, c'est donner à la Louisiane, en nous séparant d'elle, un dernier témoignage des intentions paternelles et bienveillantes de leur ancienne Mère Patrie . . .

Arrête

Art. 1. L'Edit donné à Versailles au mois de mars 1724, pour le gouvernement et l'administration de la Justice, Police, Discipline et Commerce des esclaves nègres, dans la province et colonie de la Louisiane, y sera exécuté, dorénavant selon la forme et la teneur.

Art. 2. Sont néanmoins exceptées, de cette disposition générale, les dispositions du dit Edit qui supposent un culte national ou la Traite Directe des Nègres et, en un mot, toutes celles qui seraient en contradiction avec aucun des Articles de la Constitution des Etats-Unis, sous l'empire de laquelle La Louisiane est à la veille de passer.

Donné à Nouvelle Orléans, le 24 Frimaire

an XII et 17 décembre 1803.

Laussat

59. See *supra* note 33. "*L'installation des Tribunaux*" to which Laussat refers never occurred. See *supra* note 6. Barbé Marbois wrote that the appointed judges merely administered justice in summary and urgent matters.

The following is the author's translation of the relevant language of the decree cited *supra* at note 33: "The Municipal body shall adjudicate, in legal matters, until the tribunals have been established or until it has been decided otherwise, by one of several commissioners selected from amongst its members, on summary and urgent proceedings for which there is danger in delaying."

**PART IV. LOUISIANA UNDER AMERICAN DOMINATION:
THE FIRST YEARS (1803-1808)**

During the short period that preceded the official cession of Louisiana to the United States, President Thomas Jefferson set out to learn how this newly acquired territory was being governed, what legal system was in force, and how justice was being dispensed. The American governor, W.C.C. Claiborne, to whom these questions were being directed, sent the President a report in which he wrote the following about the Louisiana legal system:

Louisiana, like most other Countries which have undergone a change of Masters, derives many of its Municipal Customs and regulations from different sources; By what kind of Laws, the French formerly governed the Province is unknown to me.—After its session [sic] by them to Spain, General O'Reilly the Governor of the Province, published a Collection of Laws (as I am informed) of a general nature, but few in number. But whether that small Code was a selection from the previous Laws of the Country, to which he intended to give new force, or were certain Ordinances, then for the first time promulgated by the authority of the new Government, I have not ascertained.

. . . .

There are in Louisiana, both Civil and Ecclesiastical Courts, the respective Jurisdictions of which, are I presume, separated by the usual Lines of distinction. Many of the officers of Government civil and Military, are vested, according to Circumstances, with inferior judicial Authority. In the several divisions of the Province, the Commandants, and other Persons commissioned only as Alcaldes or Majistrates [sic], hold petty courts of limited Jurisdiction. From these petty Courts an Appeal lies to the Governor General, who is invariably assisted with the Advice of a Counsellor called the Auditeur.—From the decision of the Governor General, an appeal formerly lay to the Governor of the Havana; but now lies to the King and Council only Fame accuses these Courts with Corruption, and I fear, many notorious facts support the Suspicion⁶⁰

In a report in which he addressed himself to these same questions, Daniel Clark wrote the following:

60. 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 19-20.

The Code of laws is derived from the Recopilacion de Indias, & Leyes de Castilla & les uses & Coutumes de Paris for what respects usages & Customs,

The Courts in existence are:

The Governor's which has a Civil & military Jurisdiction throughout the province,

The Lewt. Governor's whose Jurisdiction extends throughout the Province in Civil affairs only.

The Tribunal of each of the two Alcaldes . . .

The Tribunal of the Intendant in Admiralty & Revenue Causes

. . . .

The Tribunal of the Alcalde Provincial . . .

The Ecclesiastical Tribunal⁶¹

Based on this firsthand but somewhat biased information, President Jefferson approved, on October 31, 1803, a resolution of Congress which provided for the temporary administration of the newly-acquired territory until more permanent measures could be adopted. This resolution stipulated, among other things, that

all the military, civil, and judicial powers, exercised by the officers of the existing government of the same, shall be vested in such person and persons, and shall be exercised in such a manner, as the President of the United States shall direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion⁶²

That same day, the President appointed William C.C. Claiborne temporary governor "to exercise within the said ceded territories all the powers and authorities heretofore exercised by the Governor and Intendant thereof"⁶³ A few weeks later, Claiborne arrived in New Orleans and, in three days, took possession of Louisiana in the name of the United States.⁶⁴

61. *Id.* at 35-36.

62. *Id.* at 90.

63. *Id.* at 143.

64. On December 30, 1803, Claiborne established

a court of pleas, composed of seven justices. Its civil jurisdiction was limited to cases, which did not exceed in value three thousand dollars, with an appeal to the governor, in cases where it exceeded five hundred. Its criminal jurisdiction extended to all cases, in which the punishment did not exceed a fine of two hundred dollars and imprisonment during sixty days.

MARTIN, *supra* note 1, at 319 (1882).

Claiborne was divested of his "despotic"⁶⁵ powers on March 26, 1804, when the United States Congress passed an act "for the organization of Orleans Territory and the Louisiana District."⁶⁶ The newly-acquired territory was thus divided into two parts (the Territory of Orleans in the south and the District of Louisiana in the north), and the executive, judicial, and legislative branches of government were organized in each. The judicial power in the Territory of Orleans⁶⁷—the only one with which we shall be concerned—was vested in a Superior Court and in such inferior courts and justices of the peace as might be deemed necessary by the Legislative Council of the territory.⁶⁸ The Superior Court was granted jurisdiction over both civil and criminal cases and consisted of three judges, any one of whom was sufficient by himself to constitute a court.⁶⁹ These judges were appointed by the President for a period of four years.⁷⁰ A district court consisting of one judge was established, and it held a minimum of four annual sessions in the city of New Orleans.⁷¹

Some of the provisions of the Act of March 26, 1804, and in particular one that prohibited the importation of slaves into the territory,⁷² distressed the old French settlers who were denied any active participation in the organization of the three branches of government.⁷³ Laussat, who was still in Louisiana in April 1804,

65. 4 GAYARRÉ HISTORY, *supra* note 1, at 4.

66. 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 202-13.

67. See Act of March 26, 1804, § 5.

68. The Legislative Council of the Territory was composed of thirteen persons appointed annually by the President of the United States. See Act of March 26, 1804, §§ 4-5.

69. Act of March 26, 1804, § 5.

70. *Id.* §§ 4-5.

71. *Id.* § 8. The provisions of the section declare that the district judge shall have and exercise the same jurisdiction and powers as those exercised by the judge of the district of Kentucky, as defined in §§ 10 and 12 of the Act of September 24, 1789. 1 Stat. 77-80 (1845). This judge earned an annual salary of \$2,000. Act of March 26, 1804, § 8.

72. Section 10 of the act prohibited any person from importing or bringing into the territory any slave or slaves. Act of March 26, 1804, § 10.

73. The anxiety and concern of the French colonists, who were awaiting the adoption by Congress of laws which would provide for the organization of the territory, were expressed in the following terms by the Mayor of New Orleans, Etienne Boré, in a letter addressed to the President of the United States and dated February 10, 1804:

To the President of the United States

. . . I Am at the head of the municipal Body of the capital of this province, that is to say of the Only body which exists there, of the Only one which Is composed of landowners and of citizens: I am qualified to speak to you of their interests . . .

We Are in extreme impatience for the Bills which must fix our internal Organization. the need thereof makes Itself felt more and more every day. we have extreme

described the dissatisfaction among the Louisianians in the following letter to Decrès:

Le Prefet Colonial, Comre de la République Française Au citoyen Decrès, Ministre de la Marine et des Colonies. Citoyen Ministre,

Le Louisianais, comme j'en ai déjà informé votre Excellence, se vit à regret jeté une seconde fois du sein de son ancienne mère-patrie; il interpréta et commenta en général, au premier moment, la cession avec beaucoup d'amertume. Les Espagnols l'y incitaient sourdement par dépit de la prédilection que ce pays avait toujours conservé pour la France, non moins que par une haine nationale dans laquelle les menées et les exemples très signalés d'un de leurs chefs étaient tout à fait propres à les nourrir et à les enflammer.

Le penchant et les vues des Espagnols étaient d'ailleurs merveilleusement servis par l'antipathie naturelle du Louisianais pour les américains.

confidence in the Wisdom of Congress, in yours, Mr. President, who after having caused to be negotiated our union with the federation, will have it at heart that it should turn out to our good fortune. you will be anxious to cement Sentiments of fraternity between louisiana, and the other states which you govern, between their inhabitants and the louisianians

I shall venture to represent it to you, Mr. President: it is indispensable that the heads of louisiana should know the french language, as well as the english language: if they had had this advantage, we should not have experienced the occurrences which have produced so bad a Feeling and the course of business would not languish and Would not be exposed to numberless embarrassments.

We have seen the moment when the municipal body was forced to take to you in this regard strong complaints: Mr. Claiborne began from the start by suggesting to us that we should draw up our public acts in english. a change of policy, after the discontent which this proposal excited, caused us to renounce addressing to you, Mr. President, the memoir of complaints which we had already drawn up on this Subject and preserved our liberties from this attack. a government which was despotic by its nature respected them for a long time what ought we not to expect from a Republican Government, in which the principles of natural rights have so many Safeguards and with which we are now associated Under the guarantees of a treaty which contains Sacred Stipulations in our favor: we flatter ourselves generally that we Shall be erected into a Separate state, as soon as it Shall be proved that we have a Sufficient population; we have no doubt that in the meantime we shall be given what you call your *Second degree* of Government: it is the continual object of our hopes and of our conversations among all louisianians. our fathers discovered, settled, cleared this region: it is watered with our Blood and our Sweat; we have caused it to flourish in spite of obstacles: worthy up to now of a better fate, we are expecting from the united states that they will appreciate the acquisition which they have made, and they will Endeavor to make it dear to us: they have a good means, for doing so by giving us a constitution in agreement with our needs our wishes our rights

⁹ THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 184-86.

Néanmoins, aux approches du changement de domination, partie amour de la nouveauté, partie espoir des avantages dont on leur dépeignait la brillante perspective, peut-être aussi résignation forcée au sort qu'il ne dépendait pas d'eux d'éviter, ils étaient assez disposés à se laisser aller sous le gouvernement des Etats-Unis.

Mais à peine ses agents eurent-ils pris les rênes qu'ils firent école sur école et faute sur faute.

J'en épargnerai à V.E. les détails inutiles.

En deux mots, introduction brusque de la langue Anglaise, que presque personne n'entend, dans l'exercice journalier de l'autorité et dans les actes les plus importants de la vie; rixes et tumultes pour savoir lesquelles l'emporteraient aux bals publics, des contredanses Anglaises ou des contredanses Françaises . . . substitution affectée de majorités américaines aux majorités créoles dans les corps administratifs et judiciaires, mélange arbitraire d'anciens usages sous prétexte qu'il n'y a encore rien d'innové dans les formes du gouverneur,—Il n'était guère possible que le gouvernement des Etats-Unis débutat plus mal et qu'il envoyat deux hommes (Mr. Claiborne, Gouverneur et Wilkinson, Général) moins propres à lui concilier les coeurs,—.

*Laussat*⁷⁴

74. ARCHIVES NATIONALES COLONIES LOUISIANE, C 13, A 53.

The following is the Author's translation:

The Colonial Prefect, Commissioner of the French Republic, to the Citizen Decrès, Minister of the Navy and the Colonies:

Citizen Minister

The Louisianians, as I have already informed your Excellency, have, to their regret, been rejected once again from their mother-country. At first, they viewed and referred to this cession with much bitterness. The Spaniards secretly encouraged them to do so out of spite for the preference which Louisiana has always shown for France, as well as by a national hatred incited by the plots and acts of one of their leaders.

The tendencies and views of the Spaniards were, moreover, wonderfully assisted by the natural antipathy which the Louisianians entertained for the Americans.

Nevertheless, at the approach of a new sovereign, partly from the love of novelty, partly from the hope for those advantages which had been depicted to them, and perhaps partly from a forced resignation to a fate which they could not escape, they were about ready to acquiesce to the United States government.

But no sooner had the agents of this government assumed power that they committed one blunder after another.

I shall spare your Excellency the unnecessary details and mention only the sudden introduction of the English language, which hardly anyone understands, in the daily exercise of authority and in the most important acts of public life; brawls and commotions at public balls to decide which of the English dances or French dances would start first . . . the marked substitution of American for Creole majorities in the administrative and judicial bodies, the arbitrary mixture of old customs [with new ones], under the pretext that nothing has changed in the forms of the governor,—the

With the Act of March 26, 1804 of the United States Congress, the new governmental structure of the Territory of Orleans came into being as of October 1, 1804.⁷⁵ The territory was immediately divided by the Legislative Council into twelve counties; in each county, an inferior court was established, presided over by one judge. The Council passed a series of acts regulating the procedure to be followed in the different courts of the territory, from the Superior Court to the justice of the peace courts.⁷⁶

In section 11 of the Act of March 26, 1804, it was stipulated that "[t]he laws in force in the said territory, at the commencement of this [A]ct, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified or repealed by the legislature."⁷⁷ For the longer term, the Legislative Council had the difficult mission of introducing into the Territory of Orleans a system of law which would be accepted by the old French settlers and the newcomers alike, as well as by both the Creoles and the "Americans." Furthermore, the system that was to be created had to be compatible with the United States Constitution and made easy for the recently-established legal institutions to administer. The Council's efforts to carry out this mission would ultimately fan a fire of wrath and indignation, which had been kindled by the political events leading up to this moment.

Whether of French or Spanish origin, the civil law was considered at that time to be the law of the Territory of Orleans. The provision of the Act of March 26, 1804 that continued that law in force was certainly not welcomed by the "Americans" who had emigrated to Louisiana and who felt totally estranged from its system of law. As a result, a confrontation arose between the partisans of

United States government could hardly have had a worse beginning or have sent two men (Governor Claiborne and General Wilkinson) less suitable to conciliate their hearts

75. On August 30, 1804, Thomas Jefferson appointed: Claiborne, Governor; James Brown, Secretary of the Territory; Dominic Hall, Judge of the District of Orleans; Col. Kirby and M. Prevost, judges of the Superior Court. Furthermore, he decided that, out of the thirteen members of the Legislative Council, seven would be American (constituting, thus, the majority) and six would be French. 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 281-82. Kirby died before taking office, and Duponceau, who would have been the third judge of the Superior Court, refused his nomination.

76. MARTIN, *supra* note 1, at 326; Acts passed at the first session of the Legislative Council of the Territory of Orleans (New Orleans, 1805) at 144-209, 388-99.

77. 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 210.

the civil law system, who at that time constituted the majority, and the defenders of the common law system, who, although fewer in number, were nonetheless influential and powerful. By the nature of his duties, Governor Claiborne was caught in the middle of this dispute—to which, through his awkwardness, he added more fuel. He described the intensity of this dispute in the following passage:

In the course of my efforts to introduce the American System of Jurisprudence into the ce'ded [sic] Territory, I experienced many difficulties, and excited some dissatisfaction among the People.—I sincerely wish, that the Judges may find their duties agreeable; and that the happiest result may attend their exertions for the Public Good⁷⁸

The local newspapers offered advocates of the two legal systems a vehicle through which they could match their talents and express their opinions. On November 9, 1804, the following letter appeared in the *Louisiana Gazette*:

By the treaty of cession Louisiana became entitled to be incorporated into the union. She was thenceforth to be considered as the germ of one, or of several states, to be assimilated, in all respects, and as soon as possible to her sister commonwealths. In all the other states the laws are founded on the common law of England The laws of Spain are generally excellent in themselves; for they are founded on the Roman Code, one of the most perfect and elegant systems of jurisprudence ever promulgated to the world. Its precepts are for the most part the genuine maxims of the law of nature, applied to the state of man in civil society; but the manner of carrying them into effect, adopted by the Spanish Tribunals, is perhaps the most objectionable that could have been derived. If ingenuity had been exerted to give opportunity for the corrupt administration of justice no rules of practice more efficacious for that purpose could have been framed, than those which permit the Judge to hear, to examine and decide in private It appears, therefore, . . . that Mr. Claiborne acted right in establishing a Court, similar in many respects to those of America, in place of restoring the Tribunals which the French Prefect had abolished

. . . .

I admit that the introduction of the English language will occasion some inconvenience. But would not inconvenience be felt if the French language were exclusively established? Those whose native

78. Letter from Claiborne to James Madison (Oct. 29, 1804) in 9 *id.* at 317-18.

tongue is English, though they now compose but a small part, will probably form in a few years, a majority of our population. Is it not then advisable to commence with the gradual introduction of that language, which the interests of all require to become one day the general language of the Country?

Laelius⁷⁹

A few weeks later, the *Gazette* published a second letter expressing a counter argument:

On reading in your paper a piece signed LAELIUS, which has for its object a defence of the administration of Governor Claiborne, I was induced to make enquiry who Laelius was, what were his means of information, and what could induce him to volunteer in a cause, in which notwithstanding his talents he could render so little service to the person he calls his friend. I learned with surprise that Laelius was a stranger to ninety-nine hundredths of the community, a man of yesterday among us, it is said a foreigner, who has not been a resident two months in Louisiana, who had no opportunity of judging by his own experience, of any part of the administration of Governor Claiborne⁸⁰

The year 1805 was to be a particularly crucial year in the Claiborne administration. The proponents and opponents of the two legal systems became extremely vocal and adamant, and the long-term strategy behind which the local administration seemed to withdraw only served to aggravate the situation. Perhaps in a spirit of compromise, James Brown proposed a solution that lacked neither originality nor a certain impracticability:

Should the present system be continued until October I have conceived that much good might be done by availing ourselves of the assistance of the Council to adopt a good code of Laws for the Government of the Territory. We possess all the materials for the able execution of such a work. The Civil law—the Spanish Ordinances—the British Statute and Common Laws, and the codes of all the States are spread before us, and the people are prepared for the reception of a code ably compiled from these several systems⁸¹

79. Laelius, *To the Editor of the Louisiana Gazette*, LA. GAZETTE, Nov. 9, 1804.

80. *To the Editor of the Louisiana Gazette*, LA. GAZETTE, Jan. 11, 1805.

81. Letter of James Brown to Senator John Breckinridge (Jan. 22, 1805), in 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 378-79.

On February 4, 1805, a joint resolution of the governor and the Legislative Council was approved, appointing a committee to compile and prepare a civil and a criminal code and "to employ two counselors-at-law to assist them in drafting the said codes."⁸² The committee's plans were thwarted by Claiborne's opposition, on the one hand, and by the passing of an act of Congress, on the other hand. This Act of March 2, 1805,⁸³ among other things, reorganized the legislative branch of the Orleans Territory, creating a new assembly, to which was given the name of the "House of Representatives" and which was composed of twenty-five members who were to be elected by the people. This assembly existed side by side with the Legislative Council, which was composed of five members who were to be appointed by the President of the United States out of ten individuals selected by the House of Representatives of the territory. The Act further stipulated that "[t]he laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified, or repealed by the legislature."⁸⁴

The expression "laws in force" referred to the Spanish law, to the acts of the United States Congress applicable to the territory, and, naturally, to those acts that had been passed by the Legislative Council of the territory from the time it first came into being. These last acts related, for the most part, to questions of criminal law and introduced elements of the common law. However, in the area of private law, no act had as yet been passed to establish permanently and indisputably the nature of this law. Thus, the French grew increasingly fearful that, through the common law rules of procedure which had now spread to the Territory of Orleans, the common law would work its way into the substantive law as well.⁸⁵ The suspicion with which many regarded Claiborne was

82. Acts passed at the first session of the Legislative Council of the Territory of Orleans, Joint Resolution of Feb. 4, 1805, at 458. The two counselors-at-law "employed" by the committee were Edward Livingston and James Brown. 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 379.

83. 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 405-07. This act which would become effective as of July 4, 1805 granted to the Territory of Orleans only a semblance of government which fooled no one.

84. Act of March 2, 1805, § 4; *see supra* note 76.

85. This fear arose from what was stipulated in section I of the Act of March 2, 1805: "[A]nd that from and after the establishment of the said government, the inhabitants of the territory of Orleans, shall be entitled to, and enjoy all the rights, privileges, and advantages, secured by the said ordinance, and now enjoyed by the people of the Mississippi territory." FRANÇOIS X. MARTIN, DIGESTE GENERAL DES ACTES DES LÉGISLATURES DU TERRITOIRE

quickly justified when, at the opening of the second session of the Legislative Council on June 22, 1805, the Governor addressed the council with awkwardness and provocative determination. In his speech, the Governor took pleasure in emphasizing that the Act of March 2, 1805, by which the ordinances of 1787 were applied in the Territory of Orleans,⁸⁶ implied that the court to be created would have a "common Law Jurisdiction"⁸⁷ and that, therefore, it was advisable to consider making innovations upon the present system and to take measures to allow for a gradual transition from one system of law to another.⁸⁸

The substance of Claiborne's speech, a speech that had not been delivered by the Governor with the intention of appeasing his opponents, isolated him even further and alienated him from certain important figures, such as James Brown,⁸⁹ who until then had been an ally of the Governor in his effort to introduce the common law into the territory. The House of Representatives, which had been elected in the autumn of 1805, also expressed its opposition to the Governor by considering a proposal

*de charger le Comité occupé dans ce moment à préparer un Mémoire pour être présenté au Congrès des Etats-Unis, de solliciter dans ce mémoire, la révocation de toute clause de l'Ordonnance du 13 juillet 1787, qui tendrait à établir dans le Territoire d'Orléans le système judiciaire connu sous le nom de loi commune, vu le . . . , la confusion qui résulteraient d'une subversion aussi complète des lois qui ont régi ce Territoire jusqu'au quatre du présent mois*⁹⁰

D'ORLÉANS 169-77 (1816); see also Elizabeth G. Brown, *Legal Systems in Conflict: Orleans Territory 1804-1812*, 1 AM. J. LEGAL HIST. 35, 45-46 (1957).

86. 3 WILLIAM C.C. CLAIBORNE, OFFICIAL LETTER BOOKS OF W.C.C. CLAIBORNE, 1801-1816, at 103 (Dunbar Rowland ed., 1917).

87. *Id.* at 104.

88. *Id.*

89. Letter of James Brown to John Breckinridge (Sept. 17, 1805), in 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 506-13.

90. LE MONITEUR, Nov. 16, 1805. House of Representatives. We have been unable to determine whether the report in question had been adopted. The following is the author's translation:

[t]o charge the committee engaged at this time in preparing a report for the United States Congress, to request in this report the revocation of those clauses in the ordinance of July 13, 1787 which would aid in establishing in the Territory of Orleans that legal system known as the common law . . . , considering the confusion which would result from a radical change in the laws which had governed this Territory up until the fourth day of this month

This volcanic situation finally erupted in 1806 when the two houses of the newly-formed legislature of the territory convened together for the first time. These houses were predominantly made up of Frenchmen. On May 22, 1806, the two houses adopted a resolution "*déclarant les lois qui continuent d'être en vigueur dans le Territoire d'Orléans, et les auteurs auxquels on peut se référer comme autorités en matière de droit dans le même Territoire.*"⁹¹ The object of this resolution was twofold: On the one hand, the

91. NATIONAL ARCHIVES, 8 ORLEANS TERRITORIAL PAPERS, Jan. 2, 1806—Dec. 31, 1806 (1958).

An Act declaring the laws which continue to be in force in the Territory of Orleans, and authors which may be resorted to as authorities within the same

Whereas by the effect of the reiterated changes which the government of this Territory has undergone, the divers matters which now compose its judiciary system, are in some measure, wrapped in obscurity, so that it has become necessary to present to the citizens the whole of those different parts, collected together by which they may be guided, whenever they will have to recur to the laws, until the Legislature may form a civil code for the Territory; and whereas by the 11th section of the act of Congress, intitled 'an act dividing Louisiana into two Territories and providing for the temporary government thereof' passed the 22d march 1804, and by the 4th section of the act of the said Congress, intitled 'an act further providing for the government of the Territory of Orleans' it is said, that the laws which shall be in force in the said Territory, at the commencement of the said acts, and which shall not be contrary to the dispositions thereof, shall continue to be in force until altered, modified or repealed by the Legislature of the Territory.

Sect. 1st. Be it therefore declared by the legislative Council and the House of Representatives of the Territory of Orleans in general assembly convened, that by virtue of the said dispositions, the laws which remain in force, and those which can be resorted to as authorities in the tribunals of this Territory, save the changes and modifications which may have already been made by the Legislatures of the said Territory, save also whatever might be contrary to the constitution of the United States, to the laws of the Federal government which have been extended to the said Territory by Congress, and to the acts of the said Congress which direct the present government of the said Territory, and save therefore the modifications, which necessarily result from the introduction which the act of the 22d march 1804, has made into the said Territory of the two most important principles of the judiciary system of the common law, to wit, the writ of habeas corpus, and the trial by jury, are the laws and authorities following, to wit: 1. The roman Civil code, as being the foundation of the spanish law, by which this country was governed before its cession to France and to the United States, which is composed of the institutes, digest and code of the emperor Justinian, aided by the authority of the commentators of the civil law, and particularly of Domat in his treaty of the Civile laws; the whole so far as it has not been derogated from by the spanish law; 2. The Spanish law, consisting of the books of the *recopilacion* de Castills and *autos acordados* being nine books in the whole; the seven parts or *partidas* of the King Don Alphonse the learned, and the eight books of the royal statute (*fueroreal*) of Castilla; the *recopilacion de indias*, save what is therein relative to the enfranchisement of Slaves, the laws de *Toro*, and finally the ordinances and royal orders and decrees, which have been formally applied to the colony of Louisiana, but not otherwise; the whole aided by the authority of the respectable commentators admitted in the courts of Justice.

resolution aimed to declare, once and for all, the laws and other legal sources that were still in effect in the territory so as to dispel any doubts that prevailed on this matter; on the other hand, the resolution proposed to prevent the Governor and some of his allies from imposing the preeminence of the common law. Faced with this formidable challenge and a determination on the part of the legislature as relentless as his own, the Governor could not retreat without permanently impairing his own authority as well as that of the federal government which he represented. Therefore, on May 26, Governor Claiborne vetoed the resolution. On that same day, the Legislative Council and ten members of the House of Representatives issued the following "Manifesto":⁹²

Whereas the most essential and salutary measures taken by this Legislature have been successively rejected by the Governor of the Territory, and whereas this Legislature, whose members had accepted their office only in the hope of being useful to their fellow-citizens, must be convinced today that it can do nothing except cause them considerable expense;

Sect. 2. And be it further declared, that in matters of commerce the ordinance of Bilbao is that which has full authority in this Territory, to decide all contestations relative thereto; and that wherever it is not sufficiently explicit, recourse may be had to the roman laws; to Beawes lex mercatoria, to Park on insurance, to the treatise of the insurances by Emorigon, and finally to the commentaries of Valin, and to the respectable authors consulted in the United States.

John Watkins

Speaker of the house of Representatives

Jean Noel Destrehan

President of the Legislative Council

Id.

On Tuesday, June 10, 1806, the *Louisiana Gazette* published an article which accurately reflects the state of uncertainty and ignorance in which most of the Territory's inhabitants lived:

To the honorable Isaac Hebert, M. Prudhome and J. Etienne Boré!
AUGUST LEGISLATORS!

A citizen anxious for information . . . begs you to explain to him the merits of the law which the council . . . approved, and for the rejection of which our governor is esteemed so censurable. I am particularly desirous to know in which century the code of the emperor Justinian was written? of how many volumes it is composed? and whether the seven parts or partidas of the king Don Alphonso the learned can be purchased in this City?

If the Recopilacion de Castille, and Autos acordados, the laws of Toro, and the ordinance of Bilboa are in either of your libraries?

I beg you gentlemen, to furnish your constituents with a short commentary.

A MERCHANT

92. Letter from Governor Claiborne to the Secretary of State (June 3, 1806), in 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 642.

Resolved, that the General Assembly be immediately dissolved.

The Legislative Council believes that it owes to its fellow-citizens a statement of the motives which have determined it to propose the resolution copied above, and which have caused it to consider the act which confirmed it, and to which the Governor has refused his sanction, as that on which the happiness and future tranquillity [sic] of this country depended most essentially. It is for the public to judge whether these motives were pure and free from any kind of private passion.

The most inestimable benefit for a people is the preservation of its laws, usages, and habits. It is only such preservation that can soften the sudden transition from one government to another and it is by having consideration for that natural attachment that even the heaviest yoke becomes endurable. The Congress of the United States apparently wished to reflect these sacred principles and render its domination still easier for the inhabitants of the Territory of Orleans by preserving to them their former laws: such at least is the natural and reasonable sense of Article 4 of the act of March 2, 1805, which provides further for the government of the Territory of Orleans, and which is expressed in these terms: "The laws which shall be in force in the said Territory at the commencement of this act, and not inconsistent [sic] with the provisions thereof, shall continue in force, until altered, modified or repealed by the Legislature."

Now, what are the laws which Congress intended to preserve to us by this provision? What are the laws which must be subject to review and rectification by the Legislatures of this Territory? The question is not a doubtful one. It is evident that they are the old laws which were in use in this country before its cession to the United States of America. For Congress took care to apply to us all of the common law which it considered indispensable to prescribe for us to the end that our régime might not conflict with that which is in force in all the States of the Union, that is to say, the right to be judged by one's peers and the *writ of habeas corpus*, the two great *palladiums* of civil liberty

Now, since we have the power to keep our old laws in so far as they do not conflict with the Constitution of the United States and the special acts passed for our provisional government, no one can deny the advantage to us of remaining under a system to which we are accustomed and which has nothing contrary to the affection which we owe to our Government. For it is necessary to distinguish, among the laws which govern a state, those which depend on its constitution and its government from those which only regulate contracts and agreements between private persons. The former must

necessarily be common to all parts of the Republic, but the latter may differ without disadvantages. Thus the Constitution of United States and the other Federal laws being general for the whole Union, it would be absurd to claim that this Territory ought not to be subject to them: but as to the laws regarding contracts, wills and successions, what difference does it make that here such acts should be governed by the civil law while in the other States of the Union they are governed by the common law? How is it that the multiplicity of customs which is noticed in England is not prejudicial to the general harmony? Do those differences in local law prevent an Englishman from being just as good a citizen and just as loyal to the Constitution of his country? On the contrary, and it would be exposing his affection to the danger of being alienated and exciting disorder and general discontent to disturb those customs to which each province is attached by the bonds of experience and long habit.

In the United States itself there is no general civil code: the common law of England is not adopted here as an article of the Constitution—Ever since the original establishment of the New England colonies that common law has been received, in each province, only with modifications and alterations, which bring it about that the common law of Virginia is no more like that in use in South Carolina than the latter is like the common law adopted in the State of New York. At the time of the general confederation and after the war of the American Revolution, Congress had the wisdom not to do violence to those differences by laying down a general and uniform common law for all the States of the Union, and it left to each State the right to preserve or to modify that which it had seen fit to adopt of the common law and even to replace it with other laws according as it might judge to be most suitable to its special situation.

There is no doubt that it is a consequence of this prudent and judicious policy that Congress desired to grant to this Territory the privilege of keeping its old laws or of changing or modifying them according as its legislatures might find it necessary. Now, every one knows that those old laws are nothing but the civil or Roman law modified by the laws of the government under which this region existed before the latter's cession to the United States. If the title of the books in which those laws are contained is unknown, if those titles appear barbarous or ridiculous, those very circumstances are the most to their credit because they prove, by the ignorance of those who have obeyed them until now without knowing that they were doing so, how great is their mildness and their wisdom and how small is the number of disadvantages resulting from their execution. In any case it is no less true that the Roman law which formed the basis of the civil and political laws of all the civilized nations of Europe presents an ensemble of greatness and prudence which is above

all criticism. What purity there is in those decisions based on natural equity; what clearness there is in the wording which is the work of the greatest jurists, encouraged by the wisest emperors; what simplicity there is in the form of those contracts and what sure and quick means there are for obtaining the remedies prescribed by the law, for the reparation of all kinds of civil wrongs.

We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognized by all Europe; and this law is the one which nineteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair. If the inhabitants of this Territory had never known any laws, if they had lived down to the present time without making agreements or contracts, it would perhaps be a matter of indifference to them whether to adopt one system or another system, and it is even probable that their attachment to their new mother country would cause them to prefer that system which would bring them nearest to their new fellow-citizens. But it is a question here of overthrowing received and generally known usages and the uncertainty with which they would be replaced would be as unjust as disheartening. Every one knows today and from a long experience how successions are transferred, what is the power of parents over their children and the amount of property of which they can dispose to their prejudice, what are the rights which result from marriages effected with or without contract, the manner in which one can dispose by will, the manner of selling, of exchanging or alienating one's properties with sureness and the remedies which the law accords in the case of default of payment. Each of the inhabitants dispersed over the vast expanse of this Territory, however little educated he may be, has a tincture of this general and familiar jurisprudence, necessary to the conduct of the smallest affairs, which assures the tranquility of families; he has sucked this knowledge at his mother's breast, he has received it by the tradition of his forefathers and he has perfected it by the experience of a long and laborious life. Overthrow this system all at once. Substitute new laws for the old laws; what a tremendous upset you cause! What becomes of the experience of an old man and what becomes of the facility and sureness of transfers? Who will dare to sign a contract under a new régime the effects of which will not be known to him? What will be the lot of the inhabitant who is so unfortunate as not to have received sufficient education to learn these new laws at least by reading them, even supposing that his understanding of them is facilitated by transmitting the new laws to him in his own language? Will he not shudder every time that he wishes to dispose of his properties? Will he not then be afraid lest he be throwing himself

into a bottomless pit without outlet and of bringing about his total ruin? Or must he always have recourse to the knowledge of a jurist regarding the most ordinary transactions of civil law?

. . . The first Legislature of this Territory has to be particularly interested in establishing the fundamental bases; the secondary laws, accessory laws and details should only come later, otherwise one is exposed to making parts which will be found inconsistent with the whole. Now, what is the first law, the most important law in the present situation of this country; what is the fundamental basis of the great edifice of its future legislation? It cannot be denied that it is the matter of giving to it a civil code. The present composition of the courts, the judges presiding over them and the jurists who plead before them being almost all strangers to the French language and still more so to the language in which the greater part of the laws of this country are written, the very scarcity even of the elementary authors who deal with them, everything renders indispensable the adoption of a measure which tends to place within the reach of all citizens, both in the French and the English language, a complete collection of the laws governing us. But before undertaking that work was it not necessary to determine what would be its basis and what would be the canvas on which one would do the work? For what ought to be, in the true interest of the inhabitants of this country, the basis to be adopted? It is that of keeping, of the old laws, everything which can be saved without disadvantage and without going contrary to the general system of our Government, and of not having recourse to foreign codes except in so far as the old may be found defective or prejudicial. By this measure one will not place the courts so to speak between two different codes. For all the contracts which have been made till now must necessarily be judged by the laws under which they were made; so how great would be the embarrassment of the courts if, while canceling everything which remains of the civil law, the courts should nevertheless be left under the necessity of judging, under that same law, of the effects of all contracts and documents made down to today? The point should be reflected upon that during perhaps thirty years to come half the lawsuits which will be presented to the courts will arise over the execution of contracts anterior to the time in which we are speaking. Here, therefore, are new reasons which ought to strengthen the attachment of the Legislature to the maintenance of our old laws by making a code which shall be as near to them as possible; the courts will see in them a sure compass which will facilitate the decision of all the old lawsuits as well as the new without leaving anything to arbitrary opinion.

Such are the principles which determined the Legislature to place, before its act on the formation of the code, a preliminary and

declaratory law regarding the laws which were to serve as a basis for that work.

. . . .

Finally an act *declaratory of the laws which continue to be in force in the Territory* was proposed as a measure to preserve our present laws in so far as the latter are not contrary to the Constitution of the United States. The Legislature attached great importance to this bill for the purpose of clarifying our present judicial system and doing away with its uncertainty, until it should have time to draw up a civil code. The Legislature considered this provision as a safeguard against dangerous innovations, and a measure necessary to the tranquillity [sic] of the citizens. This bill also has been rejected and we have returned to confusion.

Under this state of things, the Legislative Council had to consider it wise to think of putting an end to an expensive and useless session. Without doubt the executive holds his absolute *veto* from the special Constitution applied to this Territory, but if by means of that *veto* his will and nothing but his will is to constitute the supreme rule, if he is to reign alone, and openly, the Legislature ought not to be willing to serve as a plaything to amuse people. What difference does it make to the Territory that the executive should sanction laws regarding the Protestant Church, regarding hired persons and apprentices, and regarding drinking places if he stops by his *veto* the execution of a single law favorable to the happiness of the Territory?⁹³

The positions were well entrenched: The Governor favored the common law, and the two houses of the Territorial Legislature, representing the majority of the people of the territory, were resolved to retain the Roman law in all areas that related to the daily life of the individual, such as: successions, marriages with and without contracts, wills, obligations, property, etc.

The Governor and the partisans of the common law had little time to evaluate the consequences of their original wait-and-see policy, which was beginning to resemble a form of retreat. On June 7, 1806, the two houses of the legislature made further headway with the adoption of a resolution which would permanently establish the originality and singularity of Louisiana law:

93. Letter from Governor Claiborne to the Secretary of State (June 3, 1806), in 9 *id.* at 642, 650-57. For French text, see *id.* at 643-50; LA. GAZETTE, June 6, 1806, at 2 (Translated from the Telegraph, Extract from the Minutes of the Legislative Council, May 26, 1806.).

RESOLVED, by the Legislative Council and House of Representatives of the Territory of Orleans, in General Assembly convened, That both branches of the legislature shall appoint James Brown, and Moreau Lislet, lawyers, whose duty it shall be to compile and prepare, jointly, a Civil Code for the use of this territory.

Resolved, That the two juriconsults shall make the civil law by which this territory is now governed, the ground work of said code

. . . .⁹⁴

Governor Claiborne approved the resolution, to the surprise of both those who voted for and those who voted against it. This approval was nonetheless interpreted by certain individuals as a delaying tactic intended to disguise the true intentions of the Governor who "will not approve the system when it is presented."⁹⁵ Was this really Claiborne's hidden intention? In January of 1807, he declared in a speech to the two houses of the Territorial Legislature that he was

desirous to retain the principles of the Civil Law, which are in unison with the interests of a free people, or that it is essential to the security of prosperity in this Territory; I have no disposition unnecessarily, or injuriously to innovate on the former Laws and usages of my Fellow Citizens; But in my official Character, I can never approve measures, which will tend to bar the introduction of those great political and legal principles which are cherished thro'out the United States.⁹⁶

The meaning of this message is very clear: The Governor was making an overture to the legislature in the hope that a compromise could still be reached. Julien Poydras, the President of the Legislative Council, reassured the Governor that the Legislative Council had honorable intentions, but informed him in no uncertain terms that the civil law would be preserved—and not solely with respect

94. Session Laws of American States and Territories, Territory of Orleans, 1804-1811; Legis: 1-1806, S.I. p. 215, LE MONITEUR, June 7, 1806 (Villars, Boulegni, Boré, Watkins, Arnaud, and Mahon appointed a committee to collaborate with James Brown and Moreau Lislet in order to prepare a Civil Code for this Territory).

LE MONITEUR, June 3, 1807 ("Act to determine the amount to be paid to the two juriconsults appointed to prepare a civil code for the use of the Territory of Orleans . . . and to the translators of the said code . . .").

95. GEORGE DARGO, *supra* note 53, at 146. This author cites an excerpt from a letter from Edward Livingston to his brother Robert.

96. 4 CLAIBORNE, *supra* note 86, at 92; LA. GAZETTE, Jan. 16, 1807.

to those "principles of the Civil Law which are in unison with the interests of a free people."⁹⁷

The Governor capitulated; the civil law was to prevail in the Territory of Orleans. On March 31, 1808, the two houses of the Territorial Legislature acclaimed the fruits of the work of James Brown and Louis Moreau Lislet, and the Governor signed the order that provided for the promulgation of "the Digest of the Civil Laws now in force in the territory of Orleans."⁹⁸ With the official seal appended to the order, the civil law finally emerged triumphant after a long and arduous battle. Although, officially, the Digest was the joint effort of two men, it was perhaps more the creation of Louis Moreau Lislet than of James Brown.⁹⁹ By virtue of his personal status, his education and his professional experience, Moreau Lislet was well qualified to play a predominant role in the drafting of the first Louisiana Civil Code—which turned out to be a rather unique undertaking. Yet, Moreau Lislet would never have contributed to the drafting of the Code if he had not happened, by a stroke of good fortune, to be in New Orleans when the future of the civil law of the Territory was in the making.¹⁰⁰

97. ORLEANS GAZETTE, Feb. 5, 1807.

98. Orleans Territory, Acts Passed at the First Session of the Second Legislature of the Territory of Orleans (New Orleans, 1808), at 120. In his speech of March 31, 1808 to the two chambers of the Territory, Claiborne declared that "[t]he civil code of the territory contains a number of excellent principles, which I trust will long be preserved; but there are others which should yield to those changes in the science of jurisprudence, approved by experience and sanctioned by the wisdom of the most illustrious statesmen. These just innovations will be directed by succeeding legislators; they will have a view 'of the whole ground,' and can best determine what part is susceptible of improvement."

In a letter from Governor Claiborne to the Secretary of State on October 7, 1808 he wrote that:

[t]he Secretary of the Territory, will transmit you a Copy of the "Civil Code", adopted at the last Session of the Legislature. You will find the English Text extremely incorrect;—This is attributable to the circumstance of the Work having been written in French, and the translation prepared by persons who were not well acquainted with the English Language;—So erroneous does the translation appear to be, that it will probably be necessary to declare by Law, that the French shall (solely) be considered the legal text . . . I could not do otherwise than sanction the Code. My first object has been to render the Laws certain—my next shall be to render *them* just, and to assimilate our system of Jurisprudence as much as possible, to that of the several States of the Union . . .

Letter from Governor Claiborne to the Secretary of State (Oct. 7, 1808), in 9 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS, *supra* note 53, at 802, 802-803.

99. See PRELIMINARY REPORT OF THE CODE COMMISSIONERS, Feb. 13, 1823, at 93.

100. A book soon to be published by Professor Levasseur will include Moreau Lislet's biography and an analysis of his contribution to the Digest or Civil Code of 1808.